

*SETTLING THE LAW: AN EMPIRICAL ASSESSMENT OF DECISION-MAKING AND
JUDICIAL REVIEW IN CANADA'S REFUGEE RESETTLEMENT SYSTEM*

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ABSTRACT

In light of rising numbers in the global refugee population, as well as new ideas for reforming the international refugee regime that emphasize refugee containment, there is reason to reaffirm refugee resettlement as a solid mechanism for burden-sharing, and perhaps the only obtainable durable solution for refugees in a protracted refugee situation. Canada has operated a robust refugee resettlement program for decades and is now presenting its private sponsorship of refugees program as a model to the rest of the world. Despite the significance of Canada's resettlement program, both domestically and internationally, few studies have investigated how the program is deployed on the ground and how it is integrated within Canada's legal system. This dissertation explores, through empirical methodologies, how Canada's refugee resettlement framework operates *as a legal process*, with a focus on visa officer first instance decision-making and judicial review. The dissertation also investigates the role of refugee resettlement within Canada's broader refugee policy and explores the evolving dynamics within the private sponsorship of refugees program.

The analysis relies primarily on a dataset of 403 Federal Court judicial review court files submitted by rejected resettlement applicants between 2011 and 2015. The data on visa officer decision-making reveals concerning trends in various areas of decision-making, including documenting decisions, assessing credibility, assessing objective evidence, and dealing with language barriers and gender-based claims. The data also shows problematic interpretations of legislative criteria, including local integration, successful establishment, and inadmissibility. These shortcomings have serious consequences for refugee applicants, who are entitled to a fair and accurate decision, but also for sponsors in Canada, whose commitment for sponsorship may fade in the face of repeated problematic decisions.

The analyses of judicial review outcomes show that leave grant rates are much higher in overseas refugee cases than in inland cases. The data also shows that some extra-legal factors, including lawyer experience and city of filing, are correlated to variations in outcomes. The wide variation in grant rates among individual Federal Court judges observed in the inland refugee context is also partly reflected in the dataset. In a more general sense, the data suggests that judicial review plays a limited role in the refugee resettlement program because of various legal and practical factors. Very few resettlement applicants have the financial or informational resources to pursue judicial review. As such, judicial review is an inaccessible avenue for the vast majority of resettlement applicants. Access to judicial review is further limited by the leave requirement, which deprives more than a third of applicants from having their case heard on the merits. In addition, the government settles out of court a surprisingly high proportion of cases. This practice raises concerns around IRCC's potential use of case settlement as a method to insulate objectionable practices from judicial and public scrutiny, and avoid restrictive precedents.

Considering the important practical difficulties refugee applicants face in accessing judicial review, this dissertation suggests that the most promising avenue for improving the legal infrastructure of refugee resettlement is to strengthen first instance decision-making through administrative changes. A few recommendations are offered in this regard, including increasing visa officer training, reverting to the automatic internal review of refusals, and instituting audio recording of interviews. I also argue that two regulatory changes are needed in order to bring Canada's resettlement framework more in line with UNHCR guidelines and the principle of refugee protection, namely the elimination the successful establishment and the UNHCR documentation requirements.

DEDICATION

À mes parents, Jeanine et Léon.

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LIST OF ACRONYMS

CBSA - Canadian Border Services Agency
CCR - Canadian Council for Refugees
CIC - Citizenship and Immigration Canada
CS - Community Sponsor
EIC - Employment and Immigration
G5 - Group of Five
GAR - Government-Assisted Refugees
GCR - Global Compact on Refugees
IGCR - Intergovernmental Committee for Refugees
IRB - Immigration and Refugee Board
IRCC - Immigration, Refugees and Citizenship Canada
IRO - International Refugee Organization
IRPA - Immigration and Refugee Protection Act
IRPR - Immigration and Refugee Protection Regulation
PSR - Privately Sponsored Refugee
RPD - Refugee Protection Division
RSSP - Refugee Sponsorship Support Program
RSTP - Refugee Sponsorship Training Program
SAH - Sponsorship Agreement Holder
SUR - Strategic use of Resettlement
UNHCR - United Nations High Commissioner for Refugees
UNRRA - United Nations Relief and Rehabilitation Administration
UNRWA - United Nations Relief and Works Agency

CHAPTER 1 INTRODUCTION

In 2018, OpenCanada¹ published the story of Yassin, a Syrian refugee. Yassin was a staff sergeant in the Syrian army who deserted in 2012 after receiving orders to fire on unarmed demonstrators. As he was travelling to his home Idlib province, he was ordered off a bus and arrested. In detention, he was tortured and forced to sit cross-legged continually for years. Eventually, he was released back to the army. Yassin, who had been rendered disabled as a result of extreme abuse in prison, was given a two-week leave to recover from his injuries. During his leave, he deserted once more. Eventually, he paid a smuggler to take him, his wife, and his son to Turkey. In Turkey, the Turkish Red Crescent visited his neighbourhood. Seeing that Yassin was disabled and with a family, he was referred to the International Organization for Migration for resettlement abroad. He, his wife and their son were eventually selected to be resettled to Canada through the Blended Visa Office Referred program and matched with the Beaches Presbyterian Church, a private sponsorship group in Toronto. Yassin and his family were interviewed, in person, in Adana in December 2015. The interview was conducted through an English-Arabic interpreter. During the interview, the visa officer asked Yassin what his duties were in the Syrian army. Yassin answered that he was a “fitness and marching coach” at the “department of missiles management.” Twenty months passed without Yassin hearing back from Canadian immigration officials. He was eventually interviewed again, this time on the phone, and was asked to provide more details about his duties in the army. Yassin responded as he did the first time, that he was a physical fitness trainer at the “department of missiles managements.” The visa officer took issue with this answer. As it turns out, the interpreter at the first interview misquoted Yassin as saying that he trained soldiers on how to use missiles. Ultimately, Yassin was denied resettlement for having provided contradictory testimony. The visa officer notes state that Yassin had not indicated “any difficulty in understanding the translator or in having the translator understand you.” As the journalist points out, even if Yassin could properly understand the interpreter, how could he possibly assess the accuracy of the translation?

Emails to reconsider the case were sent to the Canadian mission in Turkey by Yassin’s sponsor to no avail. However, after the sponsor group hired a lawyer and commenced judicial review proceedings, the Canadian government opted to put an end to the litigation and consider the matter afresh. On redetermination by a different visa officer, Yassin was asked to clarify his involvement in the army, which he did in writing with the help of his legal team. Ultimately, the application was approved, and Yassin arrived in Canada in November 2020.

Yassin was lucky he was selected for resettlement to Canada. Resettlement is offered to less than 1% of the world’s refugee population. Yassin was also lucky that his sponsor had the resources to challenge the decision in Canadian courts. The vast majority of rejected refugees do not have sufficient means to challenge visa officer decisions. How many resettlement applicants are in Yassin’s position, but lack the resources to seek judicial review?

¹ Gareth Chantler, “Canada’s Missing Syrians”, (May 14 2018), online: <https://www.opencanada.org/features/canadas-missing-syrians/#part-one-yassin>; Gareth Chantler, “Canada’s Syrian resettlement efforts: A flash in the pan?”, *Open Canada* (18 April 2019), online: <https://www.opencanada.org/features/canadas-syrian-resettlement-efforts-a-flash-in-the-pan/>.

The global refugee crisis is one of the most critical challenges of our time. At the end of 2019, there were 79.5 million people forcibly displaced persons globally because of violence, persecution, or armed conflict - the highest number ever recorded.² Anti-immigrant and isolationist ideologies are on the rise worldwide, and states are increasingly withdrawing from their obligations under international refugee law. The 1951 Refugee Convention³ has proven insufficient to provide protection and durable solutions to the world's refugees. As the Convention fails to enshrine the concept of burden-sharing into international law, the responsibility of protecting refugees is disproportionately falling on developing countries in the Global South who receive the vast majority of refugee flows as an accident of geography. At the same time, policies in the Global North further restrict the rights of asylum seekers and increasingly "push the border out."⁴

Refugee resettlement refers to the transfer of refugees from a state where they have sought protection to a third state which has agreed to admit them with permanent residence status.⁵ Refugee resettlement exists outside the obligations established by the Refugee Convention. It is a *voluntary* act on the part of a state, distinct from a state's international obligation to grant status to refugees who enter its territory. Resettlement is nonetheless a fundamental component of the international refugee regime. It is considered one of three 'durable solutions', along with local integration and voluntary repatriation. Few refugees are offered resettlement - only 0.449%

² UNHCR, "Global Trends: Forced Displacement in 2019" (Statistics and Demographics Section, 2020) at 2 ["Global Trends 2019"].

³ *Convention Relating to the Status of Refugees*, 1951, 189 UNTS 150 (entered into force 22 April 1954).

⁴ See Efrat Arbel & Alletta Brenner, "Bordering on Failure: Canada-U.S. Border Policy and the Politics of Refugee Exclusion" (Harvard Law School, Harvard Immigration and Refugee Law Clinical Program, 2013).

⁵ UNHCR, *Resettlement Handbook* (Geneva: UNHCR, 2011) at 2.

of the global refugee population in 2019. Despite this, refugee resettlement is a fundamental component of the international response to the global refugee crisis. Historically, the states that typically engage in refugee resettlement have primarily been those states of the Global North that receive relatively few spontaneous asylum seeker arrivals. As such, refugee resettlement is an important mechanism through which states offer not only protection but also contribute to global burden-sharing. The significance of refugee resettlement is highlighted, and challenged, by numerous ‘new’ initiatives that seek to formalize containment in the region of origin as the way forward. Such arrangements, critical refugee scholars have argued, are ethically dubious and unlikely to achieve meaningful results.⁶ Especially considering that over 77% of refugees are living in a protracted refugee situation with no solution in sight,⁷ I maintain throughout this dissertation that refugee resettlement should be reinvigorated and its role in the international refugee regime strengthened.

Canada has operated a robust resettlement system for decades. Between 2004 and 2018, Canada was the country resettling the second-most refugees per year, only behind the United States.⁸ In recent years, resettlement admissions to Canada have increased, and admissions to the United States have fallen drastically, resulting in Canada becoming the top resettlement country since 2018. The Canadian government and the United Nations Refugee Agency (UNHCR) are currently deploying an initiative to ‘export’ Canada’s unique private sponsorship of refugees

⁶ See Jennifer Hyndman, “Global Compacts or Containment? Geopolitics by Design”, in Howayda Al-Harthy, ed, *Urban Recovery: Intersecting Displacement with Post War Reconstruction*, Abingdon: Routledge [forthcoming in 2021].

⁷ UNHCR, “Global Trends 2019”, *supra* note 2 at 24.

⁸ See Refugee Council of Australia, “Global Resettlement Statistics” (2020), online: <<https://www.refugeecouncil.org.au/global-resettlement-statistics/>>.

model to foreign jurisdictions.⁹ This initiative was formed in the aftermath of Canada's much-publicized private sponsorship of tens of thousands of Syrian refugees between 2015 and 2017. The Canadian contribution to the global resettlement program has been significant and has essentially enabled the global resettlement program to maintain steady admission levels, despite drastic decreases in resettlement admissions to the United States since 2016.

Despite the significance of Canada's resettlement program both domestically and internationally, surprisingly few studies have been conducted on how the program operates on the ground and how it is integrated within Canada's legal system. Such an inquiry is important as Canada seeks to present its Private Sponsorship of Refugees (PSR) program as a model for the rest of the world to emulate.

In Canada, research in refugee law has focused almost exclusively on inland refugee status determination, administered by the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB). These studies have focused, for example, on legal, cultural and psychological issues in the refugee determination process,¹⁰ the treatment of evidence by RPD members,¹¹ RPD members' perception of their role as decision-makers and the issue of "critical

⁹ Immigration, Refugees and Citizenship Canada, News Release, "Canada, UNHCR & the Open Society Foundations Seek to Increase Refugee Resettlement through Private Sponsorship" (19 Sept 2016); Jennifer Bond, Ania Kwadrans, "Resettling Refugees through Community Sponsorship: A Revolutionary Operational Approach Built on Traditional Legal Infrastructure" (2019) 35:2 *Refugee* 86; Craig Damian Smith, "A Model for the World? Policy Transfer Theory and the Challenges to 'Exporting' Private Sponsorship to Europe" in Shauna Labman & Geoffrey Cameron (eds), *Strangers to Neighbours: Refugee Sponsorship in Context* (Montreal & Kingston: McGill-Queen's University, 2020).

¹⁰ Cécile Rousseau et al, "The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making process of the Canadian Immigration and Refugee Board" (2002) 15:1 *J Refugee Stud* 43.

¹¹ France Houle, "Le fonctionnement du régime de preuve libre dans un système non-expert : le traitement symptomatique des preuves par la Section de la protection des réfugiés" (2004) 38 *RJT* 263.

space” at the RPD,¹² the “managerialization” of the refugee determination process,¹³ inconsistencies in decision-making,¹⁴ the role of counsel in RPD hearings,¹⁵ the issue of trauma, memory, and disclosure capacity during RPD hearings,¹⁶ the application of the concept of “subjective fear” by RPD members,¹⁷ the treatment of Hungarian Romani refugee claimants,¹⁸ RPD member appointment,¹⁹ the use of guidelines by RPD members,²⁰ access to legal aid and access to justice,²¹ and the consequences of the mandatory detention of designated foreign nationals,²² to name a few. This scholarly output has contributed to efforts to improve the reliability and fairness of the refugee status determination system.²³

¹² François Crépeau & Delphine Nakache, “Critical Spaces in the Canadian Refugee Determination System: 1989-2002” (2008) 20:1 Intl J Refugee L 50.

¹³ Dagmar Soennecken, “The Managerialization of Refugee Determinations in Canada” (2013) 84:2 Dr et soc 291.

¹⁴ Sean Rehaag, “Troubling Patterns in Canadian Refugee Adjudication” (2008) 39 Ottawa L Rev 335 [“Troubling Patterns”]; Sean Rehaag, “Judicial Review of Refugee Determinations: The Luck of the Draw?” (2012) 38 Queen’s LJ 1 [“Luck of the Draw”].

¹⁵ Sean Rehaag, “The Role of Counsel in Canada’s Refugee Determination System: An Empirical Assessment” (2011) 49 Osgoode Hall LJ 71.

¹⁶ Jane Herlihy & Stuart W Turner, “Asylum claims and memory of trauma: sharing our knowledge” (2007) 191 Brit J Psychiatry 3; Cécile Rousseau, & Patricia Foxen, “Look Me in the Eye: Empathy and the Transmission of Trauma in the Refugee Determination Process” (2010) 47:1 Transcultural Psychiatry 70; Diana Bögner, Jane Herlihy & Chris R Brewin, “Impact of sexual violence on disclosure during Home Office interviews” (2007) 191 Brit J Psychiatry 75.

¹⁷ Michael Bossin & Laila Demirdache, “A Canadian Perspective on the Subjective Component of the Bipartite Test for ‘Persecution’: Time for Re-evaluation” (2004) 22 Refuge 108; Hilary Evans Cameron, “Risk Theory and ‘Subjective Fear’: The Role of Risk Perception, Assessment and Management in Refugee Status Determinations” (2008) 20:4 Intl J Refugee L 567.

¹⁸ J Beaudoin, J Danch & S Rehaag, “No Refuge: Hungarian Romani Refugee Claimants in Canada” (2015) 11:3 Osgoode Hall Law School Legal Studies Research Paper Series no 12.

¹⁹ Jacqueline Bonisteel, “Ministerial Influence at the Canadian Immigration and Refugee Board: The Case for Institutional Bias” (2010) 27:1 Refuge 103.

²⁰ France Houle & Lorne Sossin, “Tribunals and guidelines: Exploring the relationship between fairness and legitimacy in administrative decision-making” (2006) 49:3 Can Pub Admin 282.

²¹ Jennifer Bond & David Wiseman, “Shortchanging Justice: The Arbitrary Relationship Between Refugee System Reform and Federal Legal Aid Funding” (2014) 91:3 Can Bar Rev 583; Emily Bates, Jennifer Bond & David Wiseman, “Troubling Signs: Mapping Access to Justice in Canada’s Refugee System Reform” (2016) 47:1 Ottawa L Rev 5.

²² Jennifer Bond, “Failure to Report: The Manifestly Unconstitutional Nature of the Human Smugglers Act” (2014) 51:2 Osgoode Hall LJ 377.

²³ For example, empirical evidence of wide grant rate disparities amongst IRB members in Rehaag, “Troubling Patterns”, *supra* note 14, has lent support to calls for the implementation of the refugee appeal division at the IRB and for the elimination of political appointments of IRB members. Both changes were implemented as part of *Protecting Canada’s Immigration System Act*, SC 2012, c 17.

In comparison, the literature on decision-making in Canada's refugee resettlement program is remarkably thin. The bulk of recent resettlement studies have focused not on how the resettlement program unfolds on the ground, but on the historical and political context of resettlement policy in Canada, newcomer integration and evolving dynamics and challenges in the private sponsorship program. Yet, refugee decision-making in the resettlement program presents much of the same challenges, and refused refugee applicants face risks that are just as serious. Furthermore, the Canadian resettlement framework combines a number of unique characteristics that pose additional challenges in terms of decision-making, including the lack of administrative independence of decision-makers, the lack of appeal mechanisms and difficulties accessing judicial review, the lack of procedural protections for refugee applicants, the lack of legal representation, and the fact that decision-makers deal with a large caseload and receive only cursory training in refugee law. As new refugee policies are being developed and existing ones are being reconsidered or revised, there is a pressing need for studies examining how Canada's resettlement policy is deployed as an administrative legal process.

In particular, in light of reports highlighting serious problems in the quality of visa officer decision-making in the resettlement program,²⁴ there is a need for a detailed, empirical assessment of how refugee resettlement decisions are made. Important sources of information remain untapped by researchers. For instance, visa officers' decisions and other documents produced by Immigration, Refugees and Citizenship Canada (IRCC) in the course of individual

²⁴ See for example Canadian Council for Refugees, "Disturbing Upsurge in Rejections Rates of Eritrean Refugees in Cairo by Canada" (November 2009), online: <<https://ccrweb.ca/en/bulletin/09/11/30>>; Canadian Council for Refugees, "Concerns with Refugee Decision-Making at Cairo" (January 2010), online: <<https://ccrweb.ca/en/concerns-refugee-decision-making-cairo-0>>.

resettlement applications have not been systematically examined. Similarly, very little attention has been paid to either judicial review decisions rendered by the Federal Court in the context of refugee resettlement decisions, or the role of judicial review in the resettlement program. It is also worth mentioning that no study has attempted to compare and contrast resettlement decision-making with inland refugee decision-making. Although both systems rely on different legal foundations and have at least partially distinct objectives, a comparison of both systems can serve to put both processes into perspective and identify avenues for improvement.

The dearth of scholarship on refugee resettlement decision-making can be attributed to a number of factors. Resettlement decisions happen abroad and are rarely judicially reviewed by the Federal Court.²⁵ Information on assessments made by visa officers is not easily accessible. As a discretionary program, refugee resettlement has traditionally been considered legally thin by legal scholars, and not amenable to substantive and procedural legal inquiries.²⁶ In addition, refugee sponsor organizations, who normally submit sponsorship applications without the assistance of lawyers, have sometimes been reluctant to participate in legal research and legal advocacy, both enterprises being perceived as potentially leading to further legalization of the sponsorship system or antagonizing the government.²⁷

²⁵ From 2010 to 2015, a total of 403 judicial reviews of resettlement decisions were initiated before the Federal Court. By comparison, during the same period, 24,293 judicial review applications of inland refugee claims were initiated: Federal Court, Statistics, online: <http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Statistics>. It should be noted however that this figure, reported by the Federal Court, includes a number of judicial reviews of other proceedings, including Humanitarian and Compassionate applications and Pre-Removal Risk Assessments. See Rehaag, “Luck of the Draw”, *supra* note 14 at 21-22.

²⁶ See, for example, Shauna Labman, *Crossing Law's Border: Canada's Refugee Resettlement Program* (Vancouver: UBC Press, 2019) at 8-10.

²⁷ *Ibid.* See also Ashley Chapman, “Private Sponsorship and Public Policy: Political Barriers to Church-Connected Refugee Resettlement in Canada” (Citizens for Public Justice, 2014) at 12-14, online: <<https://www.cpj.ca/private-sponsorship-and-public-policy>>.

The objective of this dissertation is to engage in a detailed analysis of decision-making practices in the refugee resettlement program and to assess the role played by judicial review in the deployment of refugee resettlement policy. This dissertation further seeks to situate resettlement within refugee Canada's refugee policy, and to engage in broader debates regarding the role of resettlement within the international refugee regime. My research thus engages with three distinct bodies of literature: the literature on the development and future of the international refugee regime, the literature on substantive refugee law and first instance refugee status decision-making, and the administrative law literature on the role of judicial review.

My empirical analysis is based primarily on a quantitative and qualitative review of 403 case files of rejected refugee applicants who sought judicial review before the Federal Court between 2011 and 2015 (393 PSR cases and 10 GAR cases). I analyze both how refugee applications were decided by IRCC visa officers and how judicial review applications were decided at the Federal Court. I also review a number of reports prepared by the UNHCR and various Canadian organizations, as well guidelines, evaluation reports, training material, and statistic reports prepared by the Government of Canada.

The first two substantive chapters of this dissertation provide the historical, international, and legal context of this study, and seek to situate the role of third country resettlement within the broader international refugee framework. Chapter 2 focuses on the development of the international refugee regime. This chapter begins with a short review of the antecedents of international refugee law, including the emergence and collapse of the interwar refugee regime under the League of Nations. This is followed by a more in-depth discussion of the development of the current international framework, centring around the 1951 *Convention relating to the*

Status of Refugees and the UNHCR. Throughout the review of these international developments, particular attention is paid to how durable solutions and global burden-sharing are conceptualized in international refugee law. The role of resettlement today is further explored through a discussion of rising anti-immigrant sentiments, state retrenchment from international refugee law obligations, and the Global Compact on Refugees. I conclude Chapter 2 with a review of contemporary resettlement statistics. The numbers tell a sad story. Refugee resettlement is offered only to a small proportion of the millions of refugees in need of a durable solution.

Chapter 3 addresses the development of Canadian refugee policy, its relationship to the international refugee regime, and sets out the current Canadian legal framework of refugee resettlement. The chapter begins with a historical review of Canadian refugee policy that shows that, until the late 1970s, refugee resettlement initiatives were implemented through ad hoc government orders-in-council. Critics of Canada's refugee policy during this period argue that admissions were guided not only by humanitarian concerns, but also economic and ideologic ones. In fact, Canada did not participate meaningfully in the interwar refugee regime under the League of Nations and did not engage in significant refugee resettlement until the 1950s. I then address the formalization of refugee policy in Canada for both overseas and inland claimants and the establishment of the private sponsorship of refugees program through the 1976 *Immigration Act*. The remainder of Chapter 3 addresses the transition to the 2001 *Immigration and Refugee Protection Act (IRPA)* and the current legal framework of refugee resettlement, with a focus on eligibility criteria and application procedures. I highlight in this section a few problematic features of the framework, such as the prior UNHCR documentation requirement and the successful establishment criteria, both of which appear to be inconsistent with the

objectives of refugee protection. I also present various statistics to situate the Canadian resettlement program within its broader international context. I then move on to a discussion of judicial review as the only recourse available to resettlement applicants whose application is rejected by a visa officer. The last section of Chapter 3 canvasses concerns expressed by refugee organizations and results of government evaluations regarding the implementation of the refugee resettlement program. This last section, which focuses on slow processing times, high refusal rates, and problems in decision-making, sets the table for the following chapters.

Chapter 4 presents the dissertation's methodology, which centres around an analysis of a dataset of 403 rejected resettlement applications. Chapter 5 and 6 lay out my empirical findings, with Chapter 5 focusing on visa officer decision-making and Chapter 6 on judicial review. Chapter 5 begins with an overview of the dataset, including countries of origin, countries of asylum, type of application, application grounds, and refusal grounds. This is followed by a detailed assessment of various substantive and procedural shortcomings in visa officer decision-making identified in the dataset. These sections form the bulk of the dissertation. My analysis identifies a number of shortcomings, including poorly-documented decisions, boilerplate decision-making, failures in taking into account language barriers and vulnerability at the interview, flawed approaches to credibility determination, problematic evaluations of integration potential, and problematic approaches to gender-based claims. Visa officers were also found to be making frequent factual errors in their review of testimony, personal documentation, and objective country documentation. My analysis makes extensive reference to visa officer notes and decision letters, as well as IRCC and UNHCR guidelines. My findings are troubling, and confirm many of the concerns expressed by the refugee sponsorship community over the past three decades. I claim that these problems develop and persist in large part because the

resettlement program operates outside public and legal scrutiny. In light of the findings, I propose a number of administrative recommendations that would lead to improved decision-making, including improvements in training and workload, as well as the establishment of an automatic internal review of all negative cases. I also invite IRCC to reconsider its policy position on local integration in light of UNHCR principles. Finally, I propose two regulatory changes, namely the elimination of the successful establishment criteria and the elimination of the UNHCR/state refugee documentation criteria for refugees sponsored by certain types of sponsor groups.

Chapter 6 presents various quantitative and qualitative analyses on the operation of judicial review in the refugee resettlement context through an exploration of the outcome of the 403 cases in my dataset. I assess variation in outcomes based on a number of factors, including country of origin, city of filing, experience of counsel, and various judge-centred characteristics. Throughout the analysis, I compare judicial review outcomes of overseas refugee applicants with that of inland refugee claimants. A central finding of my examination of judicial review applicants is that very few rejected resettlement applicants, and virtually no applicants from the Government-Assisted Refugee (GAR) stream, apply for judicial review at the Federal Court. I argue that this is because very few refugees abroad have the financial and informational resources required to initiate costly court proceedings. These practical hurdles in accessing Canada's legal system are exacerbated by the fact that resettlement applicants must obtain leave before proceeding to a hearing on the merits. As such, refugee resettlement applicants face an important access-to-justice barrier. In the resettlement context, judicial review does not play its traditional role of correcting individual injustices and acting as an ongoing check on government decision-making. In fact, it is surprising how little impact courts have had on the resettlement

program as compared to Canada's inland refugee system. This, I argue, is linked to the Federal Court's position on the extraterritoriality of the *Charter* and its deferential approach to visa officer decision. In addition, and precisely because of the deferential approach of Federal Court judges in the refugee resettlement context, it is surprising to observe that both leave grant rates and ultimate grant rates are much higher for resettlement cases than they are for inland refugee cases. This is evidence, I maintain, of the comparatively poor quality of resettlement decisions. It is also surprising to observe that a very high proportion of cases - including the most meritorious cases - are settled out of court by the government, a practice that limits the court's ability to provide meaningful oversight. I make two recommendations with regard to judicial review that would increase access to justice for rejected resettlement applicants. First, the former practice of exempting refugee resettlement applicants from the leave requirement should be reintroduced. Given the high success rate of resettlement judicial reviews, confirmed problems in decision-making, and the serious consequence of erroneous refusals, the argument that the leave requirement is necessary to prevent "unnecessary litigation" is an unconvincing one.²⁸ In addition, I argue that steps should be undertaken at the administrative level to inform applicants of their options in terms of judicial review.

The results of this dissertation suggest that the legal infrastructure of refugee resettlement needs to be strengthened. The various deficiencies identified in this research in terms of administrative decision-making and access to judicial review have various consequences. Certainly, erroneous refusals lead to catastrophic outcomes for refugees abroad who lack a durable solution.

²⁸ See Canadian Bar Association, National Citizenship and Immigration Law Section, *Response to Building on a Strong Foundation for the 21st Century: White Paper for Immigration and Refugee Policy and Legislation* (March 1999) at 23, online: <<https://www.cba.org/CMSPages/GetFile.aspx?guid=97021bf5-c0d2-477d-ad41-e40dadd0b396>>.

Furthermore, erroneous refusals increase program costs and risk stymying sponsor enthusiasm over the long term.

Any discussion of refugee resettlement, especially one that aims at reforming or reinvigorating refugee resettlement, must grapple with the broader context of the international refugee regime. Advocates and humanitarians promoting refugee resettlement need to reckon with the potential pitfalls of national refugee resettlement initiatives. In Canada and elsewhere, governments have at times used resettlement initiatives as a ‘humanitarian alibi’ to justify restrictions to their inland asylum system. Legal scholars looking into refugee resettlement also need to recognize that increased juridification may be counter-productive, especially in the largely volunteer-run private sponsorship of refugees program. That being said, the proposals I forward in this dissertation are rather modest in scope. They should not lead to significantly increased costs or complexity.

My approach to this research is informed by my practical legal experience in refugee resettlement. In 2015-2018, I have acted as a legal expert with the Refugee Sponsorship Support Program (RSSP) and was part of the Advisory Committee for the RSSP Toronto Chapter. I have also provided clinical supervision to law students at Osgoode Hall Law School participating in refugee resettlement casework with the International Refugee Assistance Project and have participated in the implementation at York University of a refugee sponsorship program in partnership with the Ryerson University Lifeline Syria Challenge. In addition, I have had the opportunity to experience firsthand the PSR program, as a private sponsor of a family of six.

Much of what I write in this dissertation is critical of Canada's refugee resettlement program. I want to state here that I undertake this research with a firm belief in the important contribution Canada provides through the refugee resettlement program to global refugee protection and burden-sharing. My primary motivation for pursuing this research stems from the conviction that increased scrutiny of decision-making in the resettlement system will lead to more accurate decision-making and an improved government-sponsors relationship, and help align the program with its humanitarian objectives.

CHAPTER 2 THE INTERNATIONAL REFUGEE REGIME

2.1 Introduction

The purpose of this chapter is to provide the international context in which the Canadian resettlement program operates. The international refugee regime is a complex structure that consists of international institutions, international treaties, regional treaties, declarations, guidelines, and discretionary state practices that emerged and evolved in the 20th century.¹ At the centre of the international refugee regime is the 1951 *Convention relating to the Status of Refugees*,² (as modified by the 1967 *Protocol relating to the Status of Refugees*³) and the work of the United Nations High Commissioner for Refugees (UNHCR). This chapter shows that the international refugee regime suffers from two fundamental flaws: there exists no normative framework for global burden-sharing, and states routinely, with impunity, prevent asylum seekers from reaching their territory. As a result, the vast majority of refugees remain in the Global South, without a durable solution, while the population of refugees living in a protracted refugee situation grows. Throughout this chapter, I make the argument that, in the context of the seemingly intractable challenges of the international refugee regime, refugee resettlement has the potential to fill an important protection gap and accomplish meaningful and impactful burden-sharing.

This chapter begins with a review of how the international refugee regime emerged, evolved, and collapsed in the first half of the 20th century. In the second part of this chapter, I review the

¹ James Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005) at 70 [*The Rights of Refugees*].

² *Convention relating to the Status of Refugees*, 1951, 189 UNTS 150 (entered into force 22 April 1954) [Refugee Convention].

³ *Protocol relating to the Status of Refugees*, 1967, 606 UNTS 267 (entered into force 4 October 1967) [1967 Refugee Protocol].

development of international refugee institutions and legal instruments in the post-Second World War period, including the 1951 Refugee Convention and the 1950 UNHCR Statute. This is followed by a third section where I discuss the modern conceptualization of the three durable solutions (repatriation, resettlement and local integration), and their relationship with norms of international refugee law. I also explore how changes in geopolitics have influenced policy on durable solutions. In a fourth section, I engage with three distinct but related developments in refugee protection that highlight the shortcomings of international refugee law and reveal the significance and fragility of refugee resettlement in the global refugee regime. This begins with the question of burden-sharing. I analyze the consequences of the lack of a normative framework for burden-sharing on refugee protection and explore the significance and shortcomings of the recent Global Compact on Refugees. I then address the question of the rise of anti-immigrant sentiment globally, and its impact on refugee resettlement. Particular attention is paid to drastic reductions in resettlement to the United States under the Trump administration. The question of the proliferation of *non-entrée* regimes, and their relationship to refugee resettlement, is discussed next. Following this discussion of some of the regime's systemic flaws, I undertake to explain why studying decision-making, as I do in this dissertation, matters. In the last section of this chapter, I will present a snapshot of the current global refugee situation, and the role refugee resettlement currently plays in the international community's response to the refugee crisis.

2.2 The emergence and collapse of the interwar international refugee regime

The law of asylum was only written in the 20th century.⁴ It would be a mistake however to describe forced migration movements as a 20th century phenomenon. Forced migration

⁴ Atle Grahl-Madsen, *The Status of Refugees in International Law*, vol 1 (Leyden: AW Sijthoff, 1966) at 9.

movements are not new, nor have they ever been limited to a particular geopolitical context.⁵ The first recorded use of term “refugee” dates back to the late 17th century, describing Huguenots, or French Protestants, who fled France after the revocation of the Edict of Nantes in 1685.⁶ It was also during this period that early writers of international law Hugo Grotius and Emer de Vattel first developed the doctrine of asylum.⁷ Both Grotius and Vattel recognized the right of individuals to expatriate themselves and the right of states to grant asylum.⁸ It is also worth noting that early legal developments at the national and international levels paved the way for the emergence of the international refugee regime and for international human rights law generally, including “friendship, commerce and navigation” in the 19th century and minority treaties in the immediate aftermath of the First World War.⁹

In the early 20th century, a convergence of factors led to the idea that refugees were a special

⁵ See Gil Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (New York; Oxford: Oxford University Press, 1993) at 32-33. See also Alexander Betts & Paul Collier, *Refuge: Transforming a Broken Refugee System* (London: Random House, 2017) at 4.

⁶ Claudena Skran, *Refugees in Inter-War Europe: The Emergence of a Regime* (Oxford: Clarendon Press, 1995) at 13-15. See also Alessandra Roversi, “The Evolution of the Refugee Regime and Institutional Responses: Legacies from the Nansen Period” (2003) 22 *Refugee Surv Q* 21 at 32.

⁷ See Grahl-Madsen, *supra* note 4 at 9

⁸ See Maria-Teresa Gil-Bazo, “Asylum as a General Principle of International Law” (2015) 27:1 *Intl J Refugee L* 3.

⁹ For instance, various domestic and international rules were adopted in attempts to reconcile the need for immigration, commerce and international investment, with existing rules of exclusion. In the 19th century, treaties of “friendship, commerce, and navigation” were common throughout Europe and were widely implemented in domestic law. These “alien law” treaties were normally instigated by states heavily involved in international commerce and guaranteed basic rights for alien traders such as the recognition of juridical personality, respect of life and physical integrity, personal liberty and freedom of movement. These treaties formed the first international system limiting the absolute discretion of states in the treatment of individuals on their territory. In the aftermath of the First World War, but before the adoption of refugee agreements, the League of Nations developed a system of protection of minorities. The goal of these minority treaties was to compel vanquished states to respect certain rights of ethnic and religious minorities, such as access to public employment, the right to distinct education and cultural institutions, and language rights. Minority treaties were a significant advancement in that they established, for the first time, a system of external scrutiny of a state’s treatment of its citizens. See Hathaway, *The Rights of Refugees*, *supra* note 1 at 76-81. For a discussion of earlier legal developments in the law of asylum, see Grahl-Madsen, *supra* note 4 at 10-11; Cécile Mondonico-Torri, “Les réfugiés en France sous la Monarchie de Juillet: L'impossible Statut” (2000) 47:4 *Rev hist mod & contemp* 731 at 736; Guy S Goodwin-Gill & Jane McAdam, *The Refugee in International Law*, 3rd ed (Oxford: Oxford University Press, 2007) at 37-38.

category of migrants deserving of special treatment and international protection. One of these factors is the appearance of restrictive migration controls.¹⁰ In the 20th century, international movement and residence throughout Europe became increasingly difficult without a valid travel document.¹¹ Hathaway explains that, until the First World War, there were very few restrictions on international migration. Most European refugees were able to find a place of refuge, for example, in the Americas.¹² This system of free movement, Hathaway explains, came to an abrupt end in the 1920s, when the rise in economic and political nationalism in Europe coincided with a sharp increase in the numbers of refugees.¹³ As nations established passport controls and restricted admission, refugees were no longer free to establish themselves in a place of safety.¹⁴ British dominions as well as the United States instituted restrictive immigration measures designed to limit immigration to people of British background.¹⁵ The United States, which was the world's foremost country of migration in the 1910s with almost one million admissions per year, reduced annual entries to 165,000 by 1924.¹⁶ The emergence of restrictive immigration policies in the 20th century also coincides with the emergence of the welfare system in Europe. As states became more financially involved in the welfare of their population, they became increasingly concerned with the perceived additional burden of refugees.¹⁷

¹⁰ See Loescher, *supra* note 5 at 36. See also Hathaway, *The Rights of Refugees*, *supra* note 1 at 83; Daniel Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (Cambridge: Cambridge University Press, 2018) at 28-31.

¹¹ Skran, *supra* note 6 at 14.

¹² James Hathaway, "The Evolution of Refugee Status in International Law: 1920-1950" (1984) 33 *Intl & Comp L Rev* 348 at 348 ["The Evolution of Refugee Status"]. See also Jennifer Hyndman, *Managing Displacement: Refugees and the Politics of Humanitarianism* (Minneapolis: University of Minnesota Press, 2000) at 6-7 [*Managing Displacement*]. For an insightful history of the colonial roots of the emergence of immigration controls, see Radhika Mongia, *Indian Migration and Empire: A Colonial Genealogy of the Modern State* (Durham: Duke University Press, 2018).

¹³ *Ibid.*

¹⁴ Loescher, *supra* note 5 at 36.

¹⁵ Skran, *supra* note 6 at 22.

¹⁶ Tommie Sjöberg, *The Powers and the Persecuted: The Refugee Problem and the Intergovernmental Committee on Refugees (IGCR), 1938-1947* (Lund: Lund University Press, 1991) at 33-34.

¹⁷ Skran, *supra* note 6 at 14, 26.

Refugee scholars agree that the most determining factor in the emergence of the international refugee regime in the 1920s is the unprecedented size of the refugee crisis. These were caused by revolutionary changes, the collapse of multi-ethnic empires and the creation of nation-states along ethnic, religious and linguistic lines.¹⁸

The over one million Russian refugees who fled Russia following the Russian revolution of 1917 impacted Europe enormously.¹⁹ European countries, depleted by the First World War, were reluctant to assist Russian refugees, viewed as destabilizing elements.²⁰ The situation of Russian refugees was exacerbated by a 1921 Soviet decree that stripped Russian citizenship from Russian expatriates who had left after November 1917 and from those who had been abroad for more than 5 years.²¹ Stateless Russian refugees could not benefit from the few protections and entitlements that existed under alien law, which were only extended to a nation's subjects.²²

The interwar international refugee regime was established in 1921 with the creation of the Office of the High Commissioner for Refugees under the auspices of the newly-created League

¹⁸ The early 20th century saw the collapse of the Russian, Austro-Hungarian, German, and Ottoman empires. Ethnic, religious, and linguistic minorities in the newly created nation-states became persecuted “political misfits.” Many attempted to relocate to a country where their group was the majority. This proved impossible for groups without a home state such as Armenians, Jews, and Romanis (*ibid* at 18-20). See also Loescher, *supra* note 5 at 34-36. It is interesting to note that, while the First World War caused massive population movements in Europe, these displacements were not long-lasting. Most displaced populations and combatants were able to return home relatively quickly (Skran, *supra* note 6 at 15).

¹⁹ Skran, *supra* note 6 at 32-40.

²⁰ Roversi, *supra* note 6 at 23.

²¹ Hathaway, *The Rights of Refugees*, *supra* note 1 at 351.

²² *Ibid* at 84.

of Nations.²³ Fridtjof Nansen served as High Commissioner for Refugees until his death in 1930. The office of the High Commissioner was created to assist a specific population, Russian refugees, and the institution was conceived as a temporary one.²⁴ The High Commissioner's budget, too, was ad hoc and never became permanent.²⁵ The High Commissioner was tasked with securing legal status for refugees, helping them find work in their country of refuge, assisting their resettlement to other countries, and assisting in repatriation efforts.²⁶ The delivery and funding of humanitarian relief continued to be left to voluntary organizations.²⁷

A major achievement of the High Commissioner in the 1920s was the creation of a framework to issue identity documents to refugees, the so-called "Nansen Passport", first established through the 1922 *Arrangement with regard to the issue of certificates of identification to Russian refugees*.²⁸ The Nansen Passport was treated by states as the functional equivalent of a national passport. They allowed Russian refugees to cross borders and essentially provided them

²³ Voluntary organizations played a major role in the establishment of the regime. Voluntary organizations had traditionally played the role of providing humanitarian relief to refugees. In the early 1920s, with the quick rise in the number of Russian refugees in Europe, voluntary organizations quickly exhausted their resources. In 1921, the International Committee for the Red Cross formally pressed the newly created League of Nations to appoint a High Commissioner for Refugees. See Skran, *supra* note 6 at 84-85; Roversi, *supra* note 6 at 23. The Covenant of the League of Nations did not contain any provision for the protection of refugees (*Peace Treaty of Versailles*, Covenant of the League of Nations). The office of the High Commissioner of the League of Nations for Russian Refugees was established in 1921 under a creative reading of articles 23 and 25 of the Covenant. Article 23 provided that member states would "maintain and establish the necessary international organization" to "secure and maintain fair and humane conditions of labour for men, women, and children", while Article 25 provided that member states would "promote the establishment co-operation of duly authorized voluntary national Red Cross organisations having as purposes the improvement of health, the prevention of disease and the mitigation of suffering throughout the world." See Roversi, *supra* note 6 at 23-24.

²⁴ Roversi, *ibid* at 24.

²⁵ *Ibid* at 37.

²⁶ *Ibid* at 24.

²⁷ Loescher, *supra* note 5 at 37-38.

²⁸ *Arrangement with regard to the issue of certificates of identification to Russian refugees*, 5 July 1922, LNTS vol XIII no 355.

with a minimum of legal status, although not citizenship.²⁹

Not long after the Russian refugee crisis emerged, another massive refugee movement occurred as a result of the collapse of the Ottoman Empire in 1922.³⁰ The rise of the Third Reich in Germany in the 1930s caused further refugee movement in Europe. Four hundred thousand refugees, mostly Jews, but also socialists, Romas, LGBT persons and other minorities, fled Germany in the 1930s.³¹ Emerging fascist regimes in European countries, including Italy and Spain, also produced significant refugee movements in the 1920s and 1930s.³²

The League of Nations High Commissioner for Refugees underwent numerous deep transformations and mandate expansions as a result of the changing nature of the refugee population. In 1926, the mandate of the High Commissioner was expanded to include Armenian refugees.³³ Four years later, in 1928, the mandate of the High Commissioner was again extended to other national categories of refugees, including Assyrian, Assyro-Chaldaeian, Syrian, Kurdish, and Turkish refugees.³⁴ The first League of Nations refugee agreements did not impose specific obligations on host states beyond the recognition of documentation issued by the High Commissioner. It was generally assumed that the refugee problem was temporary and states

²⁹ Skran, *supra* note 6 at 104-09; Hathaway, *The Rights of Refugees*, *supra* note 1 at 85; Otto Hieronymi, “The Nansen Passport: A Tool of Freedom of Movement and of Protection” (2003) 22:1 *Refugee Surv Q* 36.

³⁰ Religious minorities who had enjoyed some form of protection under Ottoman rule were persecuted in the newly-formed nations of the Balkans. Many fled to France or to Bulgaria, but the majority fled to Greece, where refugees accounted for 20% of the total population in the mid-1920s. See Skran, *supra* note 6 at 45.

³¹ *Ibid* at 48-56.

³² *Ibid* at 56-59.

³³ *Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees*, 12 May 1926, 2004 LNTS 48.

³⁴ *Arrangement concerning the Extension to Other Categories of Refugee of Certain Measures taken in favour of Russian and Armenian Refugees*, 30 June 1928, 2006 LNTS 65.

voluntarily afforded refugees relatively generous benefits.³⁵ By the late 1920s, European states began to recognize the enduring nature of the refugee problem and increasingly refused to integrate refugees. This led to a shift in international refugee law and the adoption of agreements that imposed substantial obligations on states.³⁶

After the death of Nansen in 1930, the High Commissioner for refugees was integrated within the Secretariat of the League of Nations, which allowed for more long-term planning.³⁷ In 1933, after the rise to power of the Nazi regime, a separate High Commissioner for Refugees (Jewish and others) Coming from Germany mandated with the protection of German refugees was established outside the League of Nations.³⁸ In an effort to antagonize Germany as little as possible, the resolution establishing the High Commissioner for German refugees prevented any action or even discussion related to the political root causes of the German refugee flow.³⁹ In 1938, following Germany's exit from the League of Nations, the two institutions were fused.

In 1933, the League of Nations Intergovernmental Commission acknowledged the need to codify international refugee law into a binding convention, leading to the adoption of the 1933 *Convention relating to the International Status of Refugees*.⁴⁰ The 1933 Convention, however,

³⁵ Hathaway, *The Rights of Refugees*, *supra* note 1 at 86.

³⁶ For example, the 1928 Arrangement explicitly dealt with a number of refugee rights, such as access to the courts, the right to work, protection against expulsion and equal taxation. The standards contained in the 1928 Arrangement were, however, framed as non-binding recommendations, and states, facing a shortage of public funds as a result of the Great Depression, did not implement them in any meaningful way (*ibid*).

³⁷ Roversi, *supra* note 6 at 26.

³⁸ *Ibid* at 28.

³⁹ Sjöberg, *supra* note 16 at 34.

⁴⁰ Hathaway explains the significance of the 1933 Convention in the following terms:

The [1933 Convention] is one of the earliest examples of states agreeing to codify human rights as matters of binding international law. Equally important, it opened the door to a new way of thinking about the human rights of aliens. Aliens' rights had previously been conceived to respond to a fixed set of circumstances, namely those typically encountered by

was ratified by only eight states and had little impact on the ground. The poor reception of states prompted the League of Nations to work towards developing still binding but lighter obligations in the 1936 *Provisional Arrangement concerning the Status of Refugees Coming from Germany*.⁴¹ As Hathaway explains, although the 1936 Arrangement contained fewer legal obligations for host states, only seven states ratified the agreement.⁴²

The limited success of efforts aimed at imposing even light obligations on host states led to a major shift in the international refugee regime: a solution to the refugee problem was to be sought by resettling to other states those refugees incapable of integrating into their host country of refuge. The 1938 *Convention concerning the Status of Refugees coming from Germany*⁴³ was the first international instrument to explicitly endorse settlement abroad as a solution to the refugee problem.⁴⁴

In 1938 also took place the Evian Conference, which resulted in the creation of the Intergovernmental Committee for Refugees (IGCR), outside the League of Nations, under the leadership of the United States. The IGCR was mandated with assisting refugees from the Third Reich, including Jewish refugees.⁴⁵ The High Commissioner for Refugees was terminated, along

traders. ... Many risks faced by refugees in foreign states were, however, different from those which typically met business travelers. The Refugee Convention of 1933 met this challenge by setting a rights regime for a subset of the alien population, tailored to its specific vulnerabilities (Hathaway, *The Rights of Refugees*, *supra* note 1 at 87).

⁴¹ *Provisional Arrangement concerning the Status of Refugees Coming from Germany* 4 July 1936, 3952 LNTS 77 (1936-1937).

⁴² Hathaway, *The Rights of Refugees*, *supra* note 1 at 89.

⁴³ *Convention concerning the Status of Refugees coming from Germany*, 10 Feb 1938, 4461 LNTS 61 (1938).

⁴⁴ The 1938 Convention provided that

with a view of facilitating the emigration of refugees to overseas countries, every facility shall be granted to the refugees and to the organizations which deal with them for the establishment of schools for professional re-adaptation and technical training (see Hathaway, *The Rights of Refugees*, *supra* note 1 at 90).

⁴⁵ Roversi, *supra* note 6 at 29.

with the League of Nations, in 1946. The IGCR remained operational until the following year.

The interwar international refugee regime is generally considered to have been a limited success, if at all. The protection offered depended on the refugee group and projects could be vetoed if the Great Powers refused to fund them.⁴⁶ Jews from Germany and Nazi-occupied territories faced a terrible fate and widespread antisemitism. At the Evian Conference in 1938, after Nazi Germany had “offered its Jews to the World”, state delegates declared their concern for the Jewish refugees, but only the Dominican Republic and Costa Rica agreed to increase their quotas.⁴⁷ Even in countries where Jews were able to find a safe haven, antisemitic discrimination and persecution were widespread.⁴⁸ The High Commissioner for Refugees (Jewish and other) Coming from Germany was only able to bring 4,000 German Jewish refugees to safety before the outbreak of the Second World War.⁴⁹

Generally speaking, root causes and conditions in source countries were not meaningfully addressed by the international refugee regime.⁵⁰ Very little was achieved in terms of guaranteeing a right for refugees to be granted admission to a country of asylum.⁵¹ Few permanent settlement places were found. But as Skran points out, despite limited impact on the ground, the interwar refugee regime’s legacy is monumental. The institutions of the interwar period have disappeared, but the norms, rules, and procedures established during this period

⁴⁶ Skran, *supra* note 6 at 272-77, 279-81.

⁴⁷ William I Brustein & Ryan D King, “Anti-Semitism in Europe Before the Holocaust” (2004) 25:1 Intl Pol Sci Rev 35 at 35.

⁴⁸ Skran, *supra* note 6 at 50-51

⁴⁹ See Roversi, *supra* note 6 at 29.

⁵⁰ Skran, *supra* note 6 at 226-58.

⁵¹ *Ibid* at 277.

paved the way for the current refugee regime.⁵² Most importantly, the crucial legacy of the interwar refugee regime is the development of the notion that refugees are a special category of migrants, deserving of special protections.⁵³

2.3 The UNRRA and the IRO – a transition to a new regime

Two years before the end of the Second World War, the Allied Powers created the United Nations Relief and Rehabilitation Administration (UNRRA).⁵⁴ Initially, the UNRRA was created not to assist refugees, but to provide aid and relief to persons displaced by the Second World War (internally and externally), and to help with the repatriation of those outside their country of origin.⁵⁵ UNRRA's initial mandate included only nationals of the "United Nations", i.e., allied nations. In response to pleas from Jewish organizations, the mandate of UNRRA was expanded in 1944 to include

other persons who have been obliged to leave their country or place of origin or former residence or who have been deported therefrom by action of the enemy because of race, religion or activities in favor of the United Nations.⁵⁶

In the first two years of its existence, "true refugees" (i.e. persons who were unable to repatriate to their country of origin) were referred to the IGCR. In 1945, the UNRRA became directly involved in refugee protection.⁵⁷ In 1947, there remained over one million refugees in Europe,⁵⁸ and the UNRRA was facing criticism by the United States for its use of repatriation, including

⁵² *Ibid* at 293-296.

⁵³ *Ibid* at 261. See also Loescher, *supra* note 5 at 4-6.

⁵⁴ The United Nations organization itself was only created in 1945, but the term "United Nations" was used as early as 1942 to refer to the Allied Powers. The UNRRA became formally part of the United Nations in 1945.

⁵⁵ See Hathaway, "The Evolution of Refugee Status", *supra* note 12 at 372. See also Loescher, *supra* note 5 at 47-48.

⁵⁶ UNRRA Resolution 71, J 152 (1945).

⁵⁷ Hathaway, "The Evolution of Refugee Status", *supra* note 12 at 373.

⁵⁸ Denis Gallagher, "The Evolution of the International Refugee System" (1989) 23 Intl Migr R 579 at 579.

forced repatriation to Soviet states.⁵⁹ The United Nations General Assembly moved to create the International Refugee Organization (IRO) and transferred to the new organization the mandate of refugee protection and refugee aid.⁶⁰

In the following section, I will discuss in some detail the emergence and evolution of a new international refugee regime following the adoption of the 1951 Refugee Convention. Before moving on to that issue, I want to acknowledge that the preceding overview of the emergence of the international refugee regime rushes through decades of development in international refugee law without doing it justice. It is also heavily Eurocentric. It ignores many important refugee realities outside of Europe that occurred during the 19th century and early 20th century. There were many such displacements, including formerly-enslaved Black people who fled American slave states to free states and to Canada through the “Underground Railroad” in the 19th

⁵⁹ Loescher, *supra* note 5 at 50. The political context surrounding shifts in preference for a particular durable solution will be addressed in some detail in section 2.5.2.

⁶⁰ The *International Refugee Organization Constitution* (15 December 1946) (annex I, s A, para 1) defined a refugee as:

a person who has left, or who is outside of, his country of nationality or of former habitual residence, and who, whether or not he had retained his nationality, belongs to one of the following categories:

- (a) victims of the nazi or fascist regimes or of regimes which took part on their side in the second world war...;
- (b) Spanish Republicans and other victims of the Falangist regime in Spain, whether enjoying international status as refugees or not;
- (c) persons who were considered refugees before the outbreak of the second world war, for reasons of race, religion, nationality or political opinion.

Section B mandated the organization with the assistance and protection of “displaced persons”, defined as:

a person who, as a result of the actions of the authorities of the [nazi or fascist regimes or of regimes which took part on their side in the second world war] has been deported from, or has been obliged to leave his country of nationality or of former habitual residence, such as persons who were compelled to undertake forced labour or who were deported for racial, religious or political reasons.

The use of the term “displaced persons” as including not internally displaced persons but *externally* displaced persons in the IRO’s constitution is an anomaly in the language of the international refugee regime. See Goodwin-Gill & McAdam, *The Refugee in International Law*, *supra* note 9 at 18.

century,⁶¹ displacement caused by slave raids in Africa,⁶² and displacements resulting from colonialism and colonial wars in Africa. Indeed, Chimni writes:

... the limits of contemporary movement of forced migrants to the West cannot be discussed without talking about slave trade, the movement of indentured labour, and the occupation of territories declared terra nullius.⁶³

In my review of the interwar refugee regime, I have sought to rely on both authoritative and celebrated sources as well as works with a more critical perspective on the refugee regime. It was disappointing to find that very little scholarship on the development of the international refugee regime considered its non-European antecedents. In a sense, that focus reflects the Eurocentric character of the League of Nations refugee regime itself.⁶⁴ I was reminded of Chimni's reflection that knowledge production in refugee law has tended to integrate and reproduce dominant ideologies of institutions and powerful states, and to promote their objectives.⁶⁵

2.4 The UNHCR and the 1951 Refugee Convention⁶⁶

As the IRO's mandate was set to expire in 1950, there remained a large number of refugees in

⁶¹ See Natasha L Henry, "Underground Railroad", in *The Canadian Encyclopedia*, online: <<https://www.thecanadianencyclopedia.ca/en/article/underground-railroad>>.

⁶² See Dennis D Cordell, "Des 'réfugiés' dans l'Afrique précoloniale? L'exemple de la Centrafrique, 1850-1910" (2002) 85:1 Pol afr 16.

⁶³ BS Chimni, "The Global Refugee Crisis: Towards a Just Response" (Bonn: Development and Peace Foundation, 2018) at 3 ["The Global Refugee Crisis"].

⁶⁴ As explained in this section, it was only in 1967 that the Refugee Convention was extended beyond Europe.

⁶⁵ BS Chimni, "The Geopolitics of Refugee Studies and the Practice of International Institutions: A View from the South" (1998) 11:4 J Refugee Stud at 365-70 ["The Geopolitics of Refugee Studies"].

⁶⁶ This section focuses on the UNHCR and the 1951 Refugee Convention. However, it is important to note that a parallel UN agency - the United Nations Relief and Works Agency (UNRWA) - was created in 1949 to assist Palestinian refugees in Jordan, Lebanon, Syria, the Gaza Strip and the West Bank. Very few refugees are resettled through the UNRWA. The vast majority of Palestinian refugees have not returned or been locally integrated. See Alex Joffe, "UNRAW Resists Resettlement" (Fall 2012) Middle E Q 11.

Europe, and it was clear that not all remaining refugees would be repatriated or resettled.⁶⁷ As early as 1949, the United Nations General Assembly had begun the work of creating a successor organization to the IRO. This work culminated in the adoption of the *Statute of the Office of the United Nations High Commissioner for Refugees* in 1950⁶⁸ and the *Convention Relating to the Status of Refugees* in 1951. The UNHCR Statute and the 1951 Refugee Convention remain today the two pillars of the international refugee regime.⁶⁹

In order to understand how the international refugee regime operates today, it is informative to review the role played by the UNHCR and the Refugee Convention, and their evolution since the early 1950s. In particular, it is informative to consider the disjuncture between the mandate of the UNHCR and the Refugee Convention. Like its predecessor organizations, the UNHCR was designed as a temporary agency.⁷⁰ When its initial three-year mandate was due to expire, the UN General Assembly extended the UNHCR's mandate for a period of five years, and did so every five years until 2003, when a resolution of the General Assembly provided that the UNHCR would exist "until the refugee problem is solved."⁷¹

The UNHCR Statute tasks the UNHCR with providing international legal protection and durable

⁶⁷ Hathaway, *The Rights of Refugees*, *supra* note 1 at 91.

⁶⁸ *Statute of the Office of the United Nations High Commissioner for Refugees*, UNGA A/RES/428(V), 14 December 1950, art 13 [UNHCR Statute].

⁶⁹ Grahl-Madsen, *supra* note 4 at 20.

⁷⁰ UNHCR Statute, *supra* note 68, art 13.

⁷¹ Article 1 of the UNHCR Statute reads:

The United Nations High Commissioner for Refugees ... shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and ... private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.

See Loescher, *supra* note 5 at 55.

solutions for refugees.⁷² The UNHCR Statute also defines a “refugee” as (i) any person who has been considered a refugee under previous international instruments (“statutory refugees”)⁷³ and

Any other person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.⁷⁴

Early on in UNHCR’s life, it was recognized that the restricted definition in UNHCR’s mandate was inadequate for several reasons. First, the definition excluded the majority of persons displaced in the context of civil war or political change. Second, conducting individual refugee assessments, which is what the Statute seems to require, was found to be impractical in the context of mass exodus.⁷⁵ Beginning in the late 1950s, the mandate of the UNHCR was extended through various measures in order to authorize the agency to provide assistance to refugees who did not meet the strict refugee definition.⁷⁶ A 1957 resolution of the General Assembly authorized the UNHCR to assist Chinese refugees in Hong Kong, followed by another resolution in 1958 regarding Algerian refugees in Morocco and Tunisia, and another in 1961 regarding Angolan refugees in Congo.⁷⁷ In the late 1950s, the UN General Assembly began mandating the UNHCR with assisting displaced persons under its “good offices.”⁷⁸

⁷² UNHCR Statute, *supra* note 68, art 1.

⁷³ *Ibid.*, art 6(A)(i).

⁷⁴ *Ibid.*, art 6(B).

⁷⁵ See Goodwin-Gill & McAdam, *supra* note 9 at 29-30.

⁷⁶ It should be noted that the UNHCR Statute itself provides that other organs of the UN may alter the mandate of the UNHCR, including the UN General Assembly and the Economic and Social Council. See Volker Türk, “The role of UNHCR in the Development of International Refugee Law” in Frances Nicholson & Patrick Twomey, eds, *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge & New York: Cambridge University Press, 1999) 153.

⁷⁷ Goodwin-Gill & McAdam, *supra* note 9 at 24.

⁷⁸ *Ibid.* For a more critical assessment of how the notion of “good offices” allowed the UNHCR to underplay the consequences of colonialism, see Hyndman, *Managing Displacement*, *supra* note 12 at 10-11; Jennifer

Various terms and categories have since been used by the General Assembly and other UN organs to describe persons that fall under UNHCR's competence, such as "refugees of concern", "refugees and displaced persons of concern", and "victims of man-made disasters."⁷⁹ Contemporary UNHCR publications describe the agency's mandate as encompassing refugees, asylum seekers, internally-displaced persons (IDPs), returned refugees, returned IDPs, individuals under UNHCR's statelessness mandate, and "other groups or persons of concern."⁸⁰ Türk explains that all of these categories share a common element in that they include persons who "have been forced to flee, as a result of persecution, massive human rights violations, generalised violence, armed conflicts, civil strife or other circumstances which have seriously disturbed public order, threatening their lives, safety or freedom."⁸¹

The UNHCR Statute and UNHCR's expanded responsibility through UN organs, however, do not create international legal obligations on states to protect refugees. International obligations regarding refugees follow from the 1951 Refugee Convention, which still today contains a very restrictive refugee definition. The refugee definition in the Refugee Convention (as amended by the 1967 Refugee Protocol) is almost identical to the above-quoted definition that appears in the UNHCR Statute: a refugee is a person who is outside their country of origin and cannot return because of a well-founded fear of persecution because of specified grounds. The only distinction that remains of relevance is that the Refugee Convention contains an additional ground: "membership in a particular social group." The most well-known aspect of the Refugee

Hyndman & Bo Viktor Nylund, "UNHCR and the Status of Prima Facie Refugees in Kenya" (1998) 10:1-2 Intl J Refugee L 21.

⁷⁹ See Goodwin-Gill & McAdam, *supra* note 9 at 26.

⁸⁰ UNHCR, "Global Trends: Forced Displacement in 2019" (Statistics and Demographics Section, 2020) at 64-66 ["Global Trends 2019"].

⁸¹ Türk, *supra* note 76 at 153.

Convention is its prohibition against *refoulement*, i.e., the forced return of refugees to a country where they fear persecution:

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.⁸²

The focus on the refugee definition and the prohibition against *refoulement* has been said to overshadow other rights granted to refugees under Refugee Convention, which also include religious rights, property and intellectual property rights, the right of association, access to courts, employment rights, housing rights, education rights, the right to freedom of movement, the right to identity documents, the right to travel documents, the right to fair fiscal treatment, and the right to transfer one’s assets.⁸³

The Refugee Convention as adopted in 1951 contained temporal and geographical limitations. Refugee status was limited to persons who have been displaced “[a]s a result of events occurring before 1 January 1951.”⁸⁴ The Refugee Convention also provided that member states could declare at the moment of ratification that “events occurring before 1 January 1951” means

⁸² Refugee Convention, art 33. There is some debate on whether, and to what extent, the *non-refoulement* principle should be regarded as a principle of customary international law. See Hathaway, *The Rights of Refugees*, *supra* note 1 at 36, 363-76; Elihu Lauterpacht & Daniel Bethlehem, “The Scope and Content of the Principle of *Non-Refoulement*: Opinion” in Erika Feller, Volker Türk & Frances Nicholson, eds, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003) 87. The *non-refoulement* principle is also enshrined in other human rights instruments, including the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85. See Goodwin-Gill & McAdam, *supra* note 9 at 209.

⁸³ See Hathaway, *The Rights of Refugees*, *supra* note 1 at 2-3, 13; Susan Kneebone, “Introduction: Refugees and Asylum Seekers in the International Context – Rights and Realities”, in Susan Kneebone, ed, *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (Cambridge: Cambridge University Press, 2009) 1 at 6 [“Introduction”].

⁸⁴ Art 1A(2).

“events occurring in Europe before 1 January 1951.”⁸⁵ The inadequacy of the Convention refugee definition as adopted was recognized in the early 1960s, with the emergence of large refugee movements in Africa, none of which could be considered to have resulted from events occurring before 1951, or events occurring in Europe, for that matter. Efforts were undertaken within the UN to eliminate the limitations, culminating in the 1967 Refugee Protocol, which provides eliminated both the geographical and temporal limitation.⁸⁶

Still, from the 1960s on, the Convention definition became increasingly irrelevant for new flows of refugees who faced violence and were forced to flee for reasons not covered by the Convention, for example civil war or other armed conflicts.⁸⁷ In the 1980s and 90s, signatory states to the Refugee Convention engaged in discussions on the potential expansion of the Convention refugee definition. It was generally acknowledged that those fleeing generalized violence were deserving of protection, but there was much resistance to the idea of a

⁸⁵ Art 1B. For a discussion of the role of colonial states’ delegations in entrenching the European limitation in the Refugee Convention, see Ulrike Krause, “Colonial Roots of the 1951 Refugee Convention and its Effects on the Global Refugee Regime” (2021) *Intl Rel & Dev*.

⁸⁶ Articles I(2) and I(3) of the 1967 Refugee Protocol read:

2. For the purpose of the present Protocol, the term “refugee” shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words “As a result of events occurring before 1 January 1951 and ...” “and the words”... “a result of such events”, in article 1 A (2) were omitted.

3. The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article 1 B (1) (a) of the Convention, shall, unless extended under article 1 B (2) thereof, apply also under the present Protocol.

Only a few states signatory states of the Convention had opted for the optional geographical limitation: Congo, Madagascar, Monaco, and Turkey. Madagascar remains the only signatory state to the Refugee Convention that has not ratified the Protocol. Turkey has maintained the geographical limitation upon acceding to the Protocol. See UNHCR, “States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol”, online (pdf):

<<https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>>. See Türk, *supra* note 76 at 161; Gallagher, *supra* note 58 at 583; Hathaway, *The Rights of Refugees*, *supra* note 1 at 110-12.

⁸⁷ Hyndman, *Managing Displacement*, *supra* note 12 at 12. See also Betts & Collier, *supra* note 5 at 40.

corresponding international obligation. The initiative was halted in 1994.⁸⁸

A few regional instruments better recognize the reality of “new” refugee flows.⁸⁹ The most notable is the 1969 *Convention Governing the Specific Aspects of Refugee Problems in Africa* adopted by the Organization of African Unity.⁹⁰ The OAU Refugee Convention incorporates the strict refugee definition found in the 1951 Convention and the Protocol,⁹¹ but provides an additional definition, which captures persons displaced because of “external aggression, occupation, foreign domination or events seriously disturbing public order.”⁹² Another regional instrument that seeks to remedy the insufficiency of the Convention refugee definition is the 1984 *Cartagena Declaration on Refugees*, which grants protection to persons displaced by armed conflict and massive violations of human rights.⁹³ While the *Cartagena Declaration* is not binding, it has been endorsed by Latin American states.⁹⁴

2.5 Refugee Resettlement and durable solutions

The refugee regime under the 1951 Refugee Convention - and indeed frameworks established under other treaties and institutions - has a triple goal: providing protection for refugees, finding durable solutions for refugees, and ensuring global burden-sharing. Only the protection element

⁸⁸ Goodwin-Gill & McAdam, *supra* note 9 at 48-49.

⁸⁹ See Kneebone, “Introduction”, *supra* note 83 at 15.

⁹⁰ Organization of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa* (10 September 1969) 1001 UNTS 45 [OAU Refugee Convention].

⁹¹ Art I(1).

⁹² Art I(2). See Goodwin-Gill & McAdam, *supra* note 9 at 37-39; Hyndman, *Managing Displacement*, *supra* note 12 at 12-13.

⁹³ Organization of American States, *Cartagena Declaration on Refugees*, OEA/Ser.L/V/II.66/Doc.10, rev 1 (1984). See Hyndman, *Managing Displacement*, *supra* note 12 at 13-14.

⁹⁴ See Jose Alvin Gonzaga, “The Role of the United Nations High Commissioner for Refugees and the Refugee Definition” in Susan Kneebone, ed, *The Refugees Convention 50 Years On: Globalisation and International Law* (Aldershot: Ashgate, 2003) 233.

takes the form of an international obligation - the prohibition against *refoulement*. Frameworks to facilitate durable solutions and burden-sharing are developed through international voluntary-based mechanisms, such as refugee resettlement. In this section, I examine how the international refugee regime's approach to durable solutions and burden-sharing has shifted over the years, and investigate the role of refugee resettlement in trying to achieve these goals.

2.5.1 Durable solutions: concepts and legal basis

A “durable solution” is a solution that puts an end to, or resolves, the status of a person as a refugee. It is:

...one that ends the cycle of displacement by resolving their plight so that they can lead normal lives. Seeking and providing durable solutions to the problems of refugees constitutes an essential element of international protection, and the search for durable solutions has been a central part of UNHCR's mandate since its inception.⁹⁵

UNHCR policies describe three durable solutions to refugeehood: voluntary repatriation, local integration and resettlement.⁹⁶ The emphasis on durable solutions has been a central component of the international refugee law regimes of the 20th century.⁹⁷ The durable solutions framework is developed not through international legal instruments, but as a matter of institutional policies.⁹⁸ It will come as no surprise that the durable solutions framework does not integrate seamlessly into the legal framework of the Refugee Convention. The following section presents each traditional durable solution and discusses its relationship to the Refugee Convention.

⁹⁵ UNHCR, *Resettlement Handbook* (Geneva: UNHCR, 2011) at para 1.3 [*Resettlement Handbook*].

⁹⁶ *Ibid.*

⁹⁷ It is worth noting that Hathaway writes that refugee law's growing emphasis on durable solutions has had the unintended consequence of minimizing the importance of the respect of full refugee rights under the Refugee Convention: Hathaway, *The Rights of Refugees*, *supra* note 1 at 913.

⁹⁸ See Shauna Labman, *Crossing Law's Border: Canada's Refugee Resettlement Program* (Vancouver: UBC Press, 2019) at 4.

i) Voluntary repatriation, voluntary reestablishment and cessation

The UNHCR defines voluntary repatriation as a situation where “refugees return in safety and with dignity to their country of origin and re-avail themselves of national protection.”⁹⁹ As Hathaway explains, an important terminology problem has arisen as a result of conflicts between the Refugee Convention and the UNHCR Statute.¹⁰⁰ The UNHCR Statute mandates the UNHCR with “seeking permanent solutions for the problem of refugees by assisting Governments and... private organizations to facilitate the voluntary repatriation of such refugees...”¹⁰¹ The difficulty with this mandate is that, under the Refugee Convention, there is no such concept as “voluntary repatriation.”¹⁰² Under the terms of the Refugee Convention, it is not voluntary *repatriation* that terminates refugee status, but voluntary *reestablishment*.¹⁰³ Reestablishment entails something more than mere repatriation. Hathaway writes that contracting states should not automatically consider that refugee status was terminated by the mere fact that a refugee has, for example, temporarily visited her home country.¹⁰⁴

More importantly, the criteria utilized by the UNHCR to determine when to support voluntary repatriation is not well developed or even in line with the framework of the Refugee Convention. The Refugee Convention for the termination of refugee status following

⁹⁹ UNHCR, *Resettlement Handbook*, *supra* note 95 at 28. As Weima observes, the terms “return” and “returnee” are now increasingly replacing the terms “repatriation” and “repatriate”:

While repatriation refers to the legal process of regained citizenship, return is much more defined by physical location. “Returnees” can include both those who were previously recognized as refugees, as well as those whose migration was not officially recognized. “Returnee” can also be a misnomer – it can be applied to those who never themselves left, and who were born to forced-migrant parents (second generation), particularly as many refugees are spending increasingly extended periods in exile (Yolanda Weima, “Refugee Repatriation and Ongoing Transnationalisms” (2017) 7:1 *Transnat’l Soc R* 113 at 114).

¹⁰⁰ Hathaway, *The Rights of Refugees*, *supra* note 1 at 917-53.

¹⁰¹ UNHCR Statute, *supra* note 68, art 1.

¹⁰² If “repatriation” is to mean anything under the Refugee Convention, it refers to the concept of “cessation”, which is *not* voluntary: Hathaway, *The Rights of Refugees*, *supra* note 1 at 916.

¹⁰³ Refugee Convention, *supra* note 2, art 1(C)(4).

¹⁰⁴ Hathaway, *The Rights of Refugees*, *supra* note 1 at 918-19.

“cessation,” but cessation requires more than a mere voluntary desire to return or a finding that the well-founded fear of persecution no longer exists. Cessation requires the finding of a genuine, enduring change in circumstance that eliminates the well-founded fear of persecution and restores protection.¹⁰⁵ When a return occurs following cessation, the return is not “voluntary” but “mandatory.” Hathaway explains that when the UNHCR supports repatriation efforts under its mandate for a particular refugee population, host states tend to consider that refugee status has been automatically terminated under the cessation clause of the Refugee Convention. This blurring of the lines between cessation and voluntary repatriation leads to the premature withdrawal of refugee protection.¹⁰⁶

Notwithstanding the weak legal underpinning of repatriation and its conflation with cessation, established principles do guide the UNHCR’s repatriation efforts. The UNHCR’s handbook on voluntary repatriation acknowledges that voluntary repatriation is distinct from cessation and that voluntary repatriation can occur in situations that fall short of a “fundamental change of circumstances” in the country of origin.¹⁰⁷ The handbook provides that repatriation must nevertheless be truly voluntary,¹⁰⁸ and must be conducted in a “safe and dignified” way. Refugees should be not coerced, forced to move, be separated from their family, or be put in a situation where their safety is endangered.¹⁰⁹ The UNHCR also stresses the importance of

¹⁰⁵ *Ibid* at 921-22.

¹⁰⁶ *Ibid* at 931-53.

¹⁰⁷ UNHCR, *Voluntary Repatriation: International Protection* (Geneva: UNHCR, 1996) at para 2.1.

¹⁰⁸ The notion of voluntariness is defined broadly:

Voluntariness means not only the absence of measures which push the refugee to repatriate, but also means that he or she should not be prevented from returning, for example by dissemination of wrong information or false promises of continued assistance. In certain situations economic interests in the country of asylum may lead to interest groups trying to prevent refugees from repatriating (*ibid* at para 2.3).

¹⁰⁹ *Ibid* at para 3.1.

engaging in the successful reintegration of returnees.¹¹⁰ Finally, voluntary repatriation is to be considered within a comprehensive framework that includes the other durable solutions.¹¹¹ In practice, this principle is not always followed.¹¹²

In addition, in the context of growing pressures for repatriation, the UNHCR is reported to have engaged in organized repatriation in circumstances that violate the principles of voluntariness, safety, and dignity. Coercion is said to have been a factor in the repatriation of 200,000 Rohingyas from Myanmar to Bangladesh in the early 1990s, the repatriation of 350,000 Rwandan refugees in Tanzania in 1996, the repatriation of 40,000 Burundian refugees from Tanzania in 2012, and more recently, the repatriation of Afghan refugees from both Iran and Pakistan.¹¹³

ii) Local integration and naturalization

UNHCR policy documents describe local integration as a situation where “refugees legally, economically and socially integrate in the host country, availing themselves of the national protection of the host government.”¹¹⁴ Hathaway posits that this conception of local integration

¹¹⁰ *Ibid* at para 6.4.

¹¹¹ See Jeff Crisp, “Repatriation Principles Under Pressure” (2019) 62 *Forced Migr R* 20 at 20.

¹¹² Crisp writes:

Host States in developing regions of the world do not want the indefinite presence of refugees on their territory, and in most cases are adamant that refugees should not be given the option of local integration. Donor countries are keen to bring an end to protracted refugee situations and expensive long-term assistance programmes, while countries of origin are often eager to bolster their legitimacy by demonstrating that their exiled citizens are prepared to vote with their feet by returning to their homeland.

As for UNHCR – an agency funded and governed by States, and thus highly sensitive to their concerns – it became a prime objective to get as many refugees home as possible, thereby demonstrating the organisation’s usefulness to its primary stakeholder (*ibid* at 20-21).

¹¹³ *Ibid* at 21; Hathaway, *The Rights of Refugees*, *supra* note 1 at 933-34.

¹¹⁴ UNHCR, *Resettlement Handbook*, *supra* note 95 at 28.

is not an alternative to refugee status.¹¹⁵ Local integration, in this sense, is merely equivalent to the enjoyment of the full range of rights under the Refugee Convention. It will come as no surprise that the Refugee Convention does not contemplate the termination of refugee status upon “local integration.” Rather, Article 1(C)(3) of the Refugee Convention provides that refugee status is terminated upon *naturalization*, meaning a situation where a refugee “acquire(s) a new nationality, and enjoys the protection of the country of his new nationality.” The Refugee Convention recognizes that naturalization is a prerogative of sovereign states and imposes only very light obligations in this respect. Article 34 provides that contracting states shall “as far as possible facilitate the assimilation and naturalization of refugees”, which includes “mak[ing] every effort to expedite naturalization proceedings and reduce as far as possible the charges and costs of such proceedings.”

iii) Third country resettlement

The UNHCR defines resettlement as:

The selection and transfer of refugees from a State in which they have sought protection to a third State which has agreed to admit them – as refugees – with permanent residence status.¹¹⁶

The term ‘resettlement’ appears in a few articles in the Refugee Convention. For example, article 30 stipulates that contracting states “shall permit refugees to transfer assets which they have brought into its territory to another country where they have been admitted for the purposes of resettlement.” However, “resettlement” is not listed as a circumstance that brings about the termination of refugee status. Hathaway explains that when the resettlement of a refugee occurs, refugee status in the country of asylum is *de facto* terminated because “the

¹¹⁵ Hathaway, *The Rights of Refugees*, *supra* note 1 at 979.

¹¹⁶ UNHCR, *Resettlement Handbook*, *supra* note 95 at 416.

continuing need for refugee protection is ... at an end.”¹¹⁷

The UNHCR operates a resettlement program which will be explored in some detail in later sections. It is important to note, however, that some resettlement activities operate outside the UNHCR, including resettlement through Canada’s private sponsorship of refugees program. It also bears mention that some state-operated resettlement activities have taken the form of *non-consensual* resettlement. Non-consensual resettlement schemes existed under the IGCR and IRO regimes, and have resurfaced as state practices in the 1980s. Non-consensual resettlement occurs when asylum seekers are diverted by the intended asylum state to another state, and then given only one state-sanctioned resettlement opportunity (if any).¹¹⁸ The Refugee Convention imposes certain restrictions on such activities, including, at minimum, allowing “a reasonable period and all the necessary facilities to obtain admission into another country” to refugees who are being detained.¹¹⁹ Contracting states are also required, under the Refugee Convention, to allow for the transfer of assets to the country of resettlement.¹²⁰

iv) “New” durable solutions

The concept of durable solutions has been expanded beyond the three traditional durable solutions in the past 10 years. The most significant of these is the concept of “complementary pathways for admission to third countries”, defined broadly as encompassing family reunification, private sponsorship, humanitarian programs, educational opportunities for

¹¹⁷ Hathaway, *The Rights of Refugees*, *supra* note 1 at 916.

¹¹⁸ See Hathaway, *The Rights of Refugees*, *supra* note 1 at 964-65. For a discussion of the development of such measures in Australia and the United States, see Ghezelbash, *supra* note 10.

¹¹⁹ Refugee Convention, *supra* note 2, art 31(2). See Hathaway, *The Rights of Refugees*, *supra* note 1 at 965.

¹²⁰ Art 30.

refugees, and labour mobility opportunities for refugees.¹²¹ In April 2018, Canada launched a pilot program called the Economic Mobility Pathways Project, which aimed to identify and bring to Canada 10-15 skilled refugees who further met the requirements of Canada’s economic migration programs.¹²² The Global Compact on Refugees also adopts in its theory of durable solutions “other local solutions”, which include “interim legal stay, including... the appropriate economic, social and cultural inclusion of refugees... without prejudice to eventual durable solutions that may become available.”¹²³ It is unclear how “other local solutions” (just as true local integration) might differ from the simple respect of full refugee rights.

2.5.2 Shifting durable solutions

The act of resettlement is a fundamentally discretionary one. The Refugee Convention does not require that signatory states grant status to refugees who are outside their borders. Resettlement is therefore considered an entirely “voluntary” act, one that does not flow from international obligations, but from states’ commitments to humanitarianism, global burden-sharing, and strategic foreign policy concerns.¹²⁴ States’ interest in resettlement has waxed and waned along with changes in domestic and international politics. It is worth noting that the other two traditional durable solutions, in contrast, have some basis in international law. Local integration, understood as the enjoyment of full refugee rights, is a core state obligation resulting from the

¹²¹ UNHCR, *Report of the United Nations High Commissioner for Refugees - Part II: Global Compact on Refugees*, UNGAOR, 2018, Supp No 12m UN Doc A/73/12 at para 95 [*Global Compact on Refugees*].

¹²² See UNHRC & Canada, “The Economic Mobility Pathways Project – Policy Principles and Lessons Learned: A Canadian Perspective on Complementary Pathways for Admission” (2019), online (pdf): <<https://www.unhcr.ca/wp-content/uploads/2019/07/The-Economic-Mobility-Pathways-Project-Policy-Principles-and-Lessons-Learned-June-2019.pdf>>.

¹²³ *Global Compact on Refugees*, *supra* note 121 at para 10. The *Global Compact on Refugees* will be addressed below in section 2.6.1.

¹²⁴ See Guy S Goodwin-Gill, “Refuge or Asylum: International Law and the Search for Solutions to the Refugee Problem” in Howard Adelman and Michael Lanphier, eds, *Refuge or Asylum: A Choice for Canada* (Toronto: York Lanes Press, 1990) 27 at 27.

Refugee Convention itself. The right of return is recognized under the *International Covenant on Civil and Political Rights*,¹²⁵ and various international human rights instruments oblige states to refrain from activity that would make repatriation impossible.¹²⁶ However, the successful implementation of all durable solutions depends on their promotion by states and international agencies. In fact, the history of international refugee regimes is characterized by enormous shifts in the preference accorded to each durable solution by states and international institutions. These shifts can be attributed, for the most part, to changes in the international political climate and perceived changes in refugee flows.

2.5.2.1 Durable solutions under League of Nations institutions and the IGCR

The interwar international refugee regime was much more successful in securing legal protection than in finding durable solutions for refugees. While securing durable solutions was identified in the mandate of the High Commission, relatively meagre results were achieved in that respect.¹²⁷ Organized resettlement occurred on a very small scale, and these operations were often part of broader settlement activities that were primarily focused on local integration.

During the interwar period, repatriation was widely regarded as the most desirable outcome for both refugees and governments.¹²⁸ Nansen himself was appointed High Commissioner after having played a major role in the repatriation of Russian prisoners of war following the First World War.¹²⁹ Two local integration schemes developed in the 1920s, both for Armenian

¹²⁵ *International Covenant on Civil and Political Rights*, *supra* note 82, art 12(4).

¹²⁶ Hathaway, *The Rights of Refugees*, *supra* note 1 at 955-58.

¹²⁷ See Roversi, *supra* note 6 at 24.

¹²⁸ Skran, *supra* note 6 at 148.

¹²⁹ Roversi, *supra* note 6 at 24.

refugees, also included elements of resettlement.¹³⁰ The first scheme provided for the settlement of Armenian refugees in Soviet Armenia. Some of the Armenian refugees to be settled there were displaced in Greece and Constantinople. The plan collapsed as tensions developed between the Soviet Union and Western states. This was followed by a second plan for the settlement of Armenian refugees in Syria, where some hundred thousand Armenian refugees were living in extremely difficult conditions in the mid-1920s. Almost 40,000 Armenian refugees were settled in coastal regions of Lebanon and Syria by 1938, territories then under French mandate.

The IGCR, initially mandated in 1938 to help Jewish refugees from Germany and Austria and Jewish individuals who had not yet left those countries, operated with an explicit focus on resettlement, in contrast to League of Nations institutions. The task of the Chairman of the IGCR included negotiating “to improve the present conditions of exodus and to replace them by conditions of orderly emigration” and “approaching the Governments of the countries of refuge and settlement with a view to developing opportunities for permanent settlement.”¹³¹ The IGCR took the position that the answer to the Jewish refugee problem lay “in coordinating involuntary emigration with existing immigration laws and practices, in collaboration with the country of origin.”¹³² The explicit focus on resettlement by the IGCR reflected member states’ shared view that countries of first asylum would be unwilling to absorb large numbers of Jewish refugees.¹³³ In the months leading up to the Second World War, efforts by the IGCR to arrange the evacuation and resettlement of hundreds of thousands of Jewish Germans and Austrians collapsed because of difficulties in finding resettlement spaces for Jewish refugees, and because

¹³⁰ Skran, *supra* note 6 at 170-82. See also Edita Gzoyan, “The League of Nations and Armenian Refugees: The Formation of the Armenian Diaspora in Syria” (2014) 8 Cent E Eur R 83.

¹³¹ Skran, *ibid* at 215.

¹³² Goodwin-Gill & McAdam, *supra* note 9 at 423.

¹³³ Hathaway, *The Rights of Refugees*, *supra* note 1 at 964.

of German resistance in releasing Jewish assets to cover the cost of evacuation and settlement.¹³⁴ In fact, as the flight of Jewish refugees from the Third Reich increased, countries around the world moved to restrict their immigration policies.¹³⁵ The IGCR never implemented the large-scale resettlement program it had designed before and during the Second World War, but some European countries, including Holland and Belgium, as well as the United States, moved to unilaterally liberalize their immigration policies to accept Jewish refugees.¹³⁶ The IGCR was essentially not operational between the outbreak of the Second World War and 1943, when its mandate was expanded to include all refugee groups displaced by the war in Europe at the Bermuda Conference.¹³⁷ The revival of the dormant IGCR is attributed to the “massive pressure” on both the British and American governments to “do something” after Nazi atrocities against the European Jews were officially revealed by the Allied governments in December 1942.¹³⁸ At that point, member states were eager to oppose the narrative pushed by Germany that the Allies’ war effort in the Middle East and North Africa was “on behalf of the Jews”¹³⁹ and that “only Germany could liberate the Arabs from Allied-Jewish oppression.”¹⁴⁰ Another motive for the expansion of the IGCR’s mandate to all refugees from Germany was that some non-Jewish refugees had become a hindrance to the Allied war effort, including some 40,000 Polish refugees who had fled to Iran in 1942. Ultimately, 35,000 were transferred to camps in East Africa, India, Mexico and the Middle East.¹⁴¹ Large-scale resettlement efforts under the IGCR

¹³⁴ See Loescher, *supra* note 5 at 45.

¹³⁵ Skran, *supra* note 6 at 214-18.

¹³⁶ *Ibid* at 218-19.

¹³⁷ Sjöberg, *supra* note 16 at 63-67, 127.

¹³⁸ *Ibid* at 127.

¹³⁹ *Ibid* at 131.

¹⁴⁰ *Ibid*.

¹⁴¹ *Ibid* at 133.

only began after the end of the Second World War.¹⁴²

2.5.2.2 Durable solutions after the Second World War

At the conclusion of the war, there remained some 2 million “non-repatriable” displaced persons, mostly Eastern Europeans, located in Allied-occupied zones.¹⁴³ By then, major differences between states favouring repatriation and states favouring resettlement had begun to develop, a disagreement driven by Cold War political dynamics. During the UNHCR era, the international refugee regime’s approach to durable solutions continued to shift, and still today continues to be influenced by evolving international political tensions and alliances.

The UNRRA, established two years before the end of the Second World War, is considered to have operated with a strong bias towards repatriation.¹⁴⁴ The UNRRA was supported by countries of the Soviet Bloc, who considered that their nationals should be repatriated by force if necessary.¹⁴⁵ The UNRRA existed alongside the IGCR until both were dissolved in 1947. Both institutions promoted a diametrically opposed solution to the refugee problem: the IGCR was founded upon the principle that resettlement was the only possible solution for refugees from the Third Reich, while the UNRRA did not engage in any significant resettlement activities.

The UNRRA’s criteria for defining refugees was rather narrow. As a result of pressures from the Soviet Union, UNRRA’s criteria for granting refugee status required that the refugee objectively

¹⁴² Louise W Holborn, Philip Chartrand & Rita Chartrand, *Refugees: A Problem of our Time: The Work of the United Nations High Commissioner for Refugees, 1951–1972* (Metuchen: Scarecrow Press, 1975) at 19.

¹⁴³ Sjöberg, *supra* note 16 at 168-207.

¹⁴⁴ See Loescher, *supra* note 5 at 47. See also Gallagher, *supra* note 58 at 579.

¹⁴⁵ Sjöberg, *supra* note 16 at 206.

demonstrate that persecution would occur.¹⁴⁶ Under UNRRA auspices, it was generally presumed that displaced people and host countries both favoured repatriation. Loescher writes that little attention was given to actual individual wishes, and that massive repatriation operations unfolded where refugees were indiscriminately transported in boxcars. Many Soviet returnees were transported to labour camps immediately upon return.¹⁴⁷

The International Refugee Organization (IRO), created in 1947 under adamant opposition from the Soviet Union, operated with a bias towards resettlement. The IRO followed the groundwork laid by the IGCR, itself focused on resettlement.¹⁴⁸ Interestingly, the IRO's preference for resettlement was not made explicit in the agency's constitution.¹⁴⁹ In reality, however, the organization was heavily geared towards resettlement.¹⁵⁰ In contrast with UNRRA's indiscriminate repatriation, the IRO's Constitution expressly recognized that refugees or displaced persons with a "valid objection" would not be repatriated to their country of nationality.¹⁵¹ The Soviet Union, viewing the IRO as a "tool of the West", never joined the

¹⁴⁶ Hathaway, "The Evolution of Refugee Status", *supra* note 12 at 373-74. See Labman, *Crossing Law's Border*, *supra* note 98 at 21.

¹⁴⁷ Loescher, *supra* note 5 at 48.

¹⁴⁸ Holborn, Chartrand & Chartrand, *supra* note 142 at 19.

¹⁴⁹ IRO's mandate included:

the repatriation; the identification, registration and classification; the care and assistance; the legal and political protection; the transport; and the re-settlement and re-establishment, in countries able and willing to receive them, of persons who are the concern of the Organization (*Constitution of the International Refugee Organization*, (15 December 1946), art 2(1) [IRO Constitution]).

¹⁵⁰ See BS Chimni, "From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems" (2004) 23:3 *Refugee Survey Quarterly* 55 ["From Resettlement to Involuntary Repatriation"]; Labman, *Crossing Law's Border*, *supra* note 98 at 21-22.

¹⁵¹ Art c(ii). For those with valid objections, the IRO would seek (art 2(1)(b)):

- (i) their re-establishment in countries of temporary residence;
- (ii) the emigration to, re-settlement and re-establishment in other countries of individuals or family units; and
- (iii) ... the investigation, promotion or execution of projects of group re-settlement or large-scale re-settlement.

organization and provided funding.¹⁵² From 1947 to 1951, over one million refugees were resettled through the IRO, mainly to the USA, Australia, Israel, and Canada.¹⁵³ Only 54,000 were repatriated to Eastern and Central Europe.¹⁵⁴

The conceptualization of durable solutions that existed under the IRO was essentially transferred to the UNHCR. No clear preference for resettlement emerges from UNHCR's mandate or the Refugee Convention. Still, the work of the UNHCR was influenced, as Bessa writes, by a coalition of powerful Western states that sought to manipulate the international refugee regime as a political tool.¹⁵⁵ As such, resettlement became an instrument through which Western states could assert their ideological superiority over Soviet states.¹⁵⁶ As Hyndman points out, the Refugee Convention itself reflects a bias towards Western ideology:

...its emphasis on persecution based on civil and political status as grounds for refugee status expresses the particular ideological debates of postwar European politics, particularly the perceived threats of communism and another Holocaust. By emphasizing civil and political rights, the convention had the effect of minimizing the importance of socio-economic human rights.¹⁵⁷

During the 1950s and early 1960s, resettlement was promoted by the UNHCR as the preferred durable solution. During the period, the vast majority of resettled refugees were European refugees fleeing communist regimes.¹⁵⁸ As Bessa notes, the first massive UNHCR resettlement

¹⁵² Loescher, *supra* note 5 at 49-51.

¹⁵³ Gallagher, *supra* note 58 at 579; Hathaway, *The Rights of Refugees*, *supra* note 1 at 91.

¹⁵⁴ Labman, *Crossing Law's Border*, *supra* note 98 at 22.

¹⁵⁵ Thais Bessa, "From Political Instrument to Protection Tool? Resettlement of Refugees and North-South Relations" (2015) 26:1 *Refugee* 91 at 93.

¹⁵⁶ See also Alexander Aleinikoff, "State-centered Refugee Law: From Resettlement to Containment" (1992) 14 *Mich J Intl L* 120 ["State-Centered Refugee Law"].

¹⁵⁷ Hyndman, *Managing Displacement*, *supra* note 12 at 8.

¹⁵⁸ Bessa, *supra* note 155 at 92. Bessa notes that much of the resettlement during the 1950s and early 1960s, especially resettlement to the United States, actually occurred outside the auspices of the UNHCR, and through the Intergovernmental Committee for European Migration and the United States Escapee Program.

operation occurred in 1956 after the Soviet invasion of Hungary, which led to the displacement of around 200,000 Hungarians. Of these, 180,000 were resettled to third countries.¹⁵⁹ A few years later, a large proportion of the 3.5 million East Germans who fled to West Germany before 1961 were resettled to third countries.¹⁶⁰ Chimni argues that domestic economic interests were also a driving factor in defining durable solutions in the 1950s and 1960s: Northern states, experiencing unprecedented economic expansion, depended on refugee flows to fill the labour shortages caused by the Second World War.¹⁶¹

Major resettlement activities continued in the late 1960s and 1970s. During this period, new, non-European refugee flows began to emerge. The first of these were refugee movements in Africa caused by armed conflicts following decolonization, including the Algerian war of independence and various armed conflicts in newly independent states in sub-Saharan Africa.¹⁶² In the 1970s, massive refugee flows also developed in both Asia and Central America. During this period, resettlement remained shaped by Cold War dynamics. The largest resettlement operation in UNHCR's history was the resettlement of 1,311,183 Vietnamese, Laotian, and Cambodian refugees ("Indochinese" refugees) who fled their country after the fall of Saigon in 1975 and the establishment of communist regimes in the region.¹⁶³

In the 1980s, Western states' interest in resettlement began decreasing. Bessa writes that in 1979, one out of every 24 refugees were resettled. By 1996, that number had decreased to one

¹⁵⁹ *Ibid.* See also UNHCR, *The State of the World's Refugees 2000: Fifty Years of Humanitarian Action* (Oxford: Oxford University Press, 2000) at 20 [*The State of the World's Refugees*].

¹⁶⁰ Bessa, *supra* note 155 at 93.

¹⁶¹ Chimni, "From Resettlement to Involuntary Repatriation", *supra* note 150 at 57.

¹⁶² UNHCR, *The State of the World's Refugees*, *supra* note 159 at 37-57.

¹⁶³ *Ibid* at 98.

out of every 400 refugees.¹⁶⁴ This shift coincided with the end of massive opposition to communism in Western states, and an increase in non-European refugee flows, particularly in Africa. Western resettlement states proved unwilling to resettle African refugees, especially those that were not fleeing communist regimes. According to Chimni,

an image of a ‘normal’ refugee was constructed—white, male and anti-communist—which clashed sharply with individuals fleeing the Third World.¹⁶⁵

This racist and xenophobic approach by states to refugee protection is also at the source of the various *non-entrée* regimes that began appearing around the same time.¹⁶⁶ In order to maintain resettlement as a relevant solution, the UNHCR led efforts to depoliticize the program. The refugee regime’s “exilic bias” formally ended in the 1990s with the establishment of a clear preference for repatriation.¹⁶⁷ The shift was formally institutionalized in the 1990s, with the UNHCR declaring the 1990s the “decade of repatriation” and adopting a “hierarchy of durable solutions.” Under this new paradigm, resettlement became the “least preferred solution”, one that is framed as a protection tool with precisely defined criteria.¹⁶⁸ The view that resettlement is the least desirable durable solution was challenged by many critics of the international refugee regime, including Fredriksson, who recommended abandoning the hierarchy of durable solutions approach, suggesting that repatriation is the “happiest solution” not in the eyes of the refugees

¹⁶⁴ Bessa, *supra* note 155 at 96.

¹⁶⁵ Chimni, “The Geopolitics of Refugee Studies”, *supra* note 65 at 351.

¹⁶⁶ See Michael Barnett, “Humanitarianism with a Sovereign Face: UNHCR in the Global Undertow” 35:1 (2001) Intl Migr Rev 244; Charles B Keely, “The International Refugee Regime(s): The End of Cold War Matters” (2001) 35:1 Intl Migr Rev 303; Loescher, *supra* note 5 at 110.

¹⁶⁷ Aleinikoff, “State-centered Refugee Law”, *supra* note 156 at 125-30.

¹⁶⁸ See John Fredriksson, “Reinvigorating Resettlement: Changing Realities Demand Changed Approaches” (2002) 13 Forced Migr Rev 28. See also Gary Troeller, “UNHCR Resettlement: Evolution and Future Direction” (2002) 14 Intl J Refugee L 85; John Fredriksson & Christine Mougne, *Resettlement in the 1990s: A Review of Policy and Practice*, UNHCR EVAL/RES/14 (1994); Labman, *Crossing Law’s Border*, *supra* note 98 at 23.

themselves, but in the eyes of the UNHCR and individual states.¹⁶⁹

The emphasis on resettlement in the Cold War era was replaced by a focus on source control and, ultimately, repatriation. The shift was accompanied by a management review at the UNHCR that emphasized care and maintenance over protection.¹⁷⁰ Aleinikoff explains that this shift was supported by three shared principles.¹⁷¹ First, states adopted after the Cold War a liberal, human rights argument, following which the solution to the refugee problem lies not in resettlement but in preventing situations that cause people to flee. Second, states came to rely on a communitarian argument according to which membership in a community is not a question of legal status, but a question of identity that cannot easily be changed. Third, resettlement became perceived as unjustifiably relieving refugee-producing states from their responsibility. This justification is criticized by Chimni, who highlights the false assumptions that guided the shift away from resettlement.¹⁷² Chimni also challenges the “internalist” understanding of the root causes of refugee flows. He points to the cases of Rwanda and Yugoslavia, whose respective refugee crises are generally considered to have been caused by internal armed conflicts. These types of explanations, Chimni writes, ignore the fact that in both cases the international

¹⁶⁹ Fredriksson, *ibid* at 13.

¹⁷⁰ See Labman, *Crossing Law's Border*, *supra* note 98 at 24.

¹⁷¹ Aleinikoff, “State-centered Refugee Law”, *supra* note 156.

¹⁷² Chimni, “The Geopolitics of Refugee Studies”, *supra* note 65. Chimni writes that the shift away from resettlement relies on the false assumption that post-Cold War refugee movements are fundamentally different than earlier movements. Embedded in this assumption is the erroneous belief that i) the number of refugees has dramatically increased, ii) that Third World refugees do not satisfy the individual criteria of the Convention, iii) that revolutions in transportation and communications have removed the natural barriers to migration and made the former system anachronistic, and iv) that the “new refugees” are not genuine refugees but economic migrants. These assumptions, Chimni writes, not only justify rejecting the former focus on resettlement, they justify the deployment of *non-entrée* regimes, understood as necessary to prevent economic migrants from making asylum claims in Northern countries. In an effort to debunk the “myth of difference”, Chimni points out that in 1926, there were more refugees per capita than there were in 1980. He also notes that the largest migration movements happened between 1845 and 1924, long before revolutions in transportation and communication. Finally, he notes that not all European refugees did, in fact, satisfy the strict criteria of the Refugee Convention. See also Labman, *Crossing Law's Border*, *supra* note 98 at 25-26.

community created the conditions for the conflicts to take place.¹⁷³

Between 1996 and 1998, UNHCR-assisted resettlement departures hovered around 20,000, a historical low.¹⁷⁴ Beginning in the late 1990s, a renewed interest in refugee resettlement arose as a result of migration management concerns and perceived abuses of asylum systems.¹⁷⁵ The UNHCR began pushing back against the notion of resettlement as the least preferable durable solution,¹⁷⁶ and developed the “strategic use of resettlement” (SUR) in the context of the Convention Plus Initiative, which ran from 2002 to 2005. The UNHCR defines the SUR as

the planned use of resettlement in a manner that maximizes the benefits, directly or indirectly, other than those received by the refugee being resettled. Those benefits may accrue to other refugees, the hosting state, other states or the international protection regime in general.¹⁷⁷

The concept of the SUR had purchase among receiving states in the security environment that followed the attacks of 9/11. Without going into detail into the SUR, it is worth noting two

¹⁷³ Chimni, “The Geopolitics of Refugee Studies”, *supra* note 65 at 360-61. In a more recent article, Chimni writes that Western intervention has also supported postcolonial authoritarian states:

The principal source countries in the last two decades are nations that have been spaces of intervention of Western nations in the name of democracy and human rights. These include Syria and Afghanistan today and Iraq and Libya in the past. On the other hand, authoritarian postcolonial states have received the support of hegemonic powers (e.g. Iraq, Libya and Syria in the past) pursuing geopolitical ambitions. The developmental crisis that afflicts much of the Global South, the matrix in which more proximate causes of refugee flows take root, can also be in part traced to west-supported international laws and institutions that deny Third World states policy space to frame and implement welfare policies. To be sure, the failure of these states to create viable polities through appropriate social and economic policies cannot be denied. But the responsibility must be equally shared by Western nations (BS Chimni, “The Global Refugee Crisis”, *supra* note 63 at 9).

¹⁷⁴ See Hanne Beirens & Susan Fratzke, *Taking Stock of Refugee Resettlement: Policy Objectives, Practical Tradeoffs, and the Evidence Base* (Brussels: Migration Policy Institute Europe, 2017).

¹⁷⁵ See Troeller, *supra* note 168; Labman, *Crossing Law’s Border*, *supra* note 98 at 27.

¹⁷⁶ See UNHCR, *Resettlement Handbook*, *supra* note 95 at para 2.1.5.

¹⁷⁷ *Ibid* at 40. See also Debra Pressé & Jessie Thomson, “The Resettlement Challenge: Integration of Refugees from Protracted Refugee Situations” (2008) 25:1 *Refugee* 94; UNHCR Working Group on Resettlement, “The Strategic Use of Resettlement” (2003) at 4-6; Labman, *Crossing Law’s Border*, *supra* note 98 at 4-6.

major criticisms that have been voiced towards the initiative. The first relates to the assumption that increased resettlement will result in lower numbers of irregular arrivals. When the initiative was being developed, researchers insisted that there was no evidence supporting the claim that resettlement numbers impact irregular arrivals.¹⁷⁸ In a more recent empirical study, van Selm found that “strategic” resettlement initiatives had created various expectations among stakeholder that had not been met, in part because of poor management and the absence of benchmarks.¹⁷⁹ More importantly, some fear that the promotion of the SUR will result in states viewing resettlement primarily as a strategic tool rather than a humanitarian program, and turning to resettlement as a “humanitarian alibi” in order to justify restrictions on domestic asylum systems.¹⁸⁰ Such a rhetorical approach, van Selm writes, has been deployed in Australia,¹⁸¹ and, as we will see in chapter 3, in the Canadian context as well.

Efforts at implementing the SUR have been largely unsuccessful.¹⁸² It is worth considering that outside the deployment of the SUR, refugee resettlement is often part of broader geopolitical strategies designed to curb or discourage the movement of asylum seekers. Consider for example the EU-Turkey deal, where Turkey readmits asylum seekers that moved on to Greece,

¹⁷⁸ Joanne van Selm, “The Strategic Use of Resettlement: Changing the Face of Protection?” (2004) 22:1 *Refugee* at 40 [“The Strategic use of Resettlement”]; Troeller, *supra* note 168 at 92.

¹⁷⁹ Joanne van Selm, “Great Expectations: A Review of the Strategic Use of Resettlement”, UNHCR PDES/2013/13 (2013) [“Great Expectations”].

¹⁸⁰ *Ibid* at 40. See also Fredriksson, *supra* note 168.

¹⁸¹ Van Selm writes:

This is demonstrated to an extent in Australia, where asylum seekers are sometimes characterized as “queue jumpers,” i.e., people who should have waited for the resettlement program to find them, if indeed they are refugees. The notion underlying the use of the alibi is that people who wait in camps are deserving of compassion and protection, whereas those who take the initiative, even if they are from the same population group as those later resettled, might be vilified (Van Selm, “The Strategic Use of Resettlement”, *supra* note 178 at 40).

¹⁸² *Ibid* at 14-26.

in exchange for Syrian refugees in Turkey being resettled to Europe.¹⁸³ The Australia-Malaysia agreement to exchange asylum seekers and refugees,¹⁸⁴ and various US-Australia initiatives provide further examples.¹⁸⁵

2.6 Refugee resettlement and current debates in the international refugee regime

2.6.1 The challenge of burden-sharing and new directions in refugee protection

The development of the concept of the strategic use of resettlement in the early 2000s, discussed above, occurred within a broader multilateral process designed to produce norms around global burden-sharing.¹⁸⁶ Betts & Durieux explain that the refugee regime can be conceptualized as comprising of two sub-regimes: asylum and burden-sharing.¹⁸⁷ Asylum concerns a state's responsibility for refugees within its territory, while burden-sharing concerns a state's support for refugees *outside* its territory. The importance of burden-sharing has in fact been recognized

¹⁸³ See Sevda Tunaboylu & Jill Alpes, "The EU-Turkey Deal: What Happens to People who Return to Turkey?" (2017) 54 *Forced Migr Rev* 9.

¹⁸⁴ See Jaffa McKenzie & Reza Hasmath, "Deterring The 'Boat People': Explaining the Australian Government's People Swap Response to Asylum Seekers" (2013) 48:4 *Austl J Pol Sci* 417.

¹⁸⁵ See Ghezelbash, *supra* note 10 at 127-29. Such "trading" arrangements are not contemplated under the SUR initiative: van Selm, "Great Expectations", *supra* note 179 at 1.

¹⁸⁶ The use of the term "burden-sharing" has been criticized as conveying the view that refugees are "negotiable and transferable commodities" without agency: Volker Türk & Madeline Garlick, "From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees" (2016) 28:4 *Intl J Refugee L* 656 at 664, citing Ann Vibeke-Eggli, *Mass Refugee Influx and the Limits of Public International Law* (The Hague: Martinus Nijhoff Publishers, 2002). The term "responsibility-sharing" has been suggested as having a less negative connotation and as implying that refugees can make a positive contribution to host countries. I would add that the term "responsibility-sharing" reflects the reality that countries other than source countries (including developed countries far away from refugee flows) often share primary responsibility for causing refugee flows through international armed intervention (see BS Chimni, "Global Compact on Refugees: One Step Forward, Two Steps Back" (2018) 30:4 *Intl J Refugee L* 630 ["Global Compact on Refugees"]; BS Chimni, "The Geopolitics of Refugee Studies", *supra* note 65). Contemporary international documents, such as the New York Declaration and the Global Compact on Refugees, use both terms. Scholarship, however, seems for the most part to have retained the "burden-sharing" terminology, and I have therefore chosen to use that terminology as well. See also Tristan Harley, "Regional Cooperation and Refugee Protection in Latin America: A 'South-South' Approach" (2014) 26:1 *Intl J Refugee L* 22 at 44-45; Rebecca Dowd & Jane McAdam, "International Cooperation and Responsibility-Sharing to Protect Refugees: What, Why and How?" (2017) 66:4 *ICLQ* 863 at 869-70.

¹⁸⁷ Alexander Betts & Jean-François Durieux, "Convention Plus as a Norm-Setting Exercise" (2007) 20:3 *J Refugee Stud* at 510.

since the inception of the international refugee regime. The Nansen Passport system itself was presented as achieving a “more equitable distribution of Russian refugees.”¹⁸⁸ Burden-sharing is also explicitly acknowledged in the preamble of the Refugee Convention:

CONSIDERING that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation.

UNHCR’s Executive Committee has also repeatedly stated that burden-sharing is necessary for the effective functioning of the international refugee system.¹⁸⁹ It is noteworthy that the broader notion of “international cooperation” is not unknown in international law.¹⁹⁰ In addition, many international treaties, declarations and resolutions call for “international solidarity.”¹⁹¹ Despite this, no burden-sharing norms (enforceable or not) have been developed at the international level, beyond situation-specific initiatives, such as the plan that followed the 1988 International Conference on Central American Refugees, the 1989 Indochinese Comprehensive Plan of Action, and the 1999 Humanitarian Evacuation Programme (HEP) for Kosovar evacuees.¹⁹² The

¹⁸⁸ Fridtjof Nansen, “Russian Refugees: Report to the Council of July 20th, 1922”, quoted in Labman, *Crossing Law’s Border*, *supra* note 98 at 20.

¹⁸⁹ See Türk & Garlick, *supra* note 186 at 660.

¹⁹⁰ *Ibid* at 658-61. For example, art 1(3) of the *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 provides that one of the UN’s purpose is “to achiev(e) international cooperation to solve international problems.” Articles 55 and 56 of the UN Charter contain similar provisions. In addition, the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, annexed to UNGA res 2625(XXV), 24 Oct 1970 provides:

States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences.

Türk & Garlick point out that the UN General Assembly has adopted resolutions endorsing the *UN Friendly Relations Declaration* as an important interpretive tool.

¹⁹¹ Türk & Garlick, *supra* note 186 at 661-63. See also Obiora Chinedu Okafor, “The Future of International Solidarity in Global Refugee Protection” (2021) 22 HR Rev 1.

¹⁹² Alexander Betts, “The Global Compact on Refugees: Towards a Theory of Change?” (2018) 30:4 Intl J Refugee L at 624 [The Global Compact of Refugees]. See also Alexander Betts, *Protection by*

international refugee regime has thus been described as a “half-complete regime.”¹⁹³ Betts & Durieux write that the consequences resulting from the absence of a normative framework for burden-sharing are momentous:

ad hoc and *ab initio* bargaining has been required on a case-by-case basis in order to address specific protracted or mass influx situations. This has made northern commitments to provide durable solutions for protracted and mass influx situations in the South unpredictable, selective and contingent upon the perceived interests of the states involved. ... In the absence of a guiding normative framework, contributions to such initiatives have been highly discretionary acts that have been subject to the interests of states.¹⁹⁴

Today, 85% of the world’s refugee population is in the Global South.¹⁹⁵ The Global North, home to only 15% of refugees, spends around 20 billion USD for their refugee determination infrastructure. That is four times the budget made available to agencies that are responsible for the care of 85% of the refugee population in the Global South.¹⁹⁶ The consequences of the lack of norms around burden-sharing go far beyond global financial inequities. Hathaway writes that the unpredictability of burden-sharing is the main reason why host states withdraw from their legal responsibility to protect refugees.

... neither the actual duty to admit refugees nor the real costs associated with their arrival are fairly apportioned among governments. There is a keen awareness that the states in which refugees arrive presently bear sole legal responsibility for what often amounts to indefinite protection.¹⁹⁷

Persuasion: International Cooperation in the Refugee Regime (Ithaca: Cornell University Press, 2009); Michael Baruticiski & Astri Suhrke, “Lessons from the Kosovo Refugee Crisis: Innovations in Protection and Burden-sharing” (2001) 14:2 J Refugee Stud 95; Betts & Collier, *supra* note 5 at 47-52.

¹⁹³ Betts & Durieux, *supra* note 187 at 510, 515. See also Betts, *Protection by Persuasion*, *ibid*.

¹⁹⁴ Betts & Durieux, *ibid* at 517.

¹⁹⁵ UNHCR, “Global Trends 2019”, *supra* note 80 at 2.

¹⁹⁶ See James Hathaway, “The Global Cop-Out on Refugees” (2018) 30:4 Intl J Refugee L 591 at 593 [“Global Cop-Out”].

¹⁹⁷ James Hathaway & Alexander Neve, “Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection” (1997) 10 Harv Hum Rts J 115 at 117. Hathaway & Neve write that another fundamental reason why states withdraw from refugee obligation is that

There is deep skepticism among scholars of the international refugee regime about whether meaningful change can be achieved within the existing framework. Betts & Collier write that:

The world of the twenty-first century must meet the needs of refugees. And this will be achieved not by pious adherence to the dictums of a bygone era, but by rising to the current challenge, just as our grandparents rose to the very different challenge that they faced. Left to lawyers alone, the limited global energy available for the reform of the refugee system will be dissipated, and so will the limited budgets. The way forward is not to reinterpret past wording, but to build a new system that works. We need an international agency that can guide this task of building anew. UNHCR is not currently equipped to be that agency, but it must become so.¹⁹⁸

In the past two decades, two important initiatives were launched to move away from the current discretionary and ad hoc approach to burden-sharing. The Convention Plus initiative, in place during the 2000s, was intended to bring into international refugee law a normative framework for global burden-sharing, but failed to produce any such norms.¹⁹⁹ More recently, in the wake of the unprecedented Syrian refugee crisis and the drowning of thousands of refugees in the Mediterranean, the international community came together to adopt in 2016 the New York Declaration on Refugees, which called for “a more equitable sharing of the burden and

governments increasingly believe that a concerted commitment to refugee protection is tantamount to an abdication of their migration control responsibilities. They see refugee protection as little more than an uncontrolled "back door" route to permanent immigration, in conflict with official efforts to tailor admissions on the basis of economic or other criteria.

The uneven distribution of the refugee burden also exists within the Global South. Okafor writes:

... despite the fact that they tend to be more open to refugees than most countries in other regions of the world, most African countries do not do as much as Uganda, Ethiopia, Tanzania, Kenya, and others, in terms of absorbing refugees. ...

Richer Global South countries such as Saudi Arabia need to contribute much more to responsibility-sharing, both at the level of the admission of refugees and the making of financial contributions. So far, there is little indication that many more of these richer Global South states will begin to expand and deepen their expression of international solidarity in global refugee protection [sources omitted] (Okafor, *supra* note 191 at 9, 16).

¹⁹⁸ Betts & Collier, *supra* note 5 at 6.

¹⁹⁹ See Betts & Durieux, *supra* note 187 at 510.

responsibility for hosting and supporting the world’s refugees.”²⁰⁰ The long-anticipated Global Compact on Refugees (GCR), adopted by the United Nations General Assembly in December 2018, takes the form of a non-binding agreement that “seeks to operationalize the principles of burden- and responsibility-sharing to better protect and assist refugees and support host countries and communities.”²⁰¹ More particularly, the GCR seeks to (i) ease pressures on host countries; (ii) enhance refugee self-reliance; (iii) expand access to third country solutions; and (iv) support conditions in countries of origin for return in safety and dignity.²⁰² The goals of the GCR are to be further developed in periodic ministerial-level “Global Forums” and through the development of “Support Platforms” made available to host countries.

It would be outside the scope of this dissertation to address in great detail the GCR, but some remarks are in order. Despite its shortcomings, the GCR is an important step forward, triggered by some measure of consensus that more equitable and predictable burden-sharing is in the interests of both resettlement states and countries of first asylum. That states came together around this principle is, in itself, to be celebrated.²⁰³

There is cause for pessimism, however. The compact is more aspirational than normative. Just like the Convention Plus initiative, the GCR is non-binding and fails to develop actual norms to allocate the cost of refugee protection. We have yet to see the adoption of meaningful

²⁰⁰ *New York Declaration for Refugees and Migrants*, GA Res A/RES/71/1, UNGAOR, 71st Sess, (2016) at para 68. Aleinikoff writes that the principal factors that brought the international community - and in particular Northern States - to initiate discussion around burden-sharing are the mass displacement of Syrian refugees and the increase in the number of asylum seekers in Europe coming from Northern Africa (Alexander Aleinikoff, “The Unfinished Work of the Global Compact on Refugees” (2018) 30:4 Intl J Refugee L 611 at 611).

²⁰¹ Art 5.

²⁰² Art 7.

²⁰³ See Okafor, *supra* note XX at 8, 13.

operational measures. Hathaway writes that the GCR sets out a series of measures that *may* be implemented in certain, rather undefined circumstances. He likens the measures of the compact to items on a menu that may or may not be available on a given day.²⁰⁴ Academics have also claimed that the Global Compact, by prioritizing the easing of pressures on host states and by not condemning *non-entrée* regimes, in fact risks weakening international refugee law.²⁰⁵ There seems to be very little appetite, on the part of signatory states to the Refugee Convention, to expand international refugee law. Furthermore, the GCR results in cementing existing containment policies. Hyndnam writes that the GCR's approach is one of "business-as-solution and business-as-usual":

[The Global Compacts] serve to instantiate the status quo: money from the wealthiest states fund major host countries in the global South and Middle East to support refugees, reproducing the containment of displaced people in their *regions of origin*. ...

... At the end of the day, the solutions proffered are in the interests of the wealthy global North states that do not want any more asylum seekers on their territories.²⁰⁶

Under the compact, repatriation is to be the favoured solution. The compact does include a brief call for increases in refugee resettlement, but that reference seems like a mere afterthought.²⁰⁷

²⁰⁴ Hathaway, "Global Cop-Out", *supra* note 230 at 592.

²⁰⁵ See Chimni, "Global Compact on Refugees", *supra* note 196; Betts, "Global Compact on Refugees", *supra* note 192.

²⁰⁶ Jennifer Hyndman, "Global Compacts or Containment? Geopolitics by Design", in Howayda Al-Harithy, ed, *Urban Recovery: Intersecting Displacement with Post War Reconstruction*, Abingdon: Routledge [forthcoming in 2021] ["Global Compacts"]. Hyndman notes that bilateral containment partnerships - such as the EU-Lebanon and the EU-Jordan partnerships - have been emerging in recent years in parallel to the Global Compact initiative.

²⁰⁷ The *Global Compact on Refugees*, *supra* note 121, provides at paragraphs 90-91:

Apart from being a tool for protection of and solutions for refugees, resettlement is also a tangible mechanism for burden- and responsibility-sharing and a demonstration of solidarity, allowing States to help share each other's burdens and reduce the impact of large refugee situations on host countries. At the same time, resettlement has traditionally been offered only by a limited number of countries. The need to foster a positive atmosphere for

The significance of the compact lies not in its loose pledge for resettlement, but in the infrastructure it sets out for helping host states care for refugees. This is to be achieved through concerted humanitarian assistance, development cooperation, maximizing private sector contributions, and the deployment of “support platforms” in host countries.²⁰⁸

I note that the inclination to reform the international refugee regime in a way that would see the organized hosting of refugees in regions of origin is not new. Hathaway and Neve recommended in the 1990s doing away with the cumbersome and costly legal mechanisms of the current system in favour of a system that would guarantee temporary protection to all refugees in their region of origin through a global shared responsibility framework.²⁰⁹ Their proposal was to reorient refugee law towards human rights and away from migration. This view of refugee protection, according to the authors, is more consistent with the principles of the Refugee Convention. Under their plan, refugees would lose the right to reach a country of asylum of their choosing, but both protection and a durable solution would be extended to the entire refugee population. A similar reform proposal was more recently presented by Betts and Collier.²¹⁰ Their proposal, too, would see refugees granted asylum in their region of origin, with the effort funded by countries of the Global North. Their proposal would promote integration in the country of asylum through private sector investment.

In my view, initiatives such as the GCR have purchase among wealthy nations precisely because

resettlement, and to enhance capacity for doing so, as well as to expand its base, cannot be overstated. ...

Contributions will be sought from States, with the assistance of relevant stakeholders, to establish, or enlarge the scope, size, and quality of, resettlement programmes.

²⁰⁸ S 2.2 and para 32.

²⁰⁹ Hathaway & Neve, *supra* note 197.

²¹⁰ Betts & Collier, *supra* note 5.

they result in keeping refugees far away from their borders. However, formalizing the unequal human distribution of refugees worldwide does not sit well with a more critical view of refugee flows as caused in part by colonialism and Western military intervention. There, is I believe reason to push back against these approaches. Part of the solution to more equitable burden-sharing, I would submit, lies in increasing third country resettlement.

2.6.2 Anti-immigrant populism and the unpredictability of refugee resettlement

Populist movements, and in particular anti-immigrant and racist movements, have been on the rise throughout the world since the 2008 economic crisis,²¹¹ with devastating consequences for the protection of refugees. Right-wing populist movements have gained support in many Western countries, including France, Austria, Hungary, Italy, Greece, the United Kingdom, the United States, and Brazil. Opposition to immigration is considered a unifying feature of right-wing populist movements.²¹²

²¹¹ See Jörg Matthes & Desirée Schmuck, “The Effects of Anti-Immigrant Right-Wing Populist Ads on Implicit and Explicit Attitudes: A Moderated Mediation Model” (2017) 44:4 *Comm Research* 556; Fareed Zakaria, “Populism on the March: Why the West is in Trouble” (2016) 95:6 *Foreign Aff* 9; Paul Lewis et al, “Revealed: The Rise of Populist Rhetoric”, *The Guardian* (6 March 2019), online: <<https://www.theguardian.com/world/ng-interactive/2019/mar/06/revealed-the-rise-and-rise-of-populist-rhetoric>>. See also Michael Freedon, “After the Brexit Referendum: Revisiting Populism as an Ideology” (2017) 22:1 *J Pol Ideologies* 1 for a critique of the use of term populism as an ideology in contemporary politics.

²¹² Zakaria writes:

On many other social issues, such as gay rights, even rightwing populists are divided and recognize that the tide is against them. Few conservative politicians today argue for the recriminalization of homosexuality, for instance. But immigration is an explosive issue on which populists are united among themselves and opposed to their elite antagonists (Zakaria, *ibid* at 14).

See also J Eric Oliver & Wendy M Rahn, “Trumpenvolk: Populism in the 2016 Election” (2016) 667:1 *The ANNALS of the American Academy of Political and Social Science* 189; Magdalena Nowicka, “Cultural Precarity: Migrants’ Positionalities in the Light of Current Anti-immigrant Populism in Europe” (2018) 39:5 *J Intercult Stud* 527. Okafor predicts that the “re-rise” of anti-refugee populism is likely to remain prevalent in the foreseeable future, with devastating consequences for refugee protection:

It is difficult to see this trend disappearing any time soon. It may stabilize and/or weaken, but if history is our guide, it will likely not disappear altogether. This is important for the ability of many States to express as much international solidarity as they can, and ought, to refugees and asylum seekers. This is because even mainstream political parties in many Global North

The recent implementation of anti-immigration policies in the United States, historically the leading resettlement country, has had a devastating impact on the global resettlement system.²¹³ Shortly after coming into office in January 2017, President Trump suspended refugee arrivals for 120 days and suspended arrivals of Syrian refugees indefinitely, through Executive Order 13769. The same executive order implemented the notorious ‘travel ban’ targeting individuals from seven Muslim-majority countries (Iraq, Iran, Sudan, Syria, Lybia, Somalia and Yemen).²¹⁴ Legal challenges were brought against the order, which was replaced in March 2017 by Executive Order 13780. Refugee arrivals resumed in October 2017, but at drastically reduced levels.²¹⁵ During the 2017 fiscal year (ending September 30, 2017), 53,716 refugees were resettled to the United States, down from 110,000 projected under the Obama administration.²¹⁶ Resettlement numbers dropped to 22,491 for the 2018 fiscal year, the lowest number since 1980.²¹⁷ In September 2019, the Trump administration announced that refugee admissions would be lowered further to 18,000 for the 2020 fiscal year.²¹⁸ Because of the covid-19

countries often make their immigration and refugee policies in ways designed to manage the electoral risk often posed to them by these anti-refugee/migrant parties... (Okafor, *supra* note 225 at 15).

²¹³ As Kazin explains, the type of racist populist policies implemented during the Trump presidency are by no means new in the United States (Michael Kazin, “Trump and American Populism: Old Whine, New Bottles” (2016) 95:6 Foreign Aff 17).

²¹⁴ International Rescue Committee, “What is the travel ban? What does it mean for refugees?” (2017), online: <<https://www.rescue.org/article/what-travel-ban-what-does-it-mean-refugees>>.

²¹⁵ Sabrina Siddiqui, “Trump Ends Refugee Ban with Order to Review Program for 11 Countries”, *The Guardian* (25 October 2017), online: <<https://www.theguardian.com/us-news/2017/oct/24/trump-refugee-ban-end-immigration-executive-order>>.

²¹⁶ International Rescue Committee, “Refugee Admissions Update” (2019), online (pdf): <<https://www.rescue.org/sites/default/files/document/3873/wrdrefugeeadmissionsupdate18june19final.pdf>> [“Refugee Admissions Update”].

²¹⁷ *Ibid.* See also Migration Policy Institute, “U.S. Annual Refugee Resettlement Ceilings and Number of Refugees Admitted, 1980-Present” (2020), online: <<https://www.migrationpolicy.org/programs/data-hub/charts/us-annual-refugee-resettlement-ceilings-and-number-refugees-admitted-united>>.

²¹⁸ US Department of State, “Report to Congress on Proposed Refugee Admissions for Fiscal Year 2020”, online: <<https://www.state.gov/reports/report-to-congress-on-proposed-refugee-admissions-for-fy-2020/>>;

pandemic, only 11,000 were resettled that year.²¹⁹ The target decreased further still to 15,000 for the 2021 fiscal year.²²⁰

It is also significant that racialized groups were disproportionately affected by the cuts in US resettlement admissions. The International Rescue Committee reports that admissions of Christian refugees dropped by 36% in fiscal years 2017 and 2018, while admissions of Muslim refugees dropped by 85%.²²¹ Despite the drastic reductions, the number of European refugees resettled to the United States actually *increased* in fiscal year 2017 compared to 2016.²²² These changes in American refugee policy contributed to a global decreased of more than 50% in UNHCR-led resettlement departures in 2017.²²³

The drastic change in refugee admissions to the US serves to highlight how national refugee resettlement programs, as discretionary programs, are highly vulnerable to changes in national politics. It also shows the importance of expanding refugee resettlement beyond a few receiving states.

2.6.3 Asylum restrictions and retrenchment from international refugee law

Throughout this dissertation, the discretionary nature of refugee resettlement is contrasted with

Michael D Shear & Zolan Kanno-Youngs, “Trump Slashes Refugee Cap to 18,000, Curtailing U.S. Role as Haven”, *The New York Times* (26 September 2019), online: <<https://www.nytimes.com/2019/09/26/us/politics/trump-refugees.html>>.

²¹⁹ US Department of State, “Report to Congress on Proposed Refugee Admissions for Fiscal Year 2021”, online: <<https://www.state.gov/reports/report-to-congress-on-proposed-refugee-admissions-for-fy-2021/>>.

²²⁰ *Ibid.*

²²¹ International Rescue Committee, “Refugee Admissions Update”, *supra* note 216.

²²² Pew Research Center, “U.S. Resettles Fewer Refugees, Even as Global Number of Displaced People Grows” (2017), online: <<https://www.pewresearch.org/global/2017/10/12/u-s-resettles-fewer-refugees-even-as-global-number-of-displaced-people-grows/>>.

²²³ UNHCR, “Projected Global Resettlement Needs 2020” (Division of International Protection, 2019) at 77 [Global Resettlement Needs 2020].

the legally-binding prohibition against *refoulement* under international law. I would like here to nuance that distinction and posit that the protection against *refoulement* is characterized by similar discretionary state policies. As Kneebone writes:

The rights of refugees are defined in international law, but are subject to state discretion as to their implementation in national legal systems. ... [I]mplementation is being done in such a way as to deny refugees the rights which are due to them under the international regime of refugee protection.²²⁴

Beyond failures in national refugee determination systems, and national restrictions to the refugee definition, states have adopted mechanisms designed to prevent potential asylum seekers from entering their territory.²²⁵ New generation of *non-entrée* regime include financial incentives, the provision of equipment or training, shared enforcement, establishing agencies tasked with interception, and deploying staff abroad.²²⁶ The development of artificial intelligence in the area of migration could further extend the reach of *non-entrée* measures.²²⁷ Hathaway writes that *non-entrée* policies allow Northern states to insist on the respect of the

²²⁴ Kneebone, “Introduction”, *supra* note 83 at 1-2.

²²⁵ Chimni writes:

The current response of Western nations, shorn of all rhetoric, is to use a range of administrative, diplomatic, and legal measures to confine refugees in regions in which flows take place. These *non-entrée* measures have been classified into traditional *non-entrée* measures that include visa controls, carrier sanctions, interdiction on the high seas, mandatory detention etc. and the new generation of cooperation based *non-entrée* measures that are designed to conscript countries of origin and of transit to effect migration control (Chimni, “The Global Refugee Crisis”, *supra* note 63 at 7).

See also Susan Kneebone, “The Legal and Ethical Implications of Extraterritorial Processing of Asylum Seekers: The ‘Safe Third Country’ Concept”, in Jane McAdam, ed, *Forced Migration, Human Rights and Security* (London: Hart Publishing, 2008) 129; Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (The Hague: Martinus Nijhoff Publishers) 2000; James Hathaway & Michelle Foster, *The Law of Refugee Status*, 2nd ed (Cambridge: Cambridge University Press, 2014) at 27 [*The Law of Refugee Status*]; Labman, *Crossing Law’s Border*, *supra* note 98 at 30; Suzan Kneebone, “Introduction”, *supra* note 83 at 3, 8.

²²⁶ See Chimni, “The Global Refugee Crisis”, *supra* note 63 at 7-8.

²²⁷ See Ana Beduschi, “International Migration Management in the Age of Artificial Intelligence” *Migr Stud* [forthcoming]; Petra Molnar & Lex Gill, “Bots at the Gate: A Human Rights Analysis of Automated Decision-Making in Canada’s Immigration and Refugee System” (Toronto: Faculty of Law, International Human Rights Program, University of Toronto, 2018).

non-refoulement principle by countries of the Global South, while simultaneously avoiding its burden:

It enables a pattern of minimalist engagement under which the formal commitment to refugee law can be proclaimed as a matter of principle without risk that the wealthier world will actually be compelled to live up to that regime's burdens and responsibilities to any serious extent.²²⁸

There is some debate around whether particular restrictions to asylum violate the principle of *non-refoulement* under the Refugee Convention. Thus far, national courts have consistently found the *non-refoulement* principle in domestic legislation to have no extra-territorial application.²²⁹ However, commentators consider that international law does provide a basis to challenge *non-entrée* regimes,²³⁰ especially in light of recent developments in jurisdiction, shared responsibility and assistance.²³¹

It is not my goal here to provide a detailed account of restrictive measures to asylum adopted by states. The first point I want to make is that the very existence of such measures shows that

²²⁸ Thomas Gammeltoft-Hansen & James C Hathaway, "Non-Refoulement in a World of Cooperative Deterrence" (2015) 53:2 Colum J Intl L 235 at 242. According to Ghezelbash, the development of deterrent measures is a process that feeds on itself, one that is driven by a global competitive "race to the bottom":

...the adoption of harsh deterrent measures targeting asylum seekers will create pressure on comparator jurisdictions to follow suit, or face a possible increase in the number of asylum seekers attempting to enter their territory (Ghezelbash, *supra* note 10 at 23).

See also Hathaway & Neve, *supra* note 197 at 121; Labman, *Crossing Law's Border*, *supra* note 98 at 18.

²²⁹ Kneebone, "Introduction", *supra* note 83 at 12-14.

²³⁰ See *Ibid* at 8.

²³¹ Gammeltoft-Hansen and Hathaway write that

the trio of developments in relation to jurisdiction, shared responsibility, and aiding or assisting means that states are mistaken in their assumption that international legal obligations — in particular, to respect the duty to avoid the *refoulement* of refugees — are not enlivened when a state sponsors deterrent actions in some other country. Especially when the sponsoring state or states engage in more activist roles, it is in our view likely that international law as it has evolved now affords the basis for holding them liable for breaching the rules of refugee law they seek to avoid (Gammeltoft-Hansen & Hathaway, *supra* note 228 at 244).

‘hard’ norms of international refugee law are by no means immune from discretionary state practices. As such, the sharp distinction between the foundation of asylum and resettlement should be nuanced. Second, refugee resettlement is essential to refugee protection precisely because of the proliferation of *non-entrée* and containment mechanisms. Paradoxically, refugee resettlement appears as both a solution and a justification for *non-entrées* regimes. As discussed in section 2.5.2.2, states have presented increases in resettlement commitments as a justification for tightening restrictions on asylum. Arguably, as the “race to the bottom” intensifies, and as new technologies of immigration control emerge, it will become increasingly difficult for refugees to access asylum. Resettlement, meanwhile, remains the only durable solution for many refugees who are barred from entering a safe country of asylum.

2.7 Refugees and resettlement today – a glance at the numbers

In its most recent Global Trends report, the UNHCR reported that 20.4M refugees were under its mandate at the end of 2019.²³² In addition, the UNHCR reported that there were 5.6M Palestinian refugees under the mandate of the UNRWA, 45.7M internally-displaced persons (IDPs), 4.2M asylum seekers, and 4.5M “Venezuelans displaced abroad.” This amounts to a total of 79.5M “forcibly displaced” persons worldwide, the highest number of refugees ever recorded. The top countries of origin in 2019 were Syria, Venezuela, Afghanistan, South Sudan, Myanmar, Somalia, the Democratic Republic of the Congo, Sudan, Iraq, and the Central African Republic.²³³ The UNHCR also reports that, as of the end of 2019, 15.7M refugees (77% of the refugee population under UNHCR’s mandate) were living in a “protracted refugee situation”, defined as a situation where 25,000 or more refugees from the same nationality are seeking

²³² UNHCR, “Global Trends 2019”, *supra* note 80 at 2.

²³³ *Ibid* at 8.

refugee in a given country of asylum. Nearly six million refugees have been in exile for more than 20 years.²³⁴

As discussed in the previous section, the vast majority of refugees (85%) are currently located in countries of the Global South.²³⁵ Countries considered “least developed” by the United Nations, including Bangladesh, Chad, the Democratic Republic of the Congo, Ethiopia, Rwanda, South Sudan, Sudan, Tanzania, Uganda, and Yemen, host about 27% of the world’s refugee population, while they account for a combined 1.2% of the world’s gross domestic product.²³⁶

In 2020, UNHCR projected that there would be around 1.45M persons “in need of resettlement” in 2021.²³⁷ Forty-three percent (616,958) of refugees identified to be in need of resettlement are located in Africa (excluding North Africa), 29% in Europe (423,600), 19% in the Middle East and North Africa (275,981), 7% in Asia & the Pacific (99,470), and 2% in the Americas (29,374).²³⁸ In 2019, only 107,800 refugees were resettled globally²³⁹ (63,726 through the UNHCR),²⁴⁰ accounting for 7.5% of the total refugee populations identified as being “in need of

²³⁴ *Ibid* at 24. The metric used by the UNHCR to assess protraction has been criticized. Labman writes that the accepted definition of protraction

fails to encompass the chronic, irresolvable, and recurring character of protracted refugee situation or articulate the long-term political consequences of protraction. ... Protracted situations represent the failure of local integration, voluntary repatriation, and resettlement. Protraction is the antithesis to solution” (Labman, *Crossing Law’s Border*, *supra* note 98 at 28).

See also Kneebone, “Introduction”, *supra* note 83 at 3-4.

²³⁵ UNHCR, “Global Trends 2019”, *supra* note 80 at 22

²³⁶ *Ibid*.

²³⁷ UNHCR, “Projected Global Resettlement Needs 2021” (Division of International Protection, 2020) at 11 [Global Resettlement Needs 2021]. Resettlement needs are assessed by the UNHCR “based on considerations related to the protection environment/framework in the country and the effective availability of other durable solutions” (95).

²³⁸ *Ibid* at 96.

²³⁹ UNHCR, “Global Trends 2019”, *supra* note 80 at 2.

²⁴⁰ UNHCR, “Global Resettlement Needs 2021”, *supra* note 237 at 119.

resettlement” by the UNHCR in 2019 (1.4M).²⁴¹ That figure is not quite accurate, as it cannot be determined if the 36,720 refugees resettled outside the UNHCR’s auspices in 2019 (including the vast majority of refugees admitted to Canada through the PSR stream) were in fact considered “in need of resettlement” by the UNHCR for the purpose of its global resettlement needs calculations.²⁴²

Since 2001, global resettlement numbers have averaged 94,958 persons per year. The resettlement numbers for 2016 were the highest in over two decades (189,300), with 37 states taking part in refugee resettlement.²⁴³ Global arrivals for 2018 were 50% lower than in 2016 (92,400). As explained in section 2.6.2, this drop is mainly due to drastic reductions in resettlement to the United States.²⁴⁴ Nevertheless, as the below graph shows, global resettlement numbers in 2019 were above the yearly average for the 2001-2019 period.

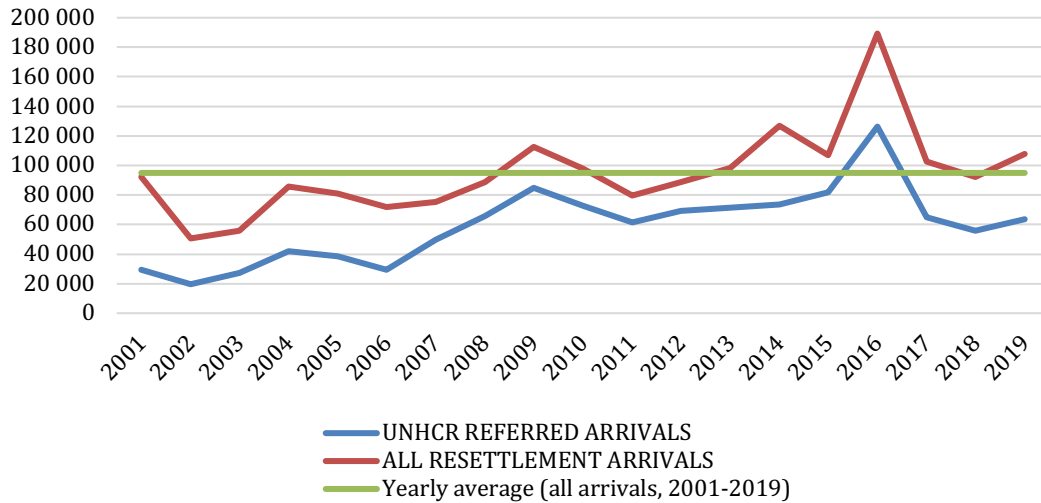
²⁴¹ *Ibid* at 55.

²⁴² I do not want to suggest that these refugees were not, objectively speaking, “in need of resettlement.” The Canadian PSR program, for instance, operates outside UNHCR’s referral-based resettlement system, but the Canadian criteria provides that resettlement will only be offered if no durable solution is available to the refugee in a reasonable period of time, a criteria that mirrors UNHCR policy. It is also worth considering that UNHCR’s position on the need for resettlement for particular populations and the availability of other durable solutions, such as local integration, is influenced by pressures from host, source and donor states. As discussed in section 2.5.1, the UNHCR has in the past promoted repatriation in situations where returning refugees were put at risk. The political nature of the international refugee regime is apparent not only at the macro-level of defining the global role durable solutions, but also at the micro-level of identifying refugee protection strategies for specific refugee populations.

²⁴³ UNHCR, “Global Trends: Forced Displacement in 2016” (2017), at 27 [Global Trends 2016].

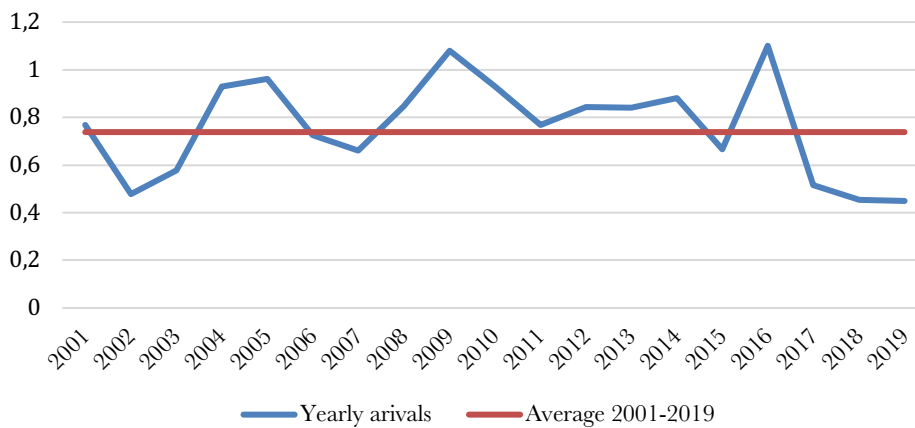
²⁴⁴ The overall reduction in resettlement would have been far greater had other states, and especially Canada, not increased their resettlement admissions.

TABLE 2.1 - GLOBAL REFUGEE RESETTLEMENT DEPARTURES (2001-2019)²⁴⁵



The above graph is somewhat misleading, however, because the global refugee population under UNHCR’s mandate has also been steadily increasing since 2010, and is now at a historic high. In stark contrast, the graph below shows that, as a proportion of the global refugee population, refugee resettlement numbers in 2019 were at their *lowest* since 2001 (0.449%).

TABLE 2.2 - RESETTLEMENT AS A % OF THE POPULATION UNDER UNHCR MANDATE



In 2019, repatriation was by far the top durable solution in terms of numbers. This comports with the international refugee regime’s shift away from the “exilic bias” in the 1980s. In 2019,

²⁴⁵ Data compiled relying on UNHCR’s Global Trends reports, UNHCR’s Statistical Yearbook reports, and UNHCR’s Resettlement Data Finder, online: <<https://rsq.unhcr.org/en/#3ENk>>.

317,200 refugees are reported to have returned to their country of origin.²⁴⁶ Local integration is a process more difficult to assess. As reviewed in section 2.5.1, the UNHCR defines local integration as a situation where “refugees legally, economically and socially integrate in the host country, availing themselves of the national protection of the host government.” Hathaway posits that such a conception of local integration merely amounts to refugee status, and that only *naturalization* can put an end to refugee status.²⁴⁷ Interestingly, the UNHCR uses full naturalization as a proxy for local integration in its Global Trends statistic, since legal, economic, and social integration is practically impossible to assess. It estimates that 55,000 refugees were naturalized in 2019.²⁴⁸

In their proposal to fundamentally reform the international refugee regime, Betts and Collier stress that the access to a durable solution has become an “elusive fiction.”²⁴⁹ The numbers speak for themselves. It is evident that, almost seventy years after the adoption of the Refugee Convention, international refugee law has failed to provide a solution to the global refugee problem. In 2019, using naturalization as a metric for local integration, a total of 480,000 refugees found a durable solution.

²⁴⁶ UNHCR, “Global Trends 2019”, *supra* note 80 at 50.

²⁴⁷ See section 2.5.1.

²⁴⁸ UNHCR, “Global Trends 2019”, *supra* note 80 at 54. The UNHCR specifies that, due to reporting limitations, naturalization data “are only indicative at best and provide an underestimate of the extent to which refugees are naturalized.”

²⁴⁹ They add that

... the international community is not managing to end conflicts to allow people to go home; it is not persuading host countries to integrate locally; and resettlement places are a drop in the ocean. Instead people are left in limbo, with generations of refugees being born in camps, growing up in camps, and becoming adults in camps. Around them, they struggle to find role refuge models because their parents have usually been denied hope and opportunity (Betts & Collier, *supra* note 5 at 137-38).

2.8 Tinkering at the margins? Why adjudication matters

This chapter has highlighted several broad and systemic problems that contribute to making the international refugee system relatively ineffective, unpredictable, and geopolitically unequal. It has also highlighted the importance of refugee resettlement as a mechanism to achieve protection and ethical burden-sharing. In a certain sense, the international refugee regime is one that is perpetually deficient and perpetually searching for a new strategy, yet the initiatives that have the most purchase among states and international institutions seem to only put “old wines in new bottles.” The political forces at play in keeping the status quo are strong. At the same time, the rationale for a different kind of response is more compelling than ever.

The critiques that can be directed at the regime are numerous, and many have advocated for deep reforms. Despite persistent calls for reform by researchers and practitioners, and periodic international initiatives, very little has been achieved since the 1960s in terms of reforming the structure of the international refugee regime.²⁵⁰ The pillar of the international refugee regime remains an outdated legal instrument, one that largely leaves the challenge of refugee protection to expressions of international solidarity. I want to make it clear that I acknowledge the deep critiques of the refugee regime and calls for reform. That being said, while I argue that refugee resettlement remains a key mechanism for refugee protection and burden-sharing and should be increased, I do not examine in this dissertation avenues to fundamentally alter the international refugee regime. My goal is more modest in scope. It is to take a component of the international refugee regime - the Canadian resettlement system - and assess it on its own terms.

²⁵⁰ See *ibid* at 5.

In the following chapters, I explore how Canada's refugee resettlement system interacts with principles of international refugee law, soft law principles of refugee protection, and Canadian administrative law. I also explore how decision-making in the resettlement system impacts refugee protection. I acknowledge that Canada is under no international legal obligation to resettle refugees. However, that should not preclude further legal analysis. I take the position that, should Canada operate a refugee resettlement program, the program should not only be consistent with principles of refugee protection and humanitarianism, it should also be fairly and accurately implemented, and consistent with principles of Canadian administrative law.

This dissertation assesses the implementation of Canada's resettlement program primarily through the lens of visa officer decision-making and judicial review. As reviewed earlier in this chapter, refugee status decision-making has been the subject of many studies in legal scholarship, in Canada and in other jurisdictions. These studies are important because they show that asylum states, despite being governed by the same international obligations and commitments, implement their obligations very differently. As Betts and Collier comment:

[the wording of the Convention has been] tortured into reinterpretations stretched to fit new circumstances. With wide variation in legal interpretation, policy coherence has been lost. Court rulings have become eccentric: refugees in identical circumstances will be granted asylum in the courts of some nations but refused it in others; even within the same country, they will be granted asylum in some years but not others. ... What began as coherent common rules for responding to persecution have evolved into chaotic and indefensible responses to the problem of mass flight from disorder.²⁵¹

In a similar vein, Evans Cameron writes that the Refugee Convention provides only the "barest legal guidance", leaving it to states to craft a system in conformity to their constitutional and

²⁵¹ *Ibid* at 5.

administrative structure.²⁵² As a result, refugee status decision-making varies tremendously between states.²⁵³

In other words, refugee status decision-making is where ‘the rubber meets the road’, at least in states with formalized, state-led refugee status determination systems. Consider for example the varying national approaches with regard to gender-based claims,²⁵⁴ claims based on sexual orientation,²⁵⁵ and claims based on gender identity.²⁵⁶ Consider also the widely varying refugee recognition rates between states. Japan has a refugee recognition rate of 0.3%,²⁵⁷ and Israel’s is less than 1%,²⁵⁸ while the Canadian refugee recognition rate for 2018 was 59.9%.²⁵⁹ Betts and Collier report that even within Europe, where relatively harmonized asylum standards have been adopted, there is important variation.²⁶⁰ In her comparative study of inland refugee status determination systems in the United States, Canada, and Australia, Rebecca Hamlin explains that the striking differences in recognition rates in each country can be explained by several

²⁵² Hilary Evans Cameron, *Refugee Law's Fact-Finding Crisis: Truth, Risk, and the Wrong Mistake* (Cambridge, Cambridge University Press, 2018) at 28.

²⁵³ *Ibid.*

²⁵⁴ See Bethany Lobo, “Women as a Particular Social Group: A Comparative Assessment of Gender Asylum Claims in the United States and the United Kingdom” (2012) 26 *Geo Immigr LJ* 361; Tal Kopan, “Trump Admin Drops Asylum Protections for Domestic Violence Victims”, *CNN* (11 June 2018), online: <<https://www.cnn.com/2018/06/11/politics/jeff-sessions-asylum-decision/index.html>>.

²⁵⁵ See Jana Weßels, “Sexual orientation in Refugee Status Determination” (2011) Refugee Studies Centre Working Paper no 73, online (pdf): <<https://www.refworld.org/pdfid/4ebb93182.pdf>>.

²⁵⁶ See Senthoran Raj, “Evolving Bodies: Mapping (Trans)Gender Identities in Refugee Law” in Gavin Brown & Kath Browne, eds, *The Routledge Research Companion to Geographies of Sex and Sexualities* (London: Routledge, 2016) 221.

²⁵⁷ “Japan Accepts Far Fewer Refugees than G7 Peers”, *Nippon.com* (May 14 2019), online: <<https://www.nippon.com/en/japan-data/h00449/japan-accepts-far-fewer-refugees-than-g7-peers.html#:~:text=Japan%20Recognizes%20Few%20Refugees&text=Compared%20to%20this%2C%20Japan's%20figures,further%20contribute%20toward%20refugee%20protection>>.

²⁵⁸ Alona Ferber, “By the Numbers: Israel Recognizes Less Than 1% of Asylum Seekers”, *Haaretz* (23 June 2014), online: <<https://www.haaretz.com/.premium-seeking-asylum-israel-oks-under-1-1.5252984>>.

²⁵⁹ This data includes both “legacy” (pre-reform cases) and new cases (Sean Rehaag, “2018 Refugee Claim Data and IRB Member Recognition Rates” (19 June 2019), online: <<https://ccrweb.ca/en/2018-refugee-claim-data>>.

²⁶⁰ For example, Betts & Collier report that refugee recognition was 14% in Greece, compared to 94% in France. For Eritreans, the recognition rate was 26% in France, compared to 100% in Sweden (Betts & Collier, *supra* note 5 at 46-47).

factors, perhaps the most important of which is institutional independence and its impact on fact-finding and training:

An RSD regime with high administrative insulation puts a great deal of pressure on the one hearing, requiring the tribunal to invest resources into fact finding and training, to ensure decision makers have as much information at their disposal as possible. It also results in questions about the refugee definition being more settled, either in a generous or restrictive direction, than they are in other, less centralized regimes.²⁶¹

I reiterate that I am not suggesting that improved decision-making in Northern states is the only way, or even the best way, to ensure that international protection is provided to those who need it. But decision-making does matter, for numerous reasons. It is important to scrutinize national refugee institutions because they reveal how the international refugee regime is implemented at the national level. Decision-making obviously matters for refugees in need of protection who are entitled to fair, accurate, and legally-sound decisions. In the Canadian resettlement context, it also matters for refugee sponsors, whose enthusiasm for sponsorship may fade in the face of repeated problematic decisions and lack of appeal mechanisms.²⁶² Furthermore, in terms of program administration, every erroneous refusal leads to additional processing costs and increased delays in reaching admission targets. In this sense, quality decision-making is required for the sustainability of the program. More fundamentally, shortcomings in decision-making undermine the program as a whole in terms of attaining its humanitarian objective.

2.9 Conclusion

In this overview, we have seen that the international refugee regime emerged as a temporary

²⁶¹ Rebecca Hamlin, “International Law and Administrative Insulation: A Comparison of Refugee Status Determination Regimes in the United States, Canada, and Australia” (2012) 37:4 L & Soc Inquiry 933 at 963.

²⁶² See Shauna Labman, “Private Sponsorship: Complementary or Conflicting Interests?” (2016) 32:2 Refuge 67 at 76.

response to a specific refugee situation in the 1920s, with a primary emphasis on legal protection and a wholly Eurocentric focus. The first generation of international refugee institutions collapsed with the onset of the Second World War and the dissolution of the League of Nations. Building on the League of Nations experience, the international refugee regime was rebuilt around the UNHCR and the 1951 Refugee Convention. The Eurocentric focus of the interwar refugee regime carried through to the new regime, until 1967, when the geographical limitation of the Refugee Convention was eliminated. The 1951 Refugee Convention remains today the pillar of the international refugee regime, despite its restricted focus on “persecution.”

The place of resettlement in the international refugee regime has shifted widely in the past 70 years. Driven by Cold War politics, resettlement was utilized as a political tool by Western countries and was considered the “preferred durable solution” in the three decades that followed the Second World War. The “exilic bias” of the refugee regime began to fade in the 1980s, with the end of the Cold War and the emergence of so-called “new refugee flows.” Repatriation firmly became the preferred durable solution in the 1990s, as resettlement numbers fell to historic lows. In the early 2000s, international efforts to reinvigorate resettlement were relatively successful, with the emergence of the concept of the “strategic use of resettlement.” In recent years, resettlement admissions have increased in absolute numbers, but have not kept up with the global increase in the global refugee population.

Shifts in state perspectives on durable solutions highlight two important deficiencies of international refugee law. First, while international refugee law explicitly protects against *refoulement*, the right to *seek asylum* - arguably provided for in the 1948 *Universal Declaration*

of *Human Rights*²⁶³ - is routinely ignored by states.²⁶⁴ In this context, this chapter has explored how states have increasingly developed policies and technologies designed to prevent asylum seekers from entering their territory. Second, the international refugee regime lacks a normative framework around burden-sharing. Third-country resettlement and the provision of financial aid to states of asylum remains an entirely discretionary act on the part of states, subject to changes in domestic politics. International law provides no solution to the reality that the vast majority of the global refugee population resides in low- to very-low income countries. The unpredictability of burden-sharing has caused host states to withdraw from their legal responsibility to protect refugees. The Global Compact on Refugees seeks to address this problem by formalizing burden-sharing principles. Just like previous initiatives, however, the Global Compact remains non-binding and experts doubt that it will deliver on its promises. The Global Compact also exposes a problematic inclination to view burden-sharing in primarily economic terms, and to promote refugee containment in the Global South. Without a solid grounding in international law, the search for durable solutions has proven an immensely difficult task, wholly dependent

²⁶³ Article 14(1) of the *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) provides that “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.” The right to seek asylum is also recognized under the *American Declaration of the Rights and Duties of Man*, 2 May 1948 and the *American Convention on Human Rights*, 22 November 1969. See Andrew Brouwer, “Interception and Asylum: When Migration Control and Human Rights Collide” (2003) 21:4 *Refugee* 6.

²⁶⁴ Janet Dench writes:

The subsequent half-century has made this right to seek asylum an orphan right, since, despite its appearance in the foundational human rights document, it was never adopted by any human rights conventions and covenants that followed. The millions who face persecution have discovered that their right to seek asylum is one that states are not necessarily prepared to protect.

Instead of addressing how people fleeing persecution might seek asylum in other countries, the 1951 Convention relating to the Status of Refugees focused on the obligation of states not to refoule a refugee to persecution. The challenge of getting out of the country in which one fears persecution and into (or to the door of) a country of potential asylum is left up to the refugee. States, meanwhile, have emphasized their right to protect their borders and decide who enters their territory (Janet Dench, “Controlling the Borders: C-31 and Interdiction” (2001) 19:4 *Refugee* 34 at 34).

See also Kneebone, “Introduction”, *supra* note 83.

on international and domestic political interests, and expressions of international solidarity.

In this context of increasing state retrenchment from refugee law and pervasive uncertainties concerning burden-sharing commitments, national refugee resettlement programs, such as Canada's program, have the potential to fill an important protection gap. Refugee resettlement has the additional benefit of generally favourable public opinion towards the 'orderly' arrivals of refugees. Positive public attitudes towards resettlement, including public interest in refugee sponsorship, should be leveraged further. The challenge in such efforts will always be to avoid causing prejudice to established asylum systems. Resettlement alone - at least resettlement as currently practiced - cannot solve the refugee problem. Many argue that it should remain the "smallest piece of the puzzle", given that relocation away from one's language and culture is not ideal, and that it may even act as a pull-factor driving refugee flows.²⁶⁵ Nevertheless, refugee resettlement remains a solid mechanism of burden-sharing, and perhaps the only durable solution for refugees in a protracted refugee situation.

²⁶⁵ See Labman, *Crossing Law's Border*, *supra* note 98 at 29.

CHAPTER 3 CANADA'S RESPONSE TO REFUGEES

3.1 Introduction

Refugee resettlement in Canada, although discretionary from the perspective of international law, is governed by detailed regulatory and legislative instruments. Decision-making in the resettlement program is also constrained by principles of administrative law and, perhaps, rights guaranteed in the *Charter of Rights and Freedoms*. The purpose of this chapter is to present the Canadian legal framework of refugee resettlement and to discuss the place of refugee resettlement within Canadian refugee policy. This chapter also explores the Private Sponsorship of Refugees (PSR) program and discusses concerns regarding the administration of the program expressed by both refugee organizations and government as a way to set the stage for chapters 5 and 6.

This chapter is not intended to be a detailed account of Canadian immigration law more generally. However, to provide a rich context, the first two sections focus on basic principles of Canadian immigration law, briefly reviewing exclusionary and discriminatory immigration policies in Canada. The third section provides an overview of developments in Canadian refugee policy in the 20th century which led to the formalization of refugee resettlement and the birth of the PSR program in the 1976 *Immigration Act*. The transition to the 2001 *Immigration and Refugee Protection Act (IRPA)* and the evolution of the resettlement program within Canadian refugee policy are then discussed in detail. Some attention will be paid in this section to policy developments that articulate a conflicting relationship between refugee resettlement and inland asylum. Important changes to the resettlement system introduced in the 2010s are addressed next, including the introduction of annual caps, the imposition of a UNHCR documentation

requirement for PSRs, and the creation of the Blended Visa Office-Referred (BVOR) program. This section also further explores the dynamics within the PSR program through a discussion of the principles of naming and additionality. The following section addresses restrictions placed on inland refugee claimants in Canada. This discussion further demonstrates the importance of refugee resettlement within Canadian refugee policy. The subsequent two sections present, in some detail, the current legislative and regulatory criteria governing refugee resettlement under the 2001 *IRPA*, and avenues for redress available to rejected resettlement applicants. This section includes an analysis of the approach taken by courts in judicial review of resettlement cases. The penultimate section canvasses concerns, including long processing delays, low approval rates, and low-quality decision-making, that have been reported by actors involved in the refugee resettlement system. In the final section, I present and discuss statistics on refugee resettlement arrivals to Canada between 1979 and 2019.

3.2 Admission and territorial sovereignty in Canada – a positivist assessment

There is a rich academic debate on the nature of border and sovereignty in liberal democracies. Rawls and Dworkin never focused on migration directly, but both of their accounts of the liberal system rely on an assumption of closed borders. The classical liberal theory of Rawls assumes a relatively closed political community as a precondition to the liberal state.¹ Dworkin considers community to be “prior to justice and fairness.”² Michael Walzer, on the other hand, explicitly endorses closed borders as necessary for his conception of justice to emerge.³ Other liberal

¹ John Rawls, *A Theory of Justice* (Cambridge: Belknap Press, 1971) at 12. See also Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983) at 61.

² Ronald Dworkin, *Law's Empire* (Cambridge: Belknap Press, 2001) at 208. See also Walzer, *ibid*, at 61.

³ Walzer, *ibid*. See also Catherine Dauvergne, “Amorality and Humanitarianism in Immigration Law” (1999) 37:3 *Osgoode Hall LJ* at 601 [“Amorality and Humanitarianism”]. That said, Walzer does recognize the legitimacy of the “mutual aid” principle, whereby sovereign states have a moral obligation to assist outsiders in need.

theorists have argued that the concept of closed borders, including a more relaxed closed borders principle that respects the principle of mutual aid, does not sit well with the principle of the equal moral worth of all individuals, also central to the liberal theory.⁴ Joseph Carens maintains that various strands of liberal theory support the concept of open borders and that therefore such a position should be considered inherent to liberalism.⁵ Galloway and Chai Yun Liew explain:

[d]espite the intellectual excitement generated by the concept of citizenship and the wide variety of critical views, the dominant framework has endured, a framework in which the nation-state is presented as having sovereignty to identify its own members and to operate as a closed system with closed borders.⁶

It is not my objective in this chapter to go any further into the theoretical debate around sovereignty, liberalism and borders. My point here is merely to state, before presenting an account of how immigration law currently operates in Canada, that the question of closed borders is very much a contested one, at least in theoretical debates.

The Supreme Court in *Chiarelli* described the principles governing immigration law in these terms:

The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country. At common law an alien has no right to enter or remain in the country. ...

The distinction between citizens and non-citizens is recognized in the Charter. While permanent residents are given the right to move to, take up residence in, and pursue the gaining of a livelihood in any province in s. 6(2) (of the *Charter*),

⁴ Dauvergne, *ibid*; Catherine Dauvergne, “Beyond Justice: The Consequences of Liberalism for Immigration Law” (1997) 10 Can JL & Jur 323.

⁵ See Joseph H Carens, “Aliens and Citizens: The Case for Open Borders” (1987) 49 Rev of Pol 251; Dauvergne, “Amorality and Humanitarianism”, *supra* note 3 at 607; Susan Kneebone, “The Rule of Law and the Role of Law: Refugees and Asylum Seekers”, in Susan Kneebone, ed, *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives*, (Cambridge: Cambridge University Press, 2009) 32 at 66.

⁶ Donald Galloway & Jamie Chai Yun Liew, *Immigration Law*, 2nd ed (Toronto: Irwin Law, 2015) at 82.

only citizens are accorded the right “to enter, remain in and leave Canada” in s. 6(1).

Thus Parliament has the right to adopt an immigration policy and to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada.⁷

Immigration legislation - just like the *Charter* - recognizes an absolute right to enter and remain in Canada only to those who hold citizenship and to persons “registered as an Indian under the Indian Act.”⁸ All other individuals can only enter or remain in Canada if they obtain permission - a visa - from the Canadian government. Generally speaking, a visa must be obtained prior to the individual’s entry into Canada.⁹ There exist two broad categories of non-citizen status in Canadian immigration law: temporary status (including the visitor class, the worker class, and the student class), and permanent status. Temporary status, as the name implies, includes an end date and severely limits the entitlements of the visa holder. For the purposes of the *IRPA*, temporary residents and persons without status are considered “foreign nationals.”¹⁰ Only in limited circumstances can a person transition from temporary to permanent status from within

⁷ *Canada (MEI) v Chiarelli*, [1992] 1 SCR 711 at 733-34. See Sharry Aiken, “From Slavery to Expulsion: Racism, Canadian Immigration Law and the Unfulfilled Promise of Modern Constitutionalism” in Vijay Agnew, ed, *Interrogating Race and Racism* (Toronto: University of Toronto Press, 2007) 55 at 57 [“From Slavery to Expulsion”]; Galloway & Liew, *supra* note 6 at 6-11.

⁸ *IRPA*, s 19(1). A quasi-absolute right to enter, remain and leave one’s country of citizenship is recognized under international law: *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 12(4) (entered into force 23 March 1976, accession by Canada 19 May 1976). See James Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005) at 954-56 [*The Rights of Refugees*]. It is also a right expressly recognized under section 6(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11. Both international and Canadian law, however, allow for the revocation of citizenship of foreign-born citizens in certain circumstances. See Christopher G Anderson, “A Long-Standing Canadian Tradition: Citizenship Revocation and Second-Class Citizenship under the Liberals, 1993–2006” (2008) 42:3 *J Can Stud* 80; Audrey Macklin, “Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien” (2014) 40:1 *Queen’s LJ* 1.

⁹ *IRPA*, s 11(1).

¹⁰ *IRPA*, s 2(1), “foreign national”.

Canada.¹¹ In addition, few temporary migrants can qualify under the stricter permanent residence rules.¹²

Permanent residency provides extensive social and legal entitlements and allows a person to stay indefinitely in Canada as well as sponsor their dependents. Permanent residency is also a pathway to citizenship. It includes three broad categories: the economic class, the family class and the humanitarian class. Resettled refugees obtain permanent residency status under the humanitarian class upon their arrival in Canada.¹³ In contrast, inland refugee claimants whose claim is accepted by the IRB immediately receive protected person status, and thereafter become eligible to apply for permanent status.¹⁴

3.3 Exclusion and discrimination in Canadian immigration law

Aiken writes that Canadian pre-Confederation immigration policy was designed to “divest the indigenous population of their sparsely populated ‘wild lands’ and render them productive as quickly as possible.”¹⁵ The colonial effort was guided by an ideology that sought to populate the land by British settlers (and French settlers under the French regime). Slavery remained legal in Canada until the early 19th century. In fact, Canada’s first non-white immigrants were enslaved

¹¹ For example, a current pilot program allows for the transition to permanent status of temporary foreign workers in the “home child care” and the “home support” categories. See Immigration, Refugees and Citizenship Canada, “Home Child Care Provider Pilot and Home Support Worker Pilot”, online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/caregivers/child-care-home-support-worker.html>>. A separate program for “Live-In-Caregivers” existed until 2014. See Galloway & Liew, *supra* note 6 at 88, 123.

¹² Galloway & Liew, *ibid* at 130.

¹³ *IRPA*, s 139(1).

¹⁴ Sasha Baglay & Martin Jones, *Refugee Law*, 2nd ed (Toronto: Irwin Law, 2017) at 120-21. Inland protected persons must wait 180 days after the conferral of protected person status before submitting a permanent residence application (*IRPR*, s 175(1)). The delay is five years in the case of “designated foreign nationals” (*IRPA*, s 11(1.1)). Protected persons found to be inadmissible on the grounds of security, violation of human or international rights, serious criminality, organized criminality, or danger to public health or safety are ineligible for permanent status in Canada (*IRPA*, s 21(2)).

¹⁵ Aiken, “From Slavery to Expulsion”, *supra* note 7 at 63.

Black people, brought as early as 1628.¹⁶ The term ‘White Canada’ has been used to describe Canadian migration policy from Confederation up to the 1960s. Jakubowski explains that

[i]nitially, immigration policies were ethnically selective: racist in orientation, assimilationist in objective. Striving to preserve the British character of Canada, authorities directed their efforts towards excluding certain people from entry, while encouraging others to settle.¹⁷

The term “race” first appeared as a tool of immigration exclusion in section 38(c) of the *1910 Immigration Act*,¹⁸ which allowed the Governor-in-Council to “prohibit ... the landing in Canada ... of immigrants belonging to any race deemed unsuited to the climate or requirements of Canada.”¹⁹ Black American immigrants were routinely excluded as being “unsuited to the climate” of Canada.²⁰ In 1919, “nationality” was added to the section. The amended section 38(c) allowed the government to exclude any race or nationality

by reasons of any economic, industrial or other condition temporarily existing in Canada or because such immigrants are deemed unsuitable having regard to the climatic, industrial, social, educational, labour or other condition or requirements of Canada or because such immigrants are deemed undesirable owing to their peculiar customs, habits, modes of life and methods of holding property, and because of their probable inability to become readily assimilated or to assume the duties and responsibilities of Canadian citizenship within a reasonable period of time after their entry.²¹

¹⁶ *Ibid.* Slavery was outlawed in the British Empire in 1833. See Gerald E Dirks, *Canada’s Refugee Policy: Indifference or Opportunism?* (Montreal: McGill-Queen’s University Press, 1977) at 22 [*Canada’s Refugee Policy*].

¹⁷ Lisa Marie Jakubowski & Elizabeth Comack, “‘Managing’ Canada’s Immigration: Racism, Racialization, and the Law” in Elizabeth Comack, ed, *Locating Law: Race/Class/Gender/Sexuality Connections*, 3rd ed (Halifax & Winnipeg: Fernwood Publication, 2014) 88 at 90, citing JE Elliot & A Fleras, *Unequal Relations: An Introduction to Race and Ethnic and Aboriginal Dynamics in Canada*, 2nd ed (Toronto: Oxford University Press, 1996).

¹⁸ *Immigration Act*, SC 1910, c 27 [1910 *Immigration Act*].

¹⁹ Section 38(c) of the 1910 *Immigration Act* was essentially carried over to section 61 of the *Immigration Act*, SC 1952 c 42. See Anna Pratt, *Securing Canada’s Borders: Detention and Deportation in Canada* (Vancouver, UBC Press, 2005) at 76.

²⁰ See Esmeralda MA Thornhill, “So Seldom for Us, So Often Against Us: Blacks and Law in Canada” (2008) 38:3 *J Black Stud* 321 at 329.

²¹ See Lisa Marie Jakubowski, *Immigration and the Legalization of Racism* (Halifax: Fernwood, 1997) at 16.

An Order-in-Council passed under section 38(c) in 1919 prohibited the immigration of persons from the German, Austrian, Hungarian, Bulgarian or Turkish “races”, without the permission of the Minister.²² The “Asian race” was prohibited from entry in 1923. The restriction remained in place until 1956 when the government entered into an agreement with Asian countries limiting the numbers of nationals allowed to immigrate to Canada.²³

In addition, in the first decades following Confederation, specific policies were enacted to prevent immigration from the Asian continent, more specifically from China, Japan and India. In the mid-1880s, following a decrease in labour needed by the Canadian Pacific Railway, the Federal Government adopted the infamous “Chinese Head Tax” with the passing of the 1885 *Chinese immigration Act*.²⁴ Fees under the Chinese Head Tax regime reached \$500 in 1903.²⁵ The exclusion of Japanese migration was achieved through a “Gentleman’s Agreement”, where Canada agreed not to impose discriminatory laws against Japanese immigrants, while the Japanese government agreed to restrict the number of people permitted to emigrate to Canada.²⁶ The case of Indian migrants proved more complicated as India was part of the British Empire. Following the arrival of around two thousand north-Indians in the early 1900s, the Governor General of Canada sent a note to the Secretary of State for the Colonies in London stating that the immigrants

²² David Matas, “Racism in Canadian Immigration Policy – Part One: The History” (1985) 5:2 *Refuge* 8 at 8.

²³ *Ibid.*

²⁴ *Chinese immigration Act*, SC 1885, c 71. See Galloway & Liew, *supra* note 6 at 17. See also Jakubowski, *supra* note 21 at 14.

²⁵ Interestingly, the passing of the 1885 *Chinese Immigration Act* came after the Federal Government had spent years opposing anti-Chinese measures by the Legislature of British Columbia. These British Columbia statutes described Chinese immigrants as “governed by pestilential habits”, “useless in instances of emergency”, and “inclined to habits subversive of the comfort and well-being of the community.” See Galloway & Liew, *supra* note 6 at 15.

²⁶ Jakubowski, *supra* note 21 at 14.

doubtless come under misrepresentation as they are not suited to climate, and there is not sufficient field for their employment. Many in danger of becoming public charge and thus subject to deportation under law of Canada.²⁷

Prime Minister Wilfrid Laurier requested that the Indian colonial government institute a passport system over which Canada would have control. The Indian colonial government, facing a rise in nationalist and anticolonial movements, insisted that migration by British subjects to other British colonies should remain untrammelled by passport restriction.²⁸ Ultimately, the goal of the Canadian government was achieved through the so-called “Continuous Journey Stipulation”, an amendment to the *1906 Immigration Act* that made it impossible for immigrants to come to Canada other than by a continuous journey.²⁹ The only company offering a continuous journey from India to Canada – the Canadian Pacific Railway – was instructed not to issue through tickets to Canada from India.³⁰ The continuous journey rule had a drastic impact on the number of Indian immigrants coming to Canada. In 1907 and 1908, over four thousand Indians came to Canada. That number fell to single and double digits in the following years.³¹

Canadian immigration law established, until the 1960s, a tiered system of “preferred nationalities” corresponding to varying admission restrictions. At the top of the list were white

²⁷ See Radhika Viyas Mongia, “Race, Nationality, Mobility: A History of the Passport” (1999) 11:3 Pub Cult 527 at 533. This obsession with climate incompatibility, Mongia writes, is a clear example of “cultural racism”, a racist framework “whose dominant theme is not biological heredity but the insurmountability of cultural differences” (534).

²⁸ *Ibid* at 536-38.

²⁹ *An Act to Amend the Immigration Act*, 7-8 Edward VII, c 33 (assented to 10 April 1908). See Jakubowski, *supra* note 21 at 14. The continuous journey rule is what led to the infamous Komagata Maru incident, where 376 Indians were stranded on a boat off of Vancouver for two months before being forcibly returned to India. Upon return, Indian officials are reported to have killed 23 passengers during a riot. See Ninette Kelley & Michael J Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy*, 2nd ed (Toronto: University of Toronto Press, 2010) at 152-54.

³⁰ Jakubowski, *supra* note 21 at 14.

³¹ *Ibid* at 15.

citizens of the United States and the United Kingdom, who could immigrate with very few restrictions. Secondary preferred nationalities varied according to labour needs. In the 1920s, the second tier of preferred countries consisted of Northern European countries and Scandinavia, who could enter Canada if they were sponsored by a Canadian relative or could fill labour needs. Citizens from “non-preferred” countries of Eastern and Southern Europe could only immigrate to Canada with a special permit, while Asian immigrants faced almost insurmountable restrictions.³²

During World War II, regulations under the *War Measures Act*³³ restricted entry by Japanese immigrants, and even provided for the deportation of Canadian citizens of Japanese descent.³⁴ In a speech in 1947, Prime Minister Mackenzie King described Canada’s immigration policy in the following terms:

I wish to make it quite clear that Canada is perfectly within her rights in selecting persons whom we regard as desirable future citizens. ... The people of Canada do not wish, as result of mass immigration, to make any fundamental alteration in the character of our population. ... Any considerable Oriental immigration would ... be certain to give rise to social and economic problems.³⁵

Restrictions by country of origin continued after World War II, with citizens from listed countries being prohibited from immigrating to Canada unless they had sufficient means. Citizens from Africa and Asia were allowed to enter Canada only if they had immediate family already in the country.³⁶ Canadian immigration law never explicitly discriminated against Jews.

³² Kelley & Trebilcock, *supra* note 29 at 192.

³³ *War Measures Act*, 1914, SC 1914, c 2.

³⁴ Matas, *supra* note 22 at 9. Regulations passed under the *War Measures Act* also allowed for the internment without trial of immigrants from enemy countries, as well as citizens naturalized after 1922. See Kelley & Trebilcock, *supra* note 29 at 279.

³⁵ Kelley & Trebilcock, *ibid* at 312. See also Pratt, *supra* note 19 at 74.

³⁶ Matas, *supra* note 22 at 9.

However, as Matas writes, Jews effectively faced discrimination through widespread abuse of discretionary power:

Whatever the immigration requirements were, Jews could not meet them. The law allowed for entry of families with sufficient capital to establish farms. But Jewish families with capital were not allowed entry. Immigration was headed by an avowed antisemite, Fred Blair. He transferred the responsibility for processing Jewish applicants from other government offices to his own where he personally scrutinized each application, deciding its eligibility. But in virtually every case the answer was “no”.³⁷

Explicit racial restrictions against non-Europeans remained until 1962, when race was removed as an immigration criterion in favour of general criteria applied to all immigrants regardless of nationality. Five years later, in 1967, the more objective “points system” - still used today - was introduced. While “white Canada” policies were officially dismantled in the 1960s, a number of scholars and advocacy groups have argued that racism and discrimination still lurk in Canadian immigration law. In particular, it has been claimed that visa officer decision-making is informed by racial biases.³⁸

For instance, current security inadmissibility proceedings have been shown to be almost entirely directed at individuals from the Global South.³⁹ Temporary visa applications are denied for an

³⁷ *Ibid.* See also, regarding the treatment of Jews under Canadian immigration and refugee law: Irving Abella & Harold Troper, *None is Too Many: Canada and the Jews of Europe (1933-1948)*, 3rd ed (Toronto: University of Toronto Press, 2012); Irving Abella, “Canadian Refugee Policy to 1980: Historical Overview” in Vaughan Robinson, ed, *The International Refugee Crisis: British and Canadian Responses* (London: Palgrave MacMillan, 1992) 77 [“Canadian Refugee Policy to 1980”].

³⁸ See Alan Simmons, “Racism and Immigration Policy” in Vic Satzewich, ed, *Racism and Social Inequality in Canada: Concepts, Controversies and Strategies of Resistance* (Toronto: Thomson Educational, 1998) 87; Augie Fleras, *Immigration Canada: Evolving Realities and Emerging Challenges in a Postnational World* (Vancouver: UBC Press, 2015); Sherene Razack, “Making Canada White: Law and the Policing of Bodies of Colour in the 1990s” (1999) 14:1 CJLS 159; Nandita Sharma, *Home Economics: Nationalism and the Making of ‘Migrant Workers’ in Canada* (Toronto: University of Toronto Press, 2006).

³⁹ See Angus Grant, *Confronting (In)Security: Forging Legitimate Approaches to Security and Exclusion in Migration Law* (PhD thesis, York University Osgoode Hall Law School, 2016).

increasingly large proportion of African applicants, while temporary visa are available upon entry for citizens of virtually every country of the Global North.⁴⁰ Scholars have also pointed out that Canadian visa offices are not evenly distributed across the globe, and are especially rare in sub-Saharan Africa.⁴¹

Lastly, it is worth reflecting on whether the points system has truly eradicated discrimination in immigration legislation. First, points systems are designed as a solution to combat one kind of discrimination, that based on race, nationality, ethnicity, and religion. However, as Dauvergne explains, points systems cement discrimination based on socio-economic class:

Points systems were invented by settler states seeking to break with their racialized immigration histories. The systems, however, do not removed discrimination, they simply deploy it differently. People who come out at the top of points systems are well educated, multi-lingual, economically successful, and young. Accordingly, they are very likely to be wealthy, and to come from wealthy families. A preference for the rich is hardly non-discriminatory, but Western legal systems have struggled to recognized and remedy discrimination against either the rich or the poor. These groups do not fit liberal analysis of discrimination well because of the embedded assumption that wealth or poverty can be chalked up to individual choice and efforts.⁴²

⁴⁰ Idil Mussa, “African visitors least likely to obtain Canadian visas”, *CBC News* (26 November 2019), online: <<https://www.cbc.ca/news/canada/ottawa/canada-s-temporary-visa-approval-rate-lowest-for-african-travellers-1.5369830>>.

⁴¹ Jakubowski & Comack, *supra* note 17 at 103. See also Vic Satzewich, *Points of Entry: How Canada’s Immigration Officers Decide Who Gets In* (Vancouver: UBC Press, 2015) at 87-88.

⁴² Catherine Dauvergne, *The New Politics of Immigration and the End of Settler Societies* (Cambridge: Cambridge University Press, 2016) at 175. See also Aiken, “From Slavery to Expulsion”, *supra* note 7 at 71; Stuart Tannock, “Points of Prejudice: Education-Based Discrimination in Canada's Immigration System” (2001) 43:4 *Antipode* 1330. Anna Pratt writes that the shift away from racial exclusion in Canadian immigration law was also followed by a preoccupation with security and criminality:

At the same time that humanitarian and legal challenges both to the racism of immigration policies and to the scope and uses of discretion gained momentum, the logic of security, supplemented by criminality discourses, emerges as the guiding rationale for immigration enforcement and exclusion. ... There was then during the period a shift away from explicit, racially based exclusions justified by national purity discourses toward exclusions based increasingly on the risks posted to a reconfigured conception of national security (Pratt, *supra* note 19 at 74).

Second, and perhaps more importantly, the modern Canadian immigration system developed into a two-tier migration and employment framework that relies on racialized temporary foreign workers in low-paying and precarious occupations.⁴³

Refugee policies do not operate in isolation from immigration policies. Although refugee law and immigration law have distinct foundations in political and legal theory, and in international law, they are deeply integrated, and largely stem from an undistinguishable core of social and economic concerns. In fact, the first legislation to governing refugees was adopted only in 1976. For a long period of Canada's history, the Canadian government was not interested in newcomers' motivations for migration.⁴⁴

3.4 The emergence of the refugee in Canadian immigration law

Early Canadian law and policy did not distinguish between immigrants and refugees. However, many migration movements in the 18th, 19th, and early 20th centuries involved refugees as understood today in international law.⁴⁵ The first of these groups is generally considered to be the American Loyalists who came to British North America following the American Revolution in the late 18th century.⁴⁶ This population movement was facilitated by what is considered the

⁴³ See Judy Fudge, "Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers" (2012-2013) 34 *Comp Lab L & Pol'y* J 95; Sarah Marsden, "Assessing the Regulation of Temporary Foreign Workers in Canada" (2011) 49:1 *Osgoode Hall LJ* 39; Delphine Nakache, "Temporary Workers: Permanent Rights?" (2010) *Canadian Issues: Temporary Foreign Workers* 45; J Adam Perry, "Barely Legal: Racism and Migrant Farm Labour in the Context of Canadian Multiculturalism" (2012) 16:2 *Citizenship Stud* 189.

⁴⁴ Dirks, *Canada's Refugee Policy*, *supra* note 16 at 25.

⁴⁵ See *Crossing Law's Border: Canada's Refugee Resettlement Program* (Vancouver: UBC Press, 2019) at 34.

⁴⁶ Kelley & Trebilcock, *supra* note 29 at 12. See also Tradafilos Tradafilopoulos, *Becoming Multicultural: Immigration and the Politics of Membership in Canada and Germany* (Vancouver: UBC Press, 2012) at 24; Christopher G Anderson, *Canadian Liberalism and the Politics of Border Control, 1867-1967* (Vancouver: UBC Press, 2012) at 33. Whether American Loyalists were "refugees" as understood today is subject to some

first example of immigration legislation in what is now Canada.⁴⁷ A number of other “non-conformist minorities”, themselves persecuted under the new American regime migrated to British North America in the 19th century, including Quakers, Tunkers, Amish, and Mennonites.⁴⁸

Over 50,000 formerly enslaved Black people migrated to Canada from the United States between 1810 and 1860. While slavery was legal through the British Empire until 1833, the institution of slavery was not widespread in British North America.⁴⁹ This movement was assisted by Canadian organizations, including the Anti-Slavery Society of Canada and the Fugitive’s Union, which helped formerly enslaved people escape the United States and find employment in the colonies.⁵⁰

debate. Dirks is of the view that Loyalist migrants were not refugees, but rather came to Canada by choice, because of a desire to remain in British territories (Dirks, *Canada’s Refugee Policy*, *supra* note 16 at 16). Irving Abella expresses a similar view (Irving Abella, “Canadian Refugee Policy to 1980”, *supra* note 37 at 80).

⁴⁷ *An Act for the ready admission of His Majesty’s Subjects in the Colonies on the Continent, who may be induced to take refuge in this Province, from the Anarchy and Confusion there, and for securing the Peace, and preserving the Loyalty and Obedience of the Inhabitants of this Province*, SNS 1775, c 6. See Galloway & Liew, *supra* note 6 at 11.

⁴⁸ Dirks, *Canada’s Refugee Policy*, *supra* note 16 at 17.

⁴⁹ The possibility of extradition of enslaved people to the United States ended in 1833 (*ibid* at 22-23).

Barrington Walker writes that the commonly held idea of British North America and Canada as a haven for enslaved Black people is only partially true. In 1790, the British Parliament enacted legislation to allow the importation of “Negroes, household furniture, utensils of husbandry or cloathing.” He adds that during much of the British colonial period, “Blacks were neither subjects nor citizens; rather, they were commodities, goods, machines for producing wealth, sexual pleasure, and social status” (Barrington Walker, “Introduction: From a Property Right to Citizenship Rights – The African Canadian Legal Odyssey” in Barrington Walker, ed, *The African Canadian Legal Odyssey: Historical Essays* (Toronto: University of Toronto Press, 2012) 3 at 4). See also Harvey Amani Whitfield, *Blacks on the Border: The Black Refugees in British North America, 1815–1860* (Burlington: University of Vermont Press, 2006). In addition, Abella writes that British North America was not a very hospitable refuge for former enslaved Black Americans:

That these areas were not much of a haven might be inferred from the fact that as soon as they could - that is, after the Emancipation Proclamation and the end of the Civil War - the vast majority of these ex-slaves chose the vagaries of a post-war America over life in their new home. Very few of these refugees chose to settle in Canada (Abella, “Canadian Refugee Policy to 1980”, *supra* note 37 at 80).

⁵⁰ Dirks, *Canada’s Refugee Policy*, *supra* note 16 at 22-23.

In the years following Confederation, Mennonites and Doukhobors facing persecution in Russia settled in Canada in considerable numbers through organized programs that included land grants.⁵¹ The motivations behind these land grants, Dirks explains, was driven not by humanitarianism but by economic factors:

Canada accepted these thousands primarily because the land had to be settled and made productive. Humanitarianism must be thought of as playing a secondary role. Certainly, any sympathy there may have been, particularly for the Doukhobors, diminished quickly after their arrival in 1899. With the appointment of Frank Oliver as minister of the interior in 1906, the government's policy of granting concessions to unorthodox sects was terminated.⁵²

In the late 19th century, other minority groups were resettled to Canada, including American Mormons and Russian Jews, but without land grants.⁵³

It is worth noting that Canada did not participate in any meaningful way in the international refugee regime under the League of Nations during the interwar period. It is somewhat ironic that Canada was awarded the Nansen Medal in 1986, given the fact that Canada never recognized the Nansen Passport and failed to act in good faith in its dealings with refugee institutions during the 1920s and 1930s. Canada did not sign the 1922 or 1924 arrangements regarding the issuance of the Nansen Passport to Russian and Armenian refugees.⁵⁴ The reason for this refusal was that the Canadian government was reluctant to relinquish the absolute right to return refugees should they become a charge to the state or become otherwise unfit for residence in Canada.⁵⁵ At the 1926 League of Nations Intergovernmental Conference, participating states agreed to include in the Nansen Passport a return visa. Canada signed the

⁵¹ *Ibid* at 32-34.

⁵² *Ibid*.

⁵³ *Ibid* at 34-35.

⁵⁴ Isabel Kaprielian-Churchill, "Rejecting Misfits: Canada and the Nansen Passport" (1994) 28:2 Intl Migr Rev 281 at 285.

⁵⁵ *Ibid*.

1926 arrangement, but never ratified nor implemented it in any meaningful way.⁵⁶ The Canadian government insisted that its condition had always been that it would only agree to the passport system if returnability was possible within *five years*, instead of the *one-year* period provided by the 1926 arrangement. When signatory states agreed to extend the returnability provision to five years, Canada once again increased its criteria. Canada did not attend the 1929 and 1933 intergovernmental conferences, and did not accede to the resulting arrangements. By 1938, the Canadian government's position on the 1926 Arrangement was that "We have done nothing to ratify it and, therefore, we are probably not bound by it in any way."⁵⁷

Throughout the interwar period, the Canadian government took the position that refugees should be bound by the same criteria and requirements as regular migrants.⁵⁸ This proved impossible for the vast majority of refugees. Armenian refugees, for example, were categorized as Asian, and therefore were required to comply with the continuous journey rule and were required to have \$250 in cash on hand. The continuous journey rule required that tickets be purchased in the country of birth or in Canada, an impossible requirement for refugees.⁵⁹ Refugees other than those from the United Kingdom and Northern and Northwestern Europe fell under "undesirable" or "least preferred" immigration categories and were required to comply with strict criteria.⁶⁰

The majority of the around 20,000 refugees who were admitted to Canada during the interwar period were brought through ad hoc programs adopted following strong pressure and support

⁵⁶ In fact, a Canadian immigration official declared that the Canadian delegate signed the 1926 Arrangement "merely as he would have signed a Final Act, to show that he was present at the Conference" and that "he did not intend in any way to bind the Government to ratify" (*ibid* at 286-87).

⁵⁷ *Ibid* at 292.

⁵⁸ *Ibid* at 294.

⁵⁹ *Ibid* at 294-95.

⁶⁰ *Ibid* at 295.

from charitable organizations in Canada. Some refugees were allowed to come through family sponsorship. Canadians of European descent were allowed to sponsor parents, children and siblings, while Canadians of Asian descent could only sponsor spouses and children under the age of 18.⁶¹ A few hundred refugees were admitted under labour sponsorships, many of which were supported by organizations such as the Armenian Relief Association of Canada and the United Church of Canada.⁶² Some 150 Jewish orphans were brought to Canada with the help of the Canadian Jewish Congress, and thousands of Russian Mennonite refugees were resettled with the support of the Canadian Mennonite Board, which had entered into an agreement with the Canadian Pacific Railway.⁶³

During the Second World War, fewer than 5,000 refugees were resettled to Canada, a record reported to be the worst record of any democracy.⁶⁴ Kelley and Trebilcock note that, while the still-fragile economy was the government's stated motive, the real motive behind not opening up immigration was to ensure that Canada did not become a haven for Jewish refugees.⁶⁵ The Canadian government's reluctance to engage in the mass resettlement of Jewish refugees was most apparent in the period leading up to the 1938 Evian Conference, which Canada initially opposed.⁶⁶ That same year, a government report acknowledged the global refugee problem, but recommended against the admission of more Jewish refugees out of a concern for preserving

⁶¹ *Ibid* at 299.

⁶² *Ibid* at 300.

⁶³ *Ibid* at 301-03. These various organizational sponsorship efforts paved the way for the private sponsorship of refugees program, formalized in the 1976 *Immigration Act*. See Geoffrey Cameron, "Reluctant Partnership: A Political History of Private Sponsorship in Canada (1947-1980)" in Shauna Labman & Geoffrey Cameron, eds, *Strangers to Neighbours: Refugee Sponsorship in Context* (Montreal & Kingston, McGill-Queen's University Press, 2020) 19.

⁶⁴ Kelley & Trebilcock, *supra* note 29 at 259-60.

⁶⁵ *Ibid* at 257. See also Dirks, *Canada's Refugee Policy*, *supra* note 16 at 50-54.

⁶⁶ Dirks, *ibid* at 56.

Canada's ethnic makeup.⁶⁷

At the conclusion of the Second World War, Canada became more involved in the international refugee regime. Canada was a key player in the efforts that led to the creation of the IRO, and made significant contributions to the organization's resettlement efforts. As Dirks notes, however, Canada's policy was to select predominantly single young men for resettlement. As the Canadian economy continued to show signs of improvement in the late 1940s, and the need for workers increased, Canadian immigration policies were liberalized and refugee movements to Canada increased. Still, the focus remained on single men with funds who were able to work. Ethnic and religious organizations again played a pivotal role in pressuring the government to do more for refugees. This resulted in the establishment of the Close Relative Program, which allowed Canadians to sponsor entire families.⁶⁸ Other special initiatives allowed for the resettlement of Estonian families from Sweden in 1948-49 and of Jewish orphans in 1947.⁶⁹ During the period of the existence of the IRO, however, Canada admitted very few "hard core" refugees, including those refugees suffering from tuberculosis.⁷⁰

Canada's ambivalent commitment to international refugee protection persisted continued in the 1950s. The *1952 Immigration Act* contained no provision referring to refugees.⁷¹ While Canada chaired the UN committee responsible for drafting the Refugee Convention, Canada did not immediately ratify the Convention in 1951, citing concerns that the Convention would prohibit

⁶⁷ *Ibid* at 57-58.

⁶⁸ *Ibid* at 157-164.

⁶⁹ *Ibid* at 164-167.

⁷⁰ *Ibid* at 172-175. The term "hard core refugee" was used to describe refugees that were either old or disabled, a group that resettlement states were largely unwilling to resettle.

⁷¹ See Labman, *Crossing Law's Border*, *supra* note 45 at 34.

Canada from removing refugees who posed a security risk.⁷² Canada also deployed efforts to limit UNHCR's refugee protection activities.⁷³ Canada abstained from voting for the expansion of the UNHCR's mandate to carry out aid programs for refugees, and only contributed minimal funds for the maintenance of refugees.⁷⁴ In 1952, the Canadian government eliminated the UNHCR's Canadian office.⁷⁵ While Canada did participate to some extent in UNHCR's resettlement activities during the early 1950s, Canada's resettlement program was not geared towards protection first and foremost. Rather, it was integrated within a broader immigration rationale. Corbett writes that the 11,000 refugees admitted between 1952 and 1954 were "carefully selected, and most of them would have satisfied our standard if they had been applying as immigrants."⁷⁶ Of the ten thousand "difficult cases" resettled to third countries, "Canada accepted so few that she was not even listed among the countries which receive two hundred cases or more."⁷⁷

Resettlement initiatives in Canada increased in the mid-1950s, 1960s, and 1970s. Still, however, there existed no permanent legal framework for refugee resettlement, and these operations were implemented through various ad hoc orders-in-council.⁷⁸ As reviewed in Chapter 2, Cold War dynamics played a defining role in the international refugee regime in the decades following the Second World War. In 1956, the Canadian government faced intense pressure from civil society and from within Parliament to respond to the refugee crisis caused by the 1956 Hungarian

⁷² Kelley & Trebilcock, *supra* note 29 at 345; Dirks, *Canada's Refugee Policy*, *supra* note 16 at 179-82.

⁷³ Dirks, *ibid* at 182.

⁷⁴ *Ibid* at 183.

⁷⁵ *Ibid* at 185.

⁷⁶ David Corbett, *Canada's Immigration Policy: A Critique* (Toronto: University of Toronto Press, 1957) at 198-99. See Labman, *Crossing Law's Border*, *supra* note 45 at 34-35.

⁷⁷ Corbett, *ibid*.

⁷⁸ See Labman, *Crossing Law's Border*, *supra* note 45 at 35.

uprising against Soviet occupation.⁷⁹ The Canadian public, and the business community in particular, were favourable to the admission of anti-communist Hungarian refugees.⁸⁰ Over 37,000 Hungarian refugees were resettled between 1956 and 1958.⁸¹ The Hungarian refugee movements also served to highlight with the Canadian public that there still remained refugees from the Second World War in reception centres across Europe, including a large population of “hard-core” refugees.⁸² In the late 1950s, Canada participated - albeit reluctantly - in international efforts to resettle the remaining hard-core Second World War refugees.⁸³ Twelve thousand Czech refugees were admitted in 1968-69.⁸⁴ In 1969 Canada finally ratified the 1951 Refugee Convention.⁸⁵ A further 200 Tibetan refugees were admitted in 1970-71, followed by 7,000 Asian Ugandan refugees in 1972.⁸⁶ These Ugandan refugees were the first “Third World refugees” to be admitted to Canada, and the initiative was undertaken only following pressures from the United Kingdom.⁸⁷ A further 7,000 Chilean refugees were admitted in 1973-74.⁸⁸

Dirks writes that Canada’s refugee policy in the first 50 years following Confederation was governed by a desire to settle the land. He adds that during the following 60 years, refugee

⁷⁹ Dirks, *Canada’s Refugee Policy*, *supra* note 16 at 193-99. See Valerie Knowles, *Strangers at our Gates: Canadian Immigration and Immigration Policy, 1540-2006*, revised ed (Toronto: Dundurn Press, 2006) at 173.

⁸⁰ Kelley & Trebilcock, *supra* note 29 at 346.

⁸¹ Freda Hawkins, *Canada and Immigration: Public Policy and Public Concern* (Montreal & Kingston: McGill-Queen’s University Press, 1972) at 114.

⁸² Dirks, *Canada’s Refugee Policy*, *supra* note 16 at 211.

⁸³ *Ibid* at 214-25.

⁸⁴ See Laura Madokoro, “Good Material: Canada and the Prague Spring Refugees” (2009) 26:1 *Refugee* 161; Jan Raska, *Czech Refugees in Cold War Canada, 1945-1989* (Winnipeg: University of Manitoba Press, 2018).

⁸⁵ Kelley & Trebilcock, *supra* note 29 at 365.

⁸⁶ Dirks, *Canada’s Refugee Policy*, *supra* note 16 at 238-44.

⁸⁷ Tanya Basok & Alan Simmons, “A Review of the Politics of Canadian Refugee Selection” in Vaughan Robinson, ed, *The International Refugee Crisis: British and Canadian Responses* (London: Palgrave MacMillan, 1992) 132 at 135-36.

⁸⁸ Dirks, *Canada’s Refugee Policy*, *supra* note 16 at 244-50.

policy remained driven by economic factors rather than a humanitarian imperative.⁸⁹ Indeed, refugee admissions in that period were primarily the result of labour needs, and during economic downturns, very few refugees were admitted.⁹⁰ Political factors played an important role in refugee policy. While Hungarian, Czech, and Ugandan refugees were admitted in relatively large numbers, other less politically desirable groups received a much less generous response, including Chilean refugees (perceived as left-leaning), Jewish refugees, and Tibetan refugees.⁹¹

3.4.1 Refugee policy under the 1976 *Immigration Act*

3.4.1.1 Formalization of refugee law

In 1974, the Canadian government released the Green Paper on Immigration.⁹² The Paper recommended that Canada “continue in its humanitarian tradition” and that a formal refugee category be incorporated in immigration legislation.⁹³ With the adoption of the 1976 *Immigration Act*, Canada for the first time recognized in legislation its obligation under the Refugee Convention. Under the legislation, refugees were designated as a class, alongside the family class, the assisted relative class and the independent class. The protection of refugees and humanitarianism also figured for the first time as legislative objectives of immigration legislation.⁹⁴

⁸⁹ *Ibid* at 254-58. See also James C Hathaway, “Selective Concern: A Review of Refugee Law in Canada” (1987) 33 McGill LJ 676 at 678-80 [“Selective Concern”].

⁹⁰ *Ibid*.

⁹¹ *Ibid*. See also Basok & Simmons, *supra* note 87 at 135-36; Labman, *Crossing Law’s Border*, *supra* note 45 at 35; Sharryn J Aiken, “Of Gods and Monsters: National Security and Canadian Refugee Policy” (2001) 14 RQDI 1.

⁹² Department of Manpower and Immigration, *Canadian Immigration and Population Study* (Ottawa: Information Canada, 1974).

⁹³ Dirks, *Canada’s Refugee Policy*, *supra* note 16 at 250-251.

⁹⁴ See Kelley & Trebilcock, *supra* note 29 at 388-98.

At the time, Canada had not yet become a significant country of first asylum, and it was assumed that the centrepiece of Canada's refugee policy would continue to be the selection and admission of refugees from abroad.⁹⁵ The Act allowed for the resettlement of refugees who met the Refugee Convention definition, but also refugees who met the definition of a "designated class", to be defined in regulations.⁹⁶ Three designated classes were created under the Act: the Indochinese class,⁹⁷ the Eastern European Self-Exiled Persons class,⁹⁸ and the Latin American Political Prisoners and Oppressed Persons class.⁹⁹ Hathaway writes that the criteria of the designated classes evidence Canada's economic and ideological bias in refugee policy.¹⁰⁰ The Self-Exiled Persons Class, which applied to Eastern Europeans, did not require that the applicant be the subject of past or prospective harm. The Indochinese Designated Class similarly concerned refugees fleeing communist regimes and did not require that the applicant show evidence of harm.¹⁰¹ The Political Prisoners and Oppressed Persons Class applied to citizens of South American countries (some of them Western-backed right-wing regimes) who had not been able to leave their country. Unlike the other designated classes, applicants in this category had to either meet the Refugee Convention definition or establish that they would be subject to some form of punishment for the legitimate exercise of their freedom of expression. Hathaway writes that Canada's resettlement policy in the early 1980s was by no means driven by a humanitarian imperative alone. It was instead driven by a mix of economic interests, a will to maintain strategic and ideological alliances, and, thirdly, a commitment to humanitarianism:

⁹⁵ See Labman, *Crossing Law's Border*, *supra* note 45 at 40.

⁹⁶ *Immigration Act*, 1976, SC 1976-77, c 52, s 6(3). See Kelley & Trebilcock, *supra* note 29 at 396-98.

⁹⁷ *Indochinese Designated Class Regulations*, SOR/78-931, s 6.

⁹⁸ *Self-Exiled Persons Designated Class Regulations*, SOR/78-933, s 6.

⁹⁹ *Political Prisoners and Oppressed Persons Designated Class Regulations*, SOR/82-977, s 6.

¹⁰⁰ Hathaway, "Selective Concern", *supra* note 89 at 692-98.

¹⁰¹ See Michael Casasola, "The Indochinese Refugee Movement and the Subsequent Evolution of UNHCR and Canadian Resettlement Selection Policies and Practices" (2016) 32:2 *Refuge* 41 at 45 ["The Indochinese Refugee Movement"].

The Canadian policy of “Compassion with Realism” accepts the promotion of the Canadian national interest as the primary determinant of its refugee policy, and strives to accommodate other concerns to the extent that they are not incompatible with that dominant focus.¹⁰²

That view has been challenged by some. Howard Adelman challenges the somewhat widespread conception that Canada selects the “best and brightest” refugees and ignores the more difficult cases. He acknowledges that during the Vietnamese, Laotian and Cambodian refugee movement, various church groups had criticized the government for selecting only those refugees with the best establishment prospects. Humanitarianism, it was said, had yielded to economic self-interest.¹⁰³ In Adelman’s view, however, while it may be true that European countries admit a proportionally greater number of “hard-core” refugees, the global number of refugees resettled in European countries is relatively low compared to the number resettled in Canada. Canada’s contribution, according to Adelman, is in quantity as opposed to quality.¹⁰⁴ That being said, the 1976 *Immigration Act* did formalize the existing practice of selecting only healthy refugees and those who have economic potential. Under the Act, this took the form of the so-called “successful establishment”¹⁰⁵ criteria and the full application of medical

¹⁰² Hathaway, “Selective Concern”, *supra* note 89 at 683.

¹⁰³ Howard Adelman, *Canada and the Indochinese Refugees* (Regina: LA Weigl Educational Associates, 1982) at 56.

¹⁰⁴ R A Girard, then Director of Refugee Affairs, Canadian Employment and Immigration Commission, makes a similar argument:

Some critics have charged that the Canadian policy is an expression of self-interest with a selection apparatus designed to pick and choose those refugees who fit Canadian ideas of who is deserving of our help. This criticism, however, disregards the scope of Canadian involvement in all aspects of refugee relief - involvement on a scale that far exceeds what could naturally be expected to be Canada’s share of the “burden” among nations (RA Girard, “Canadian Refugee Policy: Government Perspectives” in Howard Adelman & Michael Lanphier, eds, *Refuge or Asylum: A Choice for Canada* (Toronto: York Lanes Press, 1990) 113 at 114-115).

See also Casasola, “Current Trends and New Challenges for Canada’s Resettlement Program” (2001) 19:4 *Refuge* 76 at 79 [“Current Trends”].

¹⁰⁵ *Immigration Regulations*, 1978, SOR/78-172, s 7(1) (as adopted).

inadmissibility common to all immigration categories.¹⁰⁶ Even beyond the formal requirements of the act, it has been argued that the incorporation of refugee assessments within the larger immigration bureaucracy resulted in refugees being informally assessed against regular immigration criteria.¹⁰⁷

3.4.1.2 The birth of the Private Sponsorship of Refugees program

The Act's regulations, adopted in 1978, established the private sponsorship of refugees (PSR) program. The PSR program formally established in law a refugee admission framework that had been developing through ad hoc programs since the 1940s.¹⁰⁸ The PSR program has become emblematic of Canada's response to refugees, and surprisingly little has changed in the PSR framework since its inception. The PSR program will be explored in greater detail later in this chapter, but it is worth here noting particularly salient developments and debates.

The coming into force of the act in 1978 coincided with the exodus of hundreds of thousands of refugees from Vietnam, Laos, and Cambodia ("Indochinese" refugees) and an unprecedented rise in public support for mass resettlement. The PSR program was hugely successful in bringing to Canada over 60,000 "boat people" between 1979 and 1980.¹⁰⁹ Canada's response to

¹⁰⁶ *Immigration Act*, 1976-77, c 52, s 19(1)(ii). Facing critiques that it was selecting the best and brightest refugees, Canada began to shift its policies in the late 1990s, eventually exempting resettlement applicants from medical inadmissibility for "causing excessive demand on health or social services" and loosening the successful establishment criteria: See Debra Pressé & Jessie Thomson, "The Resettlement Challenge: Integration of Refugees from Protracted Refugee Situations" (2008) 25:1 *Refugee* 94 at 96.

¹⁰⁷ Labman, *Crossing Law's Border*, *supra* note 45 at 40; Gerald E Dirks, "A Policy within a Policy: The Identification and Admission of Refugees to Canada" (1984) 17 *Can J Pol Sci* 279 at 306.

¹⁰⁸ G Cameron, *supra* note 63 at 19; Labman, *Crossing Law's Border*, *supra* note 45 at 83-84.

¹⁰⁹ See Michael J Molloy et al, *Running on Empty: Canada and the Indochinese Refugees, 1975-1980* (Montreal & London: McGill-Queen's University Press, 2017); Michael J Molloy & James C Simeon, "Introduction: The Indochinese Refugee Movement and the Launch of Canada's Private Sponsorship Program" (2016) 32:2 *Refugee* 3; Michael Casasola, "The Indochinese Refugee Movement", *supra* note 101; Labman, *Crossing Law's Border*, *supra* note 45 at 87-93.

the Indochinese refugee crisis earned it the Nansen Medal in 1986, the first time the Medal was ever awarded to an entire nation. Treviranus and Casasola discuss the significance of that refugee movement in these terms:

The Indochinese resettlement movement defined resettlement internationally and was pivotal for private sponsorship in Canada. Thousands of Canadians became involved, many of whom 25 years later remain active in refugees issues. The success of the Indochinese in resettling across Canada and the welcome they received demonstrated to Canadians their country's capacity to provide refuge to those in need, as well as the meaningful role that average Canadians could play. Intensively researched, and followed very closely by the media, the resettlement of the "Indochinese boat people" remained for 20 years the public face of the Private Sponsorship Program, and a nostalgic touchstone for immigration officials.¹¹⁰

Public support for refugee resettlement decreased after the Indochinese crisis. This shift coincided with a rise in asylum claims in Canada and also with the broader international refugee politics of the 1980s, including the move away from the Cold War conception of durable solutions. Interestingly, the number of admissions through the resettlement program rose again in the late 1980s. Labman suggests that this could be a result of the international recognition Canada received in 1986 for its response to refugees.¹¹¹

Later in the 1990s, the sponsorship community, concerned by the strict application of the Convention refugee definition, was actively involved in consultations that led to the creation of the Humanitarian Designated classes, which broaden the eligibility criteria for refugee

¹¹⁰ Barbara Treviranus & Michael Casasola, "Canada's Private Sponsorship of Refugees Program: A Practitioner's Perspective of Its Past and Future" (2003) 4 J Intl Migr & Integration 177 at 185.

¹¹¹ Labman, *Crossing Law's Broder*, *supra* note 45 at 93.

protection.¹¹² Nevertheless, throughout the 1990s, the number of resettlement admissions to Canada was relatively low. In Canadian refugee policy, resettlement eventually became to be perceived as secondary to asylum.¹¹³ As Labman notes, the Department of Employment and Immigration's annual report included in 1991 for the first time a section on the refugee determination system, noting that

... Canada's program is moving away from resettling mass movements of persons ... towards emphasis on protection cases. At the same time, the UNHCR is focussing its efforts on voluntary repatriation and local resettlement of refugees. Third country resettlement is considered only in exceptional cases.¹¹⁴

3.4.1.3 Formalization and evolution of the inland asylum system

It bears noting that the 1976 *Immigration Act* also formalized procedures to grant status to inland asylum seekers found to be Convention refugees.¹¹⁵ Under the established procedure, asylum seekers would attend an interview with an immigration officer, the transcript of which was sent to the Refugee Status Advisory Committee. The committee then made a recommendation to the minister. Unsuccessful applicants could make an application on humanitarian and compassionate grounds to the Special Review Committee.¹¹⁶ The new inland refugee system became strained as a result of increases in the number of asylum seekers in the 1980s. In the 1970s, there were approximately 200-400 refugee claims lodged each year. By the early 1980s, that number jumped to 3,000-5,000 claims per year.¹¹⁷ This prompted the Canadian

¹¹² *Ibid* at 190. The Humanitarian Designated classes included the Source Country class and the Country of Asylum class. The class was carried over to the *IRPA* under a new category termed "Humanitarian Protected Person Abroad".

¹¹³ See Labman, *Crossing Law's Border*, *supra* note 45 at 40-41.

¹¹⁴ Employment and Immigration Canada, *Annual Report to Parliament (1991): Immigration Plan for 1991-1995: Year Two* (1991) at 10, cited in Labman, *Crossing Law's Border*, *supra* note 45 at 42.

¹¹⁵ Knowles, *supra* note 79 at 187-98; Kelley & Trebilcock, *supra* note 29 at 401-08.

¹¹⁶ Kelley & Trebilcock, *ibid* at 401-08.

¹¹⁷ *Ibid* at 402.

government to begin deploying measures designed to restrict the arrival of asylum seekers.¹¹⁸ Canada's inland refugee status determination procedure was fundamentally altered by the 1985 Supreme Court's *Singh* decision.¹¹⁹

Justice Wilson in *Singh* determined that section 7 of the recently adopted *Canadian Charter of Rights and Freedoms*, did apply to refugee claimants in Canada:

(Counsel for the applicant) concludes that "Everyone" in s. 7 is intended to encompass a broader class of persons than citizens and permanent residents. Counsel for the Minister concedes that "everyone" is sufficiently broad to include the appellants in its compass and I am prepared to accept that the term includes every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law.¹²⁰

Justice Wilson further held that the right to life, liberty and security of the person, as contemplated by section 7 was at play in inland refugee status determinations, and that refugee claimants are therefore entitled to fundamental justice, which requires that they be provided the opportunity to present their case orally when credibility is at stake. In 1989, in response to the *Singh* decision, the government of Canada established the *Immigration and Refugee Board*, an

¹¹⁸ See Knowles, *supra* note 79 at 225; James C Hathaway and R Alexander Neve, "Fundamental Justice and the Deflection of Refugees from Canada" (1996) 34:2 Osgoode Hall LJ 214. Audrey Macklin writes that *non-entrée* measures have proliferated in subsequent decades, and include

requiring visas from citizens of 'refugee-producing' countries and then denying visas to anyone deemed likely to make a refugee claim; imposing liability on air and marine carriers who transport undocumented or improperly documented migrants; and deputizing private transportation companies as delegates of Citizenship and Immigration Canada. Canada also posts visa officers at foreign airports to check passenger documentation on planes bound for Canada. Most recently, Canada charged a US humanitarian worker with smuggling (an offence under IRPA that carries a maximum life sentence) for transporting twelve Haitian asylum seekers to the USA– Canada border (Audrey Macklin, "Asylum and the Rule of Law in Canada: Hearing the Other (Side)", in Susan Kneebone, ed, *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (Cambridge: Cambridge University Press, 2009) 78 at 105-06).

¹¹⁹ *Singh v Canada (MEI)*, [1985] 1 SCR 177.

¹²⁰ *Ibid* at para 35.

independent administrative tribunal tasked with hearing inland refugee claims.¹²¹

3.5 The 2001 *IRPA* and the resettlement-asylum dynamic

In the late 1990s, the Canadian government moved to craft the successor to the 1976 *Immigration Act*. Major changes were recommended in the 1998 Legislative Review Advisory Group (LRAG) report *Not Just Numbers: A Canadian Framework for Future Immigration*.¹²² Notably, the LRAG report recommended that refugee and immigration matters be separated into two different acts, in order “to emphasize the different goals of Canada’s humanitarian commitment and its immigration program.”¹²³ It also recommended that the overseas resettlement system and the inland asylum system be administered by a single protection agency, whose decision-makers would be

civil servants selected by the protection agency for their abilities. They would be trained in human rights law and in procedures for making fair and consistent decisions. These Protection Officers would be assigned to work in Canada and at Canadian points of service abroad.¹²⁴

The LRAG report also recommended that selection criteria be broadened and that overseas resettlement be steered towards the protection of the most vulnerable.¹²⁵ As such, the report recommended abolishing the successful establishment criteria, exempting resettlement

¹²¹ See Kelley & Trebilcock, *supra* note 29 at 401-08. See also Aiken, “From Slavery to Expulsion” *supra* note 7 at 76-77.

¹²² Canada, Legislative Review Advisory Group, *Not Just Numbers: A Canadian Framework for Future Immigration – Executive Summary* (Ottawa: Minister of Public Works and Government Services Canada, 1997) [LRAG Report].

¹²³ *Ibid* at 12. See Labman, *Crossing Law’s Border*, *supra* note 45 at 42. The LRAG Report also recommended that citizenship matters be included in the same legislation as immigration.

¹²⁴ LRAG Report, *supra* note 122 at 6. The creation of a single agency was criticized by some as having the potential to lead to the linkage of resettlement targets to the unpredictable number of asylum seekers granted asylum (Michael Casasola, “Legislative Review, New Directions and Refugee Resettlement” (1999) 18:1 *Refugee* 18 at 20 [“Legislative Review”]).

¹²⁵ LRAG Report, *ibid* at 6.

applicants from inadmissibility for excessive cost to medical services, and prioritizing the most vulnerable and most needy refugees.¹²⁶ The recommendation to shift operations towards protection rather than the ability to settle was also recommended in CIC's own 1999 'White Paper' *Building on a Strong Foundation for the 21st Century: New Directions for Immigration and Refugee Policy and Legislation*.¹²⁷

In 2000, the Federal government introduced Bill C-31, *An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger*.¹²⁸ The bill died on the order paper and was reintroduced and adopted as Bill C-11 in 2001.¹²⁹ The two most fundamental recommendations of the LLAG report with respect to refugee policy – to create two distinct acts dealing with immigration and refugee matter and to merge overseas and inland refugee decision-making – were not adopted. The new legislation did

¹²⁶ In response to the LLAG Report, the UNHCR voiced its concern over several recommendations, including the recommendation that the new Protection Agency would follow an administrative procedure, as opposed to a quasi-judicial procedure similar to that in place at the IRB. The UNHCR also questioned the LLAG's recommendation that the new protection system should focus "first and foremost on those most in need of protection" and "mak[e] determinations closer to the source of the problem." The UNHCR's position is that

... positive measures to encourage overseas claims should not be accompanied by disincentives or barriers to the direct arrival of asylum-seekers in Canada. Canada's role in offering protection to inland asylum-seekers remains extremely important and, as the Advisory Group observes, is also a matter of international obligation. (page 88) While the meaning of the phrase "most in need of protection" is not entirely clear, the Advisory Group's underlying assumption may be that persons seeking protection overseas are more in need than asylum-seekers who arrive directly to Canada. If so, UNHCR would respectfully disagree. For UNHCR, persons in need of protection are those who have a well-founded fear of persecution, irrespective of where they lodge their claims. UNHCR would urge against establishing any form of hierarchy among refugee claimants (UNHCR, "Comments on Not Just Numbers: A Canadian Framework for Future Immigration - Report of the Immigration Legislative Review Advisory Group" (March 1998), online: <<https://ccrweb.ca/sites/ccrweb.ca/files/static-files/hcrlegr.htm>>).

See also Jennifer Hyndman, "Globalization, Immigration, and the Gender Implications of Not Just Numbers in Canada" (1999) 18:1 *Refugee* 27.

¹²⁷ See Casasola, "Legislative Review", *supra* note 124.

¹²⁸ Bill C-31, *An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger*, 2nd Sess, 36th Parl, 2000.

¹²⁹ Bill C-11, *An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger*, 1st Sess, 37th Parl, 2001 (assented to 11 November 2001).

however include separate sets of objectives for immigration and refugee matters. The new act also implemented some of the more specific recommendations of the LRAG designed to steer the resettlement program towards protection, including exempting refugee applicants from medical inadmissibility and relaxing the successful establishment requirement.¹³⁰

However, observers criticized the government for using improvements to the resettlement program in Bill C-31 to justify restrictions on asylum seekers in the same bill. Casasola writes that

[t]he urgent protection pilot and the policy commitment to ensure the immediate entry of urgent protection cases were presented in response to questions about limitations that C-31 would present for refugees seeking asylum in Canada. Resettled refugees were presented as part of the refugees using the “front door.” And by providing such refugees greater access, Canada suggested it had the moral authority to limit access to those refugees described as using the “back door”.¹³¹

In the political climate that followed the 9/11 attacks, Canada and the US resumed negotiations over a bilateral safe third country framework. In December 2002, the countries adopted the *Canada-US Safe Third Country Agreement (STCA)*, which excluded from refugee protection most asylum seekers who arrived in Canada at a land crossing or airport.¹³²

Throughout the 2000s, increasing concerns - including security concerns - over the uncontrolled arrival of asylum seekers led to resettlement being portrayed by the government as the preferred

¹³⁰ See Labman, *Crossing Law's Border*, *supra* note 45 at 43. Casasola notes that the Canadian government had been applying a relaxed version of the successful establishment requirement before the 2001 *IRPA* was introduced (Casasola, “Current Trends”, *supra* note 104 at 80).

¹³¹ Casasola, *ibid* at 79.

¹³² The impact of the STCA will be discussed in further detail in section 3.7.

manner of offering refugee protection in Canada.¹³³ Labman writes that following the arrival of a boat of Sri Lankan asylum seekers off the coast of British Columbia in 2009, immigration minister Jason Kenny declared that those migrants were entering Canada through the “back door” and that such arrivals should be restricted in favour of regular migration - despite the fact that the Convention provides that no state shall punish refugees for entering a country of asylum illegally.¹³⁴

The oppositional positioning of resettlement and asylum was also evident in the debates that led to the 2010-2012 refugee reforms implemented through the *Balanced Refugee Reform Act (BRRA)*¹³⁵ and the *Protecting Canada’s Immigration System Act (PCISA)*.¹³⁶ Both acts implemented important procedural and substantive changes designed to “accelerate the processing of refugee claims and deter abuse of the system.”¹³⁷ The refugee reforms implemented the long-awaited Refugee Appeal Division (RAD),¹³⁸ but restricted its access to

¹³³ Despite this framing, resettlement arrivals in Canada throughout the 2000s were comparable to the admission levels of the 1990s.

¹³⁴ See Shauna Labman, “Queue the Rhetoric: Refugees, Resettlement and Reform” (2011) 62 UNBLJ 55 at 57 [Queue the Rhetoric]. The so-called non-penalization clause is found in article 31(1) of the Refugee Convention:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

For an analysis of the implementation of article 31 in legislation practice in various states, see Guy Goodwin-Gill, “Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention, and Protection” in Erika Feller, Volker Turk & Frances Nicholson, eds, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003) 87. Section 133 of the *IRPA* incorporates this principle of international law into Canadian domestic law.

¹³⁵ *Balanced Refugee Reform Act*, SC 2010, c 8 [BRRA].

¹³⁶ *Protecting Canada’s Immigration System Act*, SC 2012 c 17 [PCISA].

¹³⁷ Citizenship and Immigration Canada, *Backgrounder - Canada’s New Asylum System*, (14 November 2013), online:

<<https://www.canada.ca/en/immigration-refugees-citizenship/news/archives/backgrounders-2013/canada-new-asylum-system.html>>.

¹³⁸ Provisions creating the RAD had been included in the 2001 *IRPA*, but had not come into force.

some categories of refugee claimants.¹³⁹ The legislative package also implemented restrictions on alternative recourses for failed refugee claimants,¹⁴⁰ implemented severely shortened timelines for all claimants throughout the claim process,¹⁴¹ provided for the designation of safe countries associated with further restrictions,¹⁴² created the “designated foreign nationals” regime, associated with mandatory detention and other restrictions,¹⁴³ and modified the selection process for Refugee Protection Division (RPD) members.¹⁴⁴ These legislative changes were

¹³⁹ Access to the RAD was denied for refugee claimants whose claim was deemed to be “manifestly unfounded” or to have “no credible basis”, and refugee claimants who came through the United States and whose claim was referred to the IRB as an exception to the Canada-US Safe Third Country Agreement. The RAD is also precluded from hearing appeals of refugee claims determined to be withdrawn or abandoned, and determinations that refugee protection has ceased (*IRPA*, s 110(2)).

¹⁴⁰ Refugee claimants are barred from making a humanitarian and compassionate application or requesting a pre-removal risk assessment within 12 months of a negative RPD or RAD decision (*IRPA*, s 112(2)(b.1)).

¹⁴¹ For refugees claiming asylum at a port of entry, the central claim document (the “Basis of Claim”) must be submitted with 15 days (*IRPR*, s 159.8(2)). The Basis of Claim document replaced the Personal Information Form, which had to be submitted 28 days after the submission of a refugee claim. Section 159.9 of the *IRPR* provides that the time limit for scheduling a hearing 60 days for non-DOC claimants.

¹⁴² Under the *PCISA* amendments, the minister may designate as a Designated Country of Origin any country which has a claim volume exceeding the number provided by order of the minister and which has a rejection rate or a withdrawn/abandoned rate greater than the rates fixed by order (*IRPA*, s 109.1(2)(a)). As adopted, the *PCISA* barred DCO claimants from accessing the RAD, extended the PRRA-bar for DCO claimants to 36 months (*IRPA*, s 112(2)(b.1)), eliminated the availability of an automatic stay of removal upon filing a judicial review application for DCO claimants (*IRPR* s 231(2)), and subjected DCO claimants to shortened hearing scheduling timelines (*IRPR*, s 159.9). The most important features of the DCO regime were ruled unconstitutional by the Federal Court (see *YZ v Canada (MCI)*, 2015 FC 892; *Feher v Canada (MPSEP)*, 2019 FC 335). In May 2019, the federal government of Justin Trudeau announced that it would remove all countries from the DCO list, and that the DCO regime would eventually be repealed through legislative amendment. See Immigration, Refugees and Citizenship Canada, News Release, “Canada Ends the Designated Country of Origin Practice” (17 May 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/news/2019/05/canada-ends-the-designated-country-of-origin-practice.html>>.

¹⁴³ Section 20.1 of the *IRPA* allows the minister to designate any group of two or more persons who arrive irregularly to Canada if he or she “is of the opinion that examinations of the persons in the group... cannot be conducted in a timely manner” or if he or she suspects that members of the group have engaged in human smuggling or human trafficking. Designated foreign nationals are subject to mandatory detention to be reviewed within 14 days and then every six months (*IRPA*, s 57.1). They are also barred from accessing the RAD (*IRPA*, s 110(2)(a)), are barred from making an H&C application for 5 years (*IRPA*, s 25(1.01)), and are barred from applying for permanent residence for 5 years following a favourable RPD decision (*IRPA*, s 20.2).

¹⁴⁴ Prior to the reform, RPD members and members of the Immigration Appeal Division (IAD), were appointed by the Governor in Council. They are now public servants employed in accordance with the *Public Service Employment Act*, SC 2003, c 22 (*IRPA*, s 169.1). It was widely felt within the academic and refugee advocacy communities that such a change was needed in order to improve the competence and the independence of RPD members. See, for example, François Crépeau & Delphine Nakache, “Critical Spaces in the Canadian Refugee Determination System: 1989-2002” (2008) 20:1 Intl J Refugee L 50; Jaqueline

implemented in parallel with several other important changes in immigration and refugee policy, including new visa requirements for certain countries¹⁴⁵ and cuts to health-care coverage for all refugee claimants.¹⁴⁶ Throughout those reforms, refugee claimants were portrayed as “undeserving”, “bogus”, and “queue jumpers”, whereas refugees abroad awaiting resettlement were portrayed as “legitimate” or “deserving” refugees.¹⁴⁷ The day before the introduction of the *BARRA*, which included important restrictions on asylum seekers, the government announced an increase of 2,500 resettlement places as evidence that Canada remained committed to refugee protection. The Canadian government praised resettled refugees for “their respect of our laws.”¹⁴⁸ Such juxtaposition, Labman writes,

...completely obscures the reality that, on another legal plane, resettlement refugees have no legal right to resettlement, whereas asylum refugees do possess the right not to be sent back through the legal obligation of *non-refoulement*, set out in Article 33 of the Refugee Convention and confirmed in the IRPA.

...

Essentially, one layer of legality is being asserted to evade another layer of legal obligation.¹⁴⁹

Bonisteel, “Ministerial Influence at the Canadian Immigration and Refugee Board: The Case for Institutional Bias” (2010) 27:1 *Refugee. Members of the newly created RAD are Governor in Council appointments.*

¹⁴⁵ These countries include St. Lucia, St. Vincent, Namibia, Botswana and Swaziland. The Canadian government did however lift in November 2013 the visa requirement for Czech nationals, which had been imposed in 2009.

¹⁴⁶ The Interim Federal Health Program cuts, which did not require legislative amendment, were implemented two days following the adoption of the *PCISA (Order Respecting the Interim Federal Health Program, SI/2012-26, (2012) C Gaz I, 1135)*. Before June 2012, all refugee claimants had access to “expanded health coverage”, which covered medical services, non-medical services (dental, vision, psychotherapy, etc.) and prescription medication. As a result of the 2012 cuts, refugee claimants were covered only for basic medical services, and DCO claimants and rejected claimants were covered only for diseases or conditions “posing a risk to public health or public safety.” In *Canadian Doctors for Refugee Care v Canada (AG)*, 2014 FC 651, Justice Mactavish of the Federal Court ruled that the IFHP cuts violate both section 12 and section 15 of the *Charter*. Shortly after forming government in 2015, the government of Justin Trudeau dropped the appeal of Justice Mactavish’s decision (See Janice Dickson, “Liberals Drop Harper Government’s Court Battle Over Refugee Health Benefits”, *iPolitics* (16 December 2015), online: <<https://ipolitics.ca/2015/12/16/liberals-drop-harper-governments-court-battle-over-refugee-health-benefits/>>).

¹⁴⁷ See Labman, “Queue the Rhetoric”, *supra* note 134 See also Labman, *Crossing Law’s Border, supra* note 45 at 32.

¹⁴⁸ Public Safety Canada, Media Release, “Canada’s Generous Program for Refugee Resettlement is Undermined by Human Smugglers Who Abuse Canada’s Immigration System (21 October 2010), online: <<https://www.publicsafety.gc.ca/cnt/nws/nws-rlss/2011/20110616-3-en.aspx>>.

¹⁴⁹ Labman, *Crossing Law’s Border, supra* note 45 at 79. See also Megan Bradley & Cate Duin, “A Port in the Storm: Resettlement and Private Sponsorship in the Broader Context of the Refugee Regime”, in Shauna

The oppositional juxtaposition of resettlement and asylum has continued in recent years. While the current Canadian government has thus far refrained from the inflammatory rhetoric of its predecessor, its unprecedented response to the Syrian refugee crisis in 2015 and 2016 was immediately followed by a much different response to refugee claimants crossing the border. Amid calls to suspend or repeal the Canada-US Safe Third Country Agreement (STCA),¹⁵⁰ the government instead toyed with the idea of closing the “loophole” that exempt from the application of the STCA refugee claimants who enter Canada at an unofficial land crossing.¹⁵¹ Throughout policy debates around the so-called “crisis”, border crossers were labelled as “illegals” and “queue jumpers.” For instance, Conservative immigration critic Michelle Rempel suggested that border crossers take the place of more legitimate refugees waiting to be resettled:

Of course, there are real, human consequences of this. The people entering Canada illegally from the safety and security of the United States jump ahead of

Labman & Geoffrey Cameron, eds, *Strangers to Neighbors: Refugee Sponsorship in Context* (Montreal & Kingston: McGill-Queen’s University Press, 2020) 74.

¹⁵⁰ *Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*, 5 December 2002 [STCA]. The agreement is implemented through section 159.3 of the *IRPR*:

159.3 The United States is designated under paragraph 102(1)(a) of the Act as a country that complies with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture, and is a designated country for the purpose of the application of paragraph 101(1)(e) of the Act.

Irregular border crossings by refugee claimants into Canada began to increase in 2017 after US president Donald Trump enacted several restrictive measures designed to deter refugee claimants from entering the US, including detention and family separation, and the rejection of asylum claims resulting from gender-based violence or gang violence. As a result of the STCA, refugee claimants arriving from the United States are removed to the United States, unless specified exceptions apply (*IRPA*, s 101(1)e); *IRPR*, s 159.3). The STCA does not apply to refugee claimants who enter Canada at “a location that is not a port of entry” (*IRPR*, s 159.4(1)(a)). See Letter from Canadian Law Professors to the Hon Admed D Hussen, “Suspending Safe Third Country Agreement” (31 January 2017), online (pdf): <<https://www.osgoode.yorku.ca/wp-content/uploads/2017/01/Lettre-Letter.pdf>>.

¹⁵¹ Teresa Wright, “Border security minister mulling ways to close loophole in Safe Third Country Agreement”, *Toronto Star*, (15 March 2019), online: <<https://www.thestar.com/news/canada/2019/03/15/border-security-minister-mulling-ways-to-close-loophole-in-safe-third-country-agreement.html>>. See Sean Rehaag, “Closing the Canada-U.S. Asylum Border Agreement Loophole? Not So Fast” *The Conversation* (25 March 2019), online: <<https://theconversation.com/closing-the-canada-u-s-asylum-border-agreement-loophole-not-so-fast-114116>>. See also Labman, *Crossing Law’s Border*, *supra* note 45 at 54.

others around the world whose lives are in peril as they wait for asylum in Canada.¹⁵²

This view reflects at best a misunderstanding of the Canadian refugee system, at worse a poorly veiled attempt to demonize refugee claimants. There is no such “queue.” The processing of refugees abroad by IRCC operates independently of the system set up to process refugee claims.

This brings us back to the notion of refugee resettlement being used as a humanitarian alibi in the context of government efforts to limit their responsibilities towards asylum seekers, briefly discussed in section 2.5.2.2. Bradley & Duin write that Canada’s support for the resettlement of Syrian refugees has provided “cover for more restrictive responses to asylum-seekers, particularly those who have entered Canada by land from the United States.”¹⁵³ They also note that, while Canada has not decreased its financial commitment to international refugee organizations as a result of increased resettlement admissions, such reduction remains a “palpable concern.”¹⁵⁴

3.6 The PSR program: reforms and conflicting interests

Major changes to the PSR program took place around the same time as the inland refugee reform. These changes highlight many of the tensions and conflicting interests that lie at the core of the program. In 2011, the government repealed the Source Country class, which had existed since 1997.¹⁵⁵ In many respects, the Source Country class borrowed from the Political

¹⁵² Wright, *ibid.*

¹⁵³ Bradley & Duin, *supra* note 149 at 75.

¹⁵⁴ *Ibid* at 82.

¹⁵⁵ Section 148 of the *IRPR* (repealed by SOR/2011-222, s 6), read:

Prisoners and Oppressed Persons Designated Class under the 1976 *Immigration Act*. The Source Country class allowed for the resettlement of persons from certain designated countries of origin who remained in their country of origin but would otherwise qualify under one of the other two categories. Applicants under the Source Country class could be Government-Assisted, Privately Sponsored, or admitted as “self-supported refugees.” Countries designated under the class included Bosnia-Herzegovina, Colombia, Croatia, Cambodia, Guatemala, El Salvador, Liberia, Sudan, Sierra Leone and the Democratic Republic of Congo.¹⁵⁶ The administration of the Source Country posed particular challenges due to the fact that internally displaced persons (IDPs) do not come under the protection of the UNHCR. As a result, CIC could not rely on UNHCR for

148. (1) A foreign national is a member of the source country class if they have been determined by an officer to be in need of resettlement because

- (a) they are residing in their country of nationality or habitual residence and that country is a source country within the meaning of subsection (2) at the time their permanent resident visa application is made as well as at the time a visa is issued; and
- (b) they

- (i) are being seriously and personally affected by civil war or armed conflict in that country,
- (ii) have been or are being detained or imprisoned with or without charges, or subjected to some other form of penal control, as a direct result of an act committed outside Canada that would, in Canada, be a legitimate expression of freedom of thought or a legitimate exercise of civil rights pertaining to dissent or trade union activity, or
- (iii) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group, are unable or, by reason of such fear, unwilling to avail themselves of

(2) A source country is a country

- (a) where persons are in refugee-like situations as a result of civil war or armed conflict or because their fundamental human rights are not respected;
- (b) where an officer works or makes routine working visits and is able to process visa applications without endangering their own safety, the safety of applicants or the safety of Canadian embassy staff;
- (c) where circumstances warrant humanitarian intervention by the Department in order to implement the overall humanitarian strategies of the Government of Canada, that intervention being in keeping with the work of the United Nations High Commissioner for Refugees; and
- (d) that is set out in Schedule 2.

See Treviranus & Casasola, *supra* note 110 at 190; Labman, *Crossing Law's Border*, *supra* note 45 at 59-60, 126-40.

¹⁵⁶ See Canada, *Regulatory Impact Analysis Statement - Regulations Amending the Immigration and Refugee Protection Regulations [Source Country Class]*, (2011) C Gaz I, 1001.

pre-screening and referrals of applicants under the Source Country class, and visa offices in the designated countries found themselves receiving a large number of ineligible applications.¹⁵⁷ In moving to repeal the class, the Canadian government noted that application processing in those countries required substantially more resources than in countries that were not designated under the program.¹⁵⁸ In addition, the government noted that it was quite difficult to operate visa offices in countries experiencing wared conflict.¹⁵⁹ The Canadian government repealed the Source Country class in 2011, explaining that “the class was inefficient, unresponsive to evolving protection needs and that the problems were structural in nature.”¹⁶⁰ An equally important consideration is the fact that submissions under the Source Country class could potentially surpass the targets set by the government.¹⁶¹ The Canadian Council for Refugees criticized the repeal of the class, stating that the problems underlined by the government did not apply to those applying as privately sponsored refugees:

The government argues in the *Regulatory Impact Analysis Statement* that the challenge of giving applicants direct access in Source Countries undermines the effectiveness of the resettlement program. However, this argument does not apply to applicants who are privately sponsored, since they do not require direct access – they gain access to processing by virtue of the sponsor’s undertaking in their favour.¹⁶²

In 2012, the Harper government also introduced two important measures designed primarily to limit the number of applications submitted by private sponsors. First, Groups of Five and

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.* Citizenship and Immigration Canada, “Evaluation of Government Assisted Refugees (GAR) and Resettlement Assistance Program (RAP)” (March 2011) at 52.

¹⁵⁹ Labman, *Crossing Law’s Border*, *supra* note 45 at 129.

¹⁶⁰ Citizenship and Immigration Canada, “Repeal of the Source Country Class of Humanitarian-Protected Persons Abroad”, Operational Bulletin 346 (7 October 2011), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/bulletins-2011/347-october-7-2011.html>>.

¹⁶¹ Labman, *Crossing Law’s Border*, *supra* note 45 at 130.

¹⁶² Canadian Council for Refugees, “Comments on Proposed Elimination of Source Country Class” (18 April 2011), online: <<https://ccrweb.ca/en/comments-proposed-elimination-source-country-class>>.

Community Sponsors became limited to the sponsorship refugees who have previously obtained a formal refugee status recognition by the UNHCR or by a state.¹⁶³ This requirement, which has a disproportionate impact on certain nationalities, will be further examined in section 3.8.1.2. Second, a cap was placed on the number of applications each SAH can submit in a given year.¹⁶⁴ Additionally, between 2012 and 2017 - which overlaps with most of this dissertation's study period - SAH applications were further restricted by visa office "sub-caps."¹⁶⁵ The capped missions included Nairobi, Pretoria, Cairo, Islamabad, Rome, Tel Aviv and Dar es Salaam. Hyndman writes that the sub-caps affected primarily sub-Saharan refugees, and created a system of "racialized preference."¹⁶⁶ The Trudeau government eliminated the sub-caps in December 2016.¹⁶⁷

In 2012, the Canadian government also announced a mixed stream, termed "Blended Visa Office-Referred" (BVOR) program, whereby sponsors select refugees from a list provided by IRCC and share the settlement cost with the government.¹⁶⁸ The BVOR program was in fact the culmination of various blended pilot programs that had existed since the 1990s.¹⁶⁹ The idea of a

¹⁶³ IRPR, s 153(1)(b). See Canada, *Regulatory Impact Analysis Statement - Regulations Amending the Immigration and Refugee Protection Regulations*, (2012) C Gaz I, 1534. See also Shauna Labman, "Private Sponsorship: Complimentary or Conflicting Interests?" (2016) 32:2 *Refuge* 67 at 69 ["Private Sponsorship"].

¹⁶⁴ Immigration, Refugees and Citizenship Canada, Evaluation Division, "Evaluation of the Resettlement Programs (GAR, BVOR, PSR and RAP)" (July 2016) at para 4.1.1 ["Evaluation of the Resettlement Programs"].

¹⁶⁵ See Ashley Chapman, "Private Sponsorship and Public Policy: Political Barriers to Church-Connected Refugee Resettlement in Canada" (Citizens for Public Justice, 2014) at 8, online <<https://www.cpj.ca/private-sponsorship-and-public-policy>>.

¹⁶⁶ Jennifer Hyndman, "Unsettling Feminist Geopolitics: Forging Feminist Political Geographies of Violence and Displacement" (2019) 26:1 *Gender Place & Cult* 3 at 21. See also Labman, *Crossing Law's Border*, *supra* note 45 at 108.

¹⁶⁷ *Ibid.*

¹⁶⁸ IRPR, s 157. See Labman, *Crossing Law's Border*, *supra* note 45 at 86, 111-14.

¹⁶⁹ The first such ad hoc program, FOCUS Afghanistan, brought Afghanistan Ismaili refugees to Canada in 1994-1998. This program was slightly different than subsequent blended programs in that the refugees were selected by sponsor organizations. Five other pilot blended initiatives were implemented in subsequent years. See Labman, *Crossing Law's Border*, *supra* note 45 at 98-102. See also Rachel McNally, "The Blended Visa

blended program is to be understood in the context of declining visa office-referred (VOR) sponsorships under the regular PSR program and the government's concern over the prevalence of family-linked sponsorships. The BVOR program offers clear incentives to sponsors: the government covers half of the settlement cost, BVOR sponsorships are not counted towards allocated caps, and candidates on the BVOR list are, at least in theory, travel-ready.¹⁷⁰ Despite these incentives, participation in the BVOR program has been low. In the first years of the program, participation failed to reach the modest targets set by the government.¹⁷¹ Admission numbers grew during the Syrian refugee movement, as newly-formed sponsor groups with no links to refugee families were attracted by the relatively brief processing times of the program. However, BVOR numbers have since decreased, with the annual target sitting at 1,000 for 2021, a far cry from the 4,334 refugees resettled through the program in 2016. The BVOR program has been criticized by sponsors as a means to privatize the government's resettlement commitments. Indeed, in the first year of the program, BVOR admissions were carved out of existing GAR targets, which led to a statement from the Canadian Council for Refugees that sponsors taking part in the BVOR program were not providing additional resettlement, but merely "saving the government money."¹⁷² Today, BVOR targets are set out in a third, separate category, which better respects the principle of additionality. The BVOR program creates a new way for citizens and organizations to collaborate with government to achieve refugee protection. It also provides important incentives to sponsor groups looking to sponsor refugees with higher

Office-Referred Program: Perspectives and Experiences from Rural Nova Scotia", in Shauna Labman & Geoffrey Cameron, eds, *Strangers to Neighbors: Refugee Sponsorship in Context* (Montreal & Kingston: McGill-Queen's University Press, 2020) 134 at 135-37.

¹⁷⁰ See Labman, *Crossing Law's Border*, *supra* note 45 at 113-14 for a discussion of delays that developed in 2016 in the BVOR program, which resulted in the government offering "replacement cases" to sponsors.

¹⁷¹ *Ibid* at 111.

¹⁷² *Ibid* at 111-12; Canadian Council for Refugees, "Important changes in Canada's Private Sponsorship of Refugees Program" (January 2013), online: <<https://ccrweb.ca/en/changes-private-sponsorship-refugees>> ["Important Changes"].

needs. The sustainability of the BVOR program is uncertain, however, given that a core feature of the PSR program since its inception is the possibility of naming the refugees to be sponsored. One possible scenario is that participation in the BVOR program will remain low, with temporary spikes only when global events inspire an upsurge in new, one-time sponsors groups.

It is useful here to explore in further detail the evolving dynamic between sponsors and government over the issue of “naming” and “additionality”, considered to be the two pillars of private sponsorship. Howard Adelman writes that tensions between the government and the sponsorship community began developing in the 1990s:

Instead of a program characterized by an almost loving trust between the government and the private sector, it became a program, as the research report prepared by the Strategic Planning and Research Branch of Immigration Policy stated... characterized by “a lot of mistrust”.¹⁷³

The Canadian government engaged in a review of the PSR program in 1990 which revealed that the sponsorship community had major concerns over the PSR program. More than 20 years before the introduction of the BVOR program, sponsors expressed concern over the apparent shift in responsibility for refugee protection from the government to sponsors and the erosion of the principle of “additionality.”¹⁷⁴ At the height of the Indochinese refugee movement, the

¹⁷³ Employment and Immigration Canada, “Discussion Paper: Private Sponsorship of Refugees Program” (1992) 12:3 Refuge 2 at 3 [“Discussion Paper”].

¹⁷⁴ See also Treviranus & Casasola, *supra* note 110 at 186-87. The CCR defines the principle of additionality in the following terms:

Additionality – private sponsorship is additional to government assisted refugees. Each year the government makes its commitment, on behalf of Canadians, to resettle a certain number of refugees. Anything that Canadians do through private sponsorship is on top of that commitment. This means that it allows Canadians to offer protection and a permanent home to extra refugees, who would not otherwise have the opportunity (Canadian Council for Refugees, “Important Changes”, *supra* note 172 at 1).

See also, on the principle of additionality during the Indochinese refugee movement: Casasola, “The Indochinese Refugee Movement”, *supra* note 101 at 48. While IRCC acknowledges the PSR

number of privately sponsored refugees was *over and above* the government's GAR commitments. Privately sponsored refugees were not included in annual targets. What is more, the government had in the early days of the program committed to "matching" each privately sponsored refugee with a government-assisted refugee.¹⁷⁵ The matching formula was dropped in 1980, but the new admission commitments informally reflected the former formula.¹⁷⁶ In any case, during this period, private sponsorship was considered to be truly "additional." The success of the PSR program, in a way, had a perverse effect on the government's refugee policy. Between the late 1980s and early 1990s, PSR admission numbers surpassed GAR admission numbers, leading many in the sponsorship community to question whether the principle of additionality had been abandoned and whether the government had come to rely on private sponsors to deliver its humanitarian policy. As will be discussed later in this chapter, the concept of additionality remains a controversial aspect of the PSR program to this day.

The government's 1990 report also revealed that the issue of "naming" had become an important concern from the government's perspective.¹⁷⁷ In the first few years of the PSR program - and with regard to Indochinese refugees in particular - private sponsors engaged overwhelmingly in "nameless" sponsorships, that is, a sponsorship where the refugee is selected

community's understanding of the notion of additionality, it considers that "the principle of additionality is not part of the PSR program theory" (Immigration, Refugees and Citizenship Canada, "Evaluation of the Resettlement Programs", *supra* note 164 at 14).

¹⁷⁵ Labman, *Crossing Law's Broder*, *supra* note 45 at 89.

¹⁷⁶ *Ibid* at 92.

¹⁷⁷ Even today, the naming principle remains rather unique to the Canadian PSR program. Governments around the world have recently adopted refugee sponsorship programs, but very few have adopted the naming principle. See Sabine Lehr & Brian Dyck, "'Naming' Refugees in the Canadian Private Sponsorship of Refugees Program: Diverse Intentions and Consequences", in Shauna Labman & Geoffrey Cameron, eds, *Strangers to Neighbours: Refugee Sponsorship in Context* (Montreal & Kingston: McGill-Queen's University Press, 2020) 42 at 42.

by the government.¹⁷⁸ As the program evolved, sponsors increasingly resorted to “named” sponsorships. Many of these refugees were family members of other refugees brought through the program (“echo” sponsorships). The government’s concern at this point was that the PSR program had become more of a parallel family reunification program than a humanitarian program.¹⁷⁹ The BVOR program and previous “blended initiatives” were designed to allow it to regain control of the naming of sponsored refugees.¹⁸⁰ Interestingly, in 2000, the blended initiative for Sierra Leonean refugees blended initiative included an appeal to the Sierra Leonean ethnic community to sponsor their family members.¹⁸¹ In more recent years, the Canadian government has come to consider the naming practice in a much more favourable light. CIC’s 2007 Summative Evaluation expressly recognized that family-linked refugee sponsorship is aligned with UNHCR priorities and *IRPA*’s objective of family reunification.¹⁸²

Lehr and Dyck write that many states have adopted a sponsoring program following Canada-led consultations, but note that few have adopted the naming principle.¹⁸³ This speaks to the fact that both states and the UNHCR are reluctant to relinquish refugee selection to sponsors. However, the ability to name refugees has significant benefits. Many attribute Canada’s sustained sponsor participation over the decades to the ability to name refugees. As mentioned above, reuniting separated families is a recognized principle of both the international refugee regime and an objective of Canadian immigration legislation. However, there remains a concern that refugees

¹⁷⁸ *Ibid* at 44.

¹⁷⁹ Employment and Immigration Canada, “Discussion Paper”, *supra* note 173 at 4. See also Treviranus & Casasola, *supra* note 110 at 186-87.

¹⁸⁰ See Labman, “Private Sponsorship”, *supra* note 163; Shauna Labman & Madison Perlman, “Blending, Bargaining, and Burden-Sharing: Canada’s Resettlement Programs” *J Int Migr & Integration* 339. See also Labman, *Crossing Law’s Border*, *supra* note 45 at 111-14

¹⁸¹ Treviranus & Casasola, *supra* note 110 at 194-95.

¹⁸² See Lehr & Dyck, *supra* note 177 at 54.

¹⁸³ *Ibid* at 42.

selected by private sponsors may not be the most vulnerable, and that consequently the program may be having a lesser impact than it otherwise could.¹⁸⁴ In her examination of the ethical considerations around refugee selection in the PSR program, Lenard recognizes the value of selecting family members of Canadians for resettlement, but maintains that refugees with non-familial connections to Canada should not be favoured over more vulnerable candidates:

Canadians should otherwise be encouraged to select refugees for sponsorship from those who are listed on the UNHCR priority list, and they should be discouraged from selecting on the basis of discriminatory connections.¹⁸⁵

3.7 Access to asylum and resettlement

In section 2.6.3, I discussed the importance of refugee resettlement for international refugee protection in light of the methods and technologies countries of asylum deploy to restrict access to their asylum system. In this section, I want to canvass interdiction measures enacted by Canada in recent decades. Various mechanisms are currently used to prevent persons from accessing Canada's asylum system. The *IRPA* as adopted in 2002 barred access to the asylum system to persons who have previously applied for refugee status in Canada (whether or not the application was withdrawn),¹⁸⁶ persons who were granted refugee status by another state and can be returned there,¹⁸⁷ and persons who are inadmissible because of security, violating human or international rights, serious criminality, or organized criminality.¹⁸⁸ The *IRPA* also provides for the designation of safe third countries.¹⁸⁹ The contentious Canada-US Safe Third Country Agreement, adopted in 2001, discussed in section 3.5, came into force in 2004. Under the

¹⁸⁴ See Bradley & Duin, *supra* note 149 at 74.

¹⁸⁵ *Ibid* at 66.

¹⁸⁶ *IRPA*, ss 101(1)(b)-(c).

¹⁸⁷ *IRPA*, s 101(1)(d).

¹⁸⁸ *IRPA*, s 101(1)(f).

¹⁸⁹ Section 101(1)(e) of the *IRPA* provides that a claim is ineligible if the claimant “came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence.”

regulations, barring certain exceptions,¹⁹⁰ anyone who enters Canada through a land or air port of entry is ineligible to claim refugee status. Arbel reports that the impact of the STCA on asylum seekers has been momentous:

In the first year of the STCA's operation, the number of claims lodged at the border declined by over 50 per cent, from 8,904 in 2004 to 4,041 in 2005. Recent statistics suggest a continuation of this trend. In 2010, for example, 4,642 claims were lodged at the border. In 2011, the numbers dropped significantly, with only 2,563 claims. In 2012, 3,790 claims were lodged at the border.¹⁹¹

The STCA became especially contentious following changes in the US asylum system under the Trump administration, leading to a second constitutional challenge of the STCA framework. In July 2020, Justice McDonald of the Federal Court determined that the section 7 *Charter* rights of persons returned to the United States under the terms of the *STCA* were breached because such persons face automatic detention:

The narrow focus here is the consequences that flow when a refugee claimant is returned to the US by operation of the STCA. The evidence establishes that the conduct of Canadian officials in applying the provisions of the STCA will provoke certain, and known, reactions by US officials. In my view, the risk of detention for the sake of “administrative” compliance with the provisions of the STCA cannot be justified. Canada cannot turn a blind eye to the consequences that befell Ms. Mustefa in its efforts to adhere to the STCA. The evidence clearly demonstrates that those returned to the US by Canadian officials are detained as a penalty.¹⁹²

The federal government is appealing the decision to the Federal Court of Appeal and successfully obtained a stay of justice McDonald's order.¹⁹³

¹⁹⁰ The exceptions include persons who have close family members in Canada, unaccompanied minors, temporary residents, and persons facing the death penalty in the United States (*IRPR*, ss 159.5, 159.6).

¹⁹¹ Efrat Arbel, “Shifting Borders and the Boundaries of Rights: Examining the Safe Third Country Agreement between Canada and the United States” (2013) 25:1 *Intl J Refugee L* 65 at 71-72.

¹⁹² *Canadian Council for Refugees v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 770 at para 138.

¹⁹³ *Canada (MCI) v Canadian Council for Refugees*, 2020 FCA 181. See Public Safety Canada, Media Release, “Government of Canada to appeal the Federal Court decision on the Safe Third Country Agreement”

Recently, in the wake of an increase in irregular arrivals of asylum seekers through the Canada-US land border, the Canadian government amended the *IRPA* to render ineligible any person who has previously made a refugee claim in a “Five Eye Alliance” country (the USA, the UK, Australia or New Zealand).¹⁹⁴

However, the most effective restriction to asylum is not achieved through ineligibility, but through visa requirements and overseas interception activities. Morrison and Crosland explain that

[t]he imposition of visa restrictions on all countries that generate refugees is the most explicit blocking mechanism for asylum flows and it denies most refugees the opportunity for legal migration.¹⁹⁵

Throughout the past decades, Canada has frequently amended its visa policy to impose a visa requirement on particular countries in response to changes in refugee flows (Hungary in 2001, Mexico and the Czech Republic in 2009).¹⁹⁶ The government’s rationale for such change in visa policy is rather perverse. Refugee arrivals are deemed “illegal” if they lack the proper visa. They are deemed “abusive” if they come when no visa is required, which justifies the imposition of a

(21 August 2020), online: <<https://www.canada.ca/en/public-safety-canada/news/2020/08/government-of-canada-to-appeal-the-federal-court-decision-on-the-safe-third-country-agreement.html>>.

¹⁹⁴ Bill C-97, *An Act to Implement Certain Provisions of the Budget Tabled in Parliament on March 19, 2019 and Other Measures*, 1st Sess, 42nd Parl, 2015, cl 306. See Grace Wu, Johanna Reynolds & Julie Young, “Refugee Stories Reveal Anxieties About the Canada-U.S. Border”, *The Conversation* (20 January 20), online: <<https://theconversation.com/refugee-stories-reveal-anxieties-about-the-canada-u-s-border-127394>>.

¹⁹⁵ John Morrison & Beth Crosland, “The Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy?” (2001) UNHCR Working Paper No 39 at 28, online: <<https://www.unhcr.org/research/working/3af66c9b4/trafficking-smuggling-refugees-end-game-european-asylum-policy-john-morrison.html>>. See Andrew Brouwer & Judith Kumin, “Interception and Asylum: When Migration Control and Human Rights Collide” (2003) 21:4 *Refugee* 6.

¹⁹⁶ See Efrat Arbel & Alletta Brenner, “Bordering on Failure: Canada-U.S. Border Policy and the Politics of Refugee Exclusion” (Harvard Law School, Harvard Immigration and Refugee Law Clinical Program, 2013) at 6.

visa requirement for that particular country.¹⁹⁷ Today, a visa is required to enter Canada as a visitor for citizens of 148 countries, which together account for 99.74% of the refugee population under UNHCR's mandate.¹⁹⁸ Visas are systematically refused if it is suspected that the applicant will seek asylum in Canada.¹⁹⁹ It is worth mentioning that merely applying for a visa can prove extremely difficult for persecuted persons. Visa applicants need to present a valid passport from their country of origin. Asylum seekers take a risk in obtaining a passport from their government. In the case of collapsed governments, there may be no authority issuing passports.²⁰⁰ In addition, a visa application can result in coordination and information sharing between Canada and the country of origin, which may expose the applicant.²⁰¹ As a result, travelling without proper documentation and employing smuggling is the only option for many fleeing danger.²⁰²

Canada engages in interception activities designed to intercept travellers who do not have valid

¹⁹⁷ See Gerald Kernerman, "Refugee Interdiction Before Heaven's Gate" (2008) 43:2 *Government & Opposition* 230 at 244.

¹⁹⁸ Data obtained through UNHCR, "Refugee Data Finder", online: <<https://www.unhcr.org/refugee-statistics/>>. The list of visa-exempt countries is provided in Schedule 1.1 of the *IRPR*.

¹⁹⁹ Section 179(b) of the *IRPR* reads:

An officer shall issue a temporary resident visa to a foreign national if, following an examination, it is established that the foreign national

...

(b) will leave Canada by the end of the period authorized for their stay under Division 2.

²⁰⁰ Brouwer & Kumin, *supra* note 195 at 8-9.

²⁰¹ Arbel & Brenner, *supra* note 196 at 39.

²⁰² Human Rights Watch reports:

In many cases, it is impossible for people fearing persecution from their government to obtain a passport from that government or to approach embassies in search of a visa. Even when people do approach embassies, persons from a growing number of countries will never be able to obtain a visa for the purpose of fleeing persecution. Desperate people will resort to desperate measures. With all other options closed, migrants and asylum seekers have been forced to make use of illegal and dangerous means of entry via sophisticated trafficking and smuggling rings. Numerous studies, including a recent UNHCR report, have concluded that restrictive entry policies have themselves contributed to the rise in trafficking and smuggling of persons (Human Rights Watch, International Catholic Migration Committee & World Council of Churches, "NGO Background paper on the Refugee and Migration Interface" (UNHCR Global Consultations on International Protection, 29 June 2001) at 8, online (pdf): <https://www.hrw.org/reports/ngo_refugee.pdf>).

visas without regard to protection needs.²⁰³ These activities are deployed as part of the Multiple Borders Strategy developed in 2003. The Multiple Borders Strategy's goal is to "push the border out" of the Canadian territory to facilitate the interception of undocumented migrants.²⁰⁴ Canada places immigration liaison officers at various overseas locations. Liaison officers - formerly known as "Migration Integrity Officers" - are tasked with "identifying and intercepting people in offshore locations, and also, training and working with airlines, local immigration authorities, and local law enforcement agencies to do the same."²⁰⁵ Arbel and Brenner report that, as of 2013, Canada has deployed 63 officers in 48 strategic overseas locations, leading to the interception of 73,000 persons since 2001.²⁰⁶ The Canadian government states that its practice is to direct to the UNHCR any person found to be in need to asylum. However, liaison officers are not mandated to assess protection needs and there is no available data on this practice. In addition, interception activities can occur in transit states that are not signatories to the Refugee Convention, where refugee claimants are at risk of *refoulement*.²⁰⁷

It is also worth mentioning that Canada incentivizes airlines to be extremely vigilant in their scrutiny of travellers coming to Canada through the use of carrier sanctions, whereby an airline is charged a hefty penalty for each traveller coming to Canada without valid documentation.²⁰⁸

²⁰³ See Michael Bossin, "Bill C-31: Limited Access to Refugee Determination and Protection" (2001) 19:4 *Refuge* 55 at 56.

²⁰⁴ Arbel & Brenner, *supra* note 196 at 2.

²⁰⁵ *Ibid* at 30.

²⁰⁶ *Ibid* at 34.

²⁰⁷ See Janet Dench, "Controlling the Borders: C-31 and Interdiction (2001) 19:4 *Refuge* 34 at 37; Brouwer & Kumin, *supra* note 195.

²⁰⁸ See François Crépeau & Stephen H Legomsky, "North American Responses: A Comparative Study of US and Canadian Refugee Policy" in Susan Kneebone & Felicity Rawlings-Sanaei, eds, *New Regionalism and Asylum Seekers - Challenges Ahead* (New York: Berghahn Books, 2007) 137.

Irregular travel is also curbed through the penalization of “people smuggling.”²⁰⁹

Canada’s asylum system - and that of Western liberal states more generally - is full of contradictions. Canada has established a relatively robust system to assess asylum claims, but every possible step is taken to prevent refugee claimants from accessing it. Matthew Gibney describes interdiction measures as a “liberal schizophrenia.”²¹⁰ The proliferation of interdiction measures seriously erodes the relevance of the Refugee Convention and the *non-refoulement* principle. It is precisely because refugee claimants face growing obstacles on their way to protection that refugee resettlement can play an important role in responding to global refugee needs. Paradoxically, as discussed earlier in this chapter, successive governments have justified restrictions to Canada’s inland system by announcing new resettlement initiatives. Framing refugee resettlement as a “humanitarian alibi” for restrictive asylum policies co-opts resettlement in an effort to erode the *non-refoulement* principle.

3.8 The legal framework of refugee resettlement in Canada

This section will provide an overview of current eligibility and admissibility criteria for refugee resettlement applicants and highlight the differences between the eligibility for resettlement and eligibility for seeking inland asylum. While I will not focus on sponsor eligibility and restrictions, it is useful to quickly review the different categories of resettled refugees and how

²⁰⁹ See Dench, *supra* note 207; David Moffette & Nevena Aksin, “Fighting Human Smuggling or Criminalizing Refugees? Regimes of Justification in and around R v Appulonappa” (2010) 33:1 CJLS 21; Idil Atak, Graham Hudson & Delphine Nakache, “Making Canada’s Refugee System Faster and Fairer: Reviewing the Stated Goals and Unintended Consequences of the 2012 Reform” (2017) CARFAMS Working Paper no 2017/3, online (pdf): <<https://carfms.org/wp-content/uploads/2017/05/CARFMS-WPS-No11-Idil-Atak.pdf>>.

²¹⁰ Matthew J Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees*, (Cambridge: Cambridge University Press, 2004) at 2. See also Kernerman, *supra* note 197 at 230.

they operate.²¹¹

Under current Canadian law, refugee applicants cannot independently submit an application to IRCC.²¹² They must be selected either by the Canadian government under the Government Assisted Refugees (GAR) program, or by Canadian sponsors as Privately Sponsored Refugees (PSRs). GARs receive settlement and financial assistance from the federal government through the Refugee Assistance Program (RAP) for a period of 12 months.²¹³ Privately sponsored refugees receive financial and social support from their sponsor, and also have access to government-funded settlement services.²¹⁴ In some exceptional circumstances, financial support can be extended in both the PSR and GAR programs to up to 36 months.²¹⁵

Financial assistance provided to both GARs under the RAP and to PSRs are roughly equivalent to prevailing social assistance rates.²¹⁶ In theory, private sponsors can either select the sponsored refugee independently (“named sponsorship”) or from a pre-approved list provided by IRCC (“visa office-referred refugee” - VOR), but the vast majority are sponsor-referred.²¹⁷ As

²¹¹ The Government of Quebec has established different rules for the private sponsorship of refugees within the province. This section focuses only on the rules governing private sponsorship outside Quebec.

²¹² Section 150 of the *IRPR*, which was repealed in 2012, allowed for independent applications without a referral or undertaking in certain countries or geographical areas designated by the Minister. Direct access was also allowed under the former Source Country Class, abolished in October 2011. See Labman, *Crossing Law’s Border*, *supra* note 45 at 60.

²¹³ The eligibility period under the RAP program can be extended for another 12 months in cases with special needs. See Citizenship and Immigration Canada, *IP 3 - In Canada Processing of Convention Refugees Abroad and Members of the Humanitarian Protected Persons Abroad Classes – Part 2 [Resettlement Assistance Program (RAP)]* at para 14.7, online (pdf):

<<https://www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/ip/ip03-part2-eng.pdf>>.

²¹⁴ Financial support guidelines stipulate that financial support should be equivalent to social assistance rates. In exceptional cases, the sponsorship period can be extended for up to three years: *IRPR*, s 154(2)- (3).

²¹⁵ *IRPR*, s 154(4). See Citizenship and Immigration Canada, “OP5 - Overseas Selection and Processing of Convention Refugees Abroad Class and Members of the Humanitarian-protected Persons Abroad Classes” (8 August 2009) at para 13.14 [“Overseas Selection and Processing”].

²¹⁶ Many sponsors, however, voluntarily provide additional financial assistance.

²¹⁷ See Casasola, “The Indochinese Refugee Movement”, *supra* note 101; Canada, “Resettlement Handbook

mentioned earlier in this chapter, private sponsors can now sponsor through the BVOR program and share the cost of sponsorship with the government. Another program, the Joint Assistance Program, matches GARs with private sponsors, who provide non-financial settlement support to the refugees.²¹⁸

Three types of private sponsors exist under the federal framework.²¹⁹ Sponsorship Agreement Holders (SAHs), who are responsible for the majority of sponsorships, are incorporated entities that have an ongoing agreement with the Canadian government to make several sponsorships each year.²²⁰ SAHs can sponsor on their own, with a partner organization (constituent group) or with an individual (co-sponsor). The second most common sponsorship structure is the Group of Five, defined as a group of five Canadian citizens or permanent residents who come together to make a single sponsorship. Both the SAH category and the Groupe of Five category existed under the 1976 *Immigration Act*. A third category, the Community Sponsor, was created after the adoption of the 2001 *IRPA*. A Community Sponsor can be an organization, corporation or association. Like Groups of Five, Community Sponsors are assessed for each sponsorship they make.²²¹ As mentioned earlier in this chapter, Groups of Five and Community Sponsors can only sponsor refugees who have received a previous refugee determination by a state or by the UNHCR. SAHs are exempted from the UNHCR documentation requirement, but are limited by annual caps.

Country Chapter: Canada” (July 2011, revised February 2018), online: <<https://www.unhcr.org/protection/resettlement/3c5e55594/unhcr-resettlement-handbook-country-chapter-canada.html>> [“Country Chapter: Canada”].

²¹⁸ *IRPR*, s 157. See Labman, *Crossing Law’s Border*, *supra* note 45 at 85.

²¹⁹ Immigration, Refugees and Citizenship Canada, “Guide to the Private Sponsorship of Refugees Program” (2019), at paras 2.3-2.5, online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/guide-private-sponsorship-refugees-program.html>>.

²²⁰ The Sponsorship Agreement Holder category is essentially equivalent to the “Master Agreement Holder” category that existed under the 1976 *Immigration Act* framework.

²²¹ The Community Sponsor category did not exist under the 1976 *Immigration Act* framework.

Since 1997, the province of Quebec has operated a separate but integrated private sponsorship program with similar categories of private sponsor.²²² The sponsor categories in Quebec are defined slightly differently. Instead of the Group of Five, the Quebec criteria allow for sponsorships to be conducted by Groups of *Two to Five*, and all sponsor organizations must be incorporated. The Quebec framework is also distinct in that the ministère de l'Immigration, de la Diversité et de l'Inclusion has in the past issued blanket suspensions on all sponsorship applications.²²³

3.8.1 Refugee eligibility

3.8.1.1 The refugee classes

Eligibility requirements for resettled refugees borrow from both the inland refugee framework and regular immigration programs. Refugee resettlement applicants must be members of one of two classes: the Convention Refugee Abroad class or the Humanitarian-Protected class, both defined in the *IRPR*. The Convention Refugee Abroad Class²²⁴ refers to Convention Refugee definition found in the Geneva Convention and incorporated in section 96 of the *IRPA*:

²²² See Québec, Ministère de l'Immigration, de la Diversité et de l'Inclusion, "Le parrainage collectif des personnes en situation particulière de détresse" (2010), online: <<https://numerique.banq.qc.ca/patrimoine/details/52327/2062473>>.

²²³ Such a suspension was implemented in January 2017 following the submission of a large number of sponsorship applications for Syrian refugees: Québec, Ministère de l'Immigration, de la Diversité et de l'Inclusion, Press Release, "Accueil de réfugiés parrainés - Suspension temporaire de la réception de nouvelles demandes de parrainage" (9 January 2017), online:

<<http://www.mifi.gouv.qc.ca/fr/presse/communiqués/com20170109.html>>. Another temporary suspension, this one resulting from "préoccupations sérieuses concernant l'intégrité de certaines pratiques de personnes morales" was announced on October 28, 2020: Québec, AM 2020-004, (2020) GOQ II, 4526. Under this suspension, sponsorship applications from organizations are suspended until November 1st, 2021, while Groups of 2-5 are limited to 750 applications until a new policy is announced. See Adèle Garnier & Shauna Labman, "Why Québec's Refugee Sponsorship Suspension is so Misguided", *The Conversation* (22 November 2020), online: <<https://theconversation.com/why-quebecs-refugee-sponsorship-suspension-is-so-misguided-149250>>.

²²⁴ *IRPR*, ss 139(1)(e), 144, 145.

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

The Convention refugee definition operates in Canada's overseas and inland systems. Both the inland and the overseas programs establish a secondary ground of protection. In the inland context, the *IRPA* establishes the "Persons in need of protection" category, defined as persons who face a risk of torture, a risk to their life, or cruel and unusual punishment.²²⁵ That category does not apply in the overseas context. The refugee resettlement framework contains a rather wide additional category. Section 147 of the *IRPR* establishes the Country of Asylum class, whose members are defined as foreign nationals who are seriously and personally affected by civil war, armed conflict, or massive violations of human rights in each of those countries. Since the Source Country class was repealed in 2011, the Country of Asylum class is currently the only sub-class included in the broader Humanitarian-Protected class:

Member of the country of asylum class

147 A foreign national is a member of the country of asylum class if they have been determined by an officer to be in need of resettlement because

(a) they are outside all of their countries of nationality and habitual residence; and

(b) they have been, and continue to be, seriously and personally affected by civil war, armed conflict or massive violation of human rights in each of those countries.

There is no dearth of Federal Court case law, UNHCR guidelines, or legal treatises addressing

²²⁵ *IRPA*, s 97. Persons will not qualify under the "person in need of protection" category if the risk is "faced generally by other individuals in or from that country."

the Convention refugee definition. Refugee lawyers and scholars are familiar with the Convention refugee definition, which has governed international and domestic refugee systems since 1951. The Country of Asylum class definition, being unique to Canada's resettlement system, has received much less attention from courts and commentators. It is worth reviewing here IRCC's own interpretation of the definition found in its operating manual. CIC's 2009 manual on overseas processing of refugees includes the following statement about the meaning of "human rights" under the Country of Asylum refugee class:

Human rights are defined in the Universal Declaration of Human Rights as rights from which no derogation is permitted under the International Covenant on Civil and Political Rights (ICCPR), even in times of war. The ICCPR lists the following as core human rights:

- right to life;
- freedom from torture;
- freedom from enslavement or servitude;
- protection from imprisonment for debt;
- freedom from retroactive penal laws;
- the right to recognition as a person before the law; and
- freedom of thought, conscience and religion.

ICCPR incorporates the core human rights from the Universal Declaration of Human Rights and further outlines a broader range of rights. For example, it states that freedom from arbitrary arrest and detention is a human right as is freedom from arbitrary interference in private, home and family life.

What constitutes a basic human right is determined by the international community, not by any one country. However, when making a determination as to whether a fundamental violation of a human right has taken place, it is acceptable to consider Canadian law.²²⁶

The same manual explains in the following terms the meaning of a "massive" violation of

²²⁶ Citizenship and Immigration Canada, *Overseas Selection and Processing*, *supra* note 215 at para 6.8. As part of department-wide modernization efforts, IRCC and CBSA are currently transitioning to online program delivery instructions. The content of the former manual is now published online: Immigration, Refugees and Citizenship Canada, "Program Delivery Instructions: Refugee Protection - Resettlement", online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/refugee-protection/resettlement.html>>.

human rights:

A “massive” violation of human rights means that the violation is not an isolated occurrence. “Isolated” can be interpreted two ways. In one sense, a violation is isolated (i.e., not massive), if it happens to an individual (or a few individuals) as opposed to a specific group or an entire population. In another sense, a violation is isolated if it is a one-time occurrence, as in the case of an eruption of violence over a particular incident. There may not be a history of violence prior to the incident in question, nor is there a reasonable expectation of a recurrence. In this sense, the violence may have been horrific, but it would not be considered “massive” in the context of these Regulations.²²⁷

The Country of Asylum Class definition is partly analogous to the “broader refugee definition” developed and applied by the UNHCR, which defines refugees as persons who are

outside their country of origin or habitual residence and unable to return there owing to serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order.²²⁸

The UNHCR’s Resettlement Handbook further explains that this category includes “persons who are affected by the indiscriminate effects of armed conflict or other ‘man-made disasters’, including, for example, foreign domination, intervention, occupation or colonialism.”²²⁹ The Country of Asylum class, just like the UNHCR’s broader refugee definition (and unlike the Convention refugee definition) does not require that the person be specifically targeted. The harm feared may be the result of indiscriminate acts.

²²⁷ *Ibid* at 6.28.

²²⁸ UNHCR, *Resettlement Handbook* (Geneva: UNHCR, 2011) at para 3.2.2 [*Resettlement Handbook*]. See also UNHCR, “Note on The Mandate of the High Commissioner for Refugees and his Office” (October 2013) at 3, online: <<https://www.refworld.org/docid/5268c9474.html>>.

²²⁹ UNHCR, *Resettlement Handbook*, *ibid* at para 3.4.

3.8.1.2 Other criteria

i) No alternative durable solution

As mentioned in the second chapter of this dissertation, the Canadian resettlement system follows the international refugee regime's preference for repatriation, firmly entrenched since the early 1990s. In the Canadian resettlement program, resettlement will *only* be offered if the applicant has "no reasonable prospect, within a reasonable period, of a durable solution in a country other than Canada."²³⁰

ii) Successful establishment

The *IRPR* require that resettlement applicants satisfy the visa officer that they will become "successfully established" in Canada. Establishment potential is to be assessed taking into consideration the following factors:

- (i) their resourcefulness and other similar qualities that assist in integration in a new society,
- (ii) the presence of their relatives, including the relatives of a spouse or a common-law partner, or their sponsor in the expected community of resettlement,
- (iii) their potential for employment in Canada, given their education, work experience and skills, and
- (iv) their ability to learn to communicate in one of the official languages of Canada²³¹

As, mentioned earlier in this chapter, the successful establishment requirement, as initially formalized under the 1976 *Immigration Act*, imposed stricter criteria. For example, the former regulations required that establishment potential be assessed taking into consideration the ability of the applicants to communicate in French or English, rather than their "ability to learn" those languages. The rationale behind the successful establishment criteria was criticized in the 1999

²³⁰ *IRPR*, s 139(1)(d).

²³¹ *IRPR*, s 139(1)(g).

LRAG report.²³² In the 2001 *IRPA*, the successful establishment requirement relaxed and completely eliminated for applicants determined to be “vulnerable or in urgent need of protection.”²³³ Current policy documents relied on by visa officers state that eligibility assessments are to focus not on successful establishment, but on protection needs.²³⁴

CIC’s manual on refugee overseas processing describes the successful establishment assessment as involving the determination of the likelihood that the applicant will “be able to provide for themselves and their dependants; and not rely on social assistance for food and shelter after a 3 to 5-year time period.”²³⁵ While it appears that relatively few applicants are refused for lack of establishment potential,²³⁶ the current successful establishment criteria remain at odds with the principle of humanitarianism and refugee protection. Aiken offers the following assessment:

While the criteria are to be applied with an emphasis on social factors rather than strictly economic, subjective and highly discretionary considerations with regard to the refugee’s “personal suitability” continue to supplant the assessment of the refugee’s need for protection. Canadian visa officers frequently overrule the advice of legal officers from the United Nations High Commissioner for Refugees with regard to deserving cases. Despite widespread criticism of the government’s refugee resettlement model, officials have refused to eliminate the establishment criteria from overseas selection.²³⁷

²³² See section 3.5.

²³³ *IRPR*, s 139(2). Section 138 of the *IRPR* defines a person in “urgent need of protection” as someone who is likely to be killed, subjected to violence, torture, sexual assault or arbitrary imprisonment, or returned to their country of nationality. A “vulnerable” refugee is defined as a person who “has a greater need of protection than other applicants for protection abroad because of the person’s particular circumstances that give rise to a heightened risk to their physical safety.”

²³⁴ IRCC’s processing manual states that the “shift toward protection rather than ability to establish” is one of the four core principles of Canada’s resettlement program. The other three core principles are rapid family reunion, accelerated processing of urgent and vulnerable protection cases, and balancing inclusiveness with effective management through closer relationships with partners (Citizenship and Immigration Canada, “Overseas Selection and Processing”, *supra* note 215 at para 5.2).

²³⁵ *Ibid* at para 13.9.

²³⁶ In the 105 cases reviewed for the purpose of CIC’s 2011 PSR quality assurance evaluation, “(s)ettlement potential was cited in less than 5 percent of refused cases, showing that visa officers are well aware of the humanitarian basis for the program (Citizenship and Immigration Canada, “The PSR QA Project: Managing Quality Counts” (2011) at 2.2 [“PSR QA Project”]). See also Labman, *Crossing Law’s Border*, *supra* note 45 at 63; Pressé & Thomson, *supra* note 106 at 96.

²³⁷ Sharry Aiken, “From Slavery to Expulsion”, *supra* note 7 at 76. In the same vein, Labman writes:

The UNHCR handbook itself states that the integration potential of refugees should not be a relevant factor in assessing the need for resettlement:

The notion of integration potential should not negatively influence the selection and promotion of resettlement cases. For example, educational level or other factors considered to be enhancing the prospects for integration are not determining factors when submitting cases for resettlement.²³⁸

iii) Inadmissibility

Under Canadian immigration law, some categories of non-citizens are barred from entering or remaining in Canada. The grounds of inadmissibility under the *IRPA* include security, human or international rights violation, criminality, health, financial situation, misrepresentation, failure to comply with the act, and having an inadmissible family member.²³⁹ Naturally, resettlement applicants are exempt from financial inadmissibility, as most will immediately require government or private sponsor financial support.²⁴⁰ Resettlement applicants are also exempt from health inadmissibility for placing excessive demands on health or social services.²⁴¹ This latter exemption did not exist under the 1976 *Immigration Act* framework. In addition, through section 22 of the *IRPR*, both inland refugee claimants and overseas resettlement applicants are

The fact that [the successful establishment criteria] remain in the regulation, however, means that they can be used as a basis of refusal in as many cases as desired. This despite some reworking of the criteria, the successful establishment criteria in the regulations continue to reflect the desired qualities of economic immigrants (Labman, *Crossing Law's Border*, *supra* note 45 at 63).

Before the adoption of the *IRPA*, Michael Casasola observed that the successful establishment assessment leads to inconsistent decision-making:

This seemingly objective assessment essentially measures the ability to become financially independent within one year of her arrival. In reality this is a highly subjective assessment which has led to inconsistent decision-making among visa posts. This criterion can prevent Canada from resettling refugees believed to be in greatest need of protection or a durable solution (Casasola, "Legislative Review", *supra* note 124 at 19).

²³⁸ UNHCR, *Resettlement Handbook*, *supra* note 228 at para 6.1. See also Labman, *supra* note 45 at 27.

²³⁹ *IRPA*, ss 33-42.

²⁴⁰ *IRPR*, s 139(3); *IRPA*, s 39.

²⁴¹ *IRPA*, s 139(4).

exempt from inadmissibility under the ground of misrepresentation.²⁴² Resettlement applicants remain however subject to all of the other grounds of inadmissibility.

iv) UNHCR or state refugee status documentation

Since 2012, Groups of Five and Community Sponsors can only sponsor refugees that have obtained a positive refugee determination from the UNHCR or a foreign state.²⁴³ This change was part of a broader set of reforms implemented in 2011-2012, designed to reduce the number of applications submitted in the PSR program and to increase the acceptance rate in the PSR stream.²⁴⁴ As a result of the change, sponsorships submitted by Groups of Five fell drastically in comparison to SAH sponsorships. In 2010, Groups of Five sponsored 42% of all privately sponsored refugees, while SAHs sponsored 54%. In 2014, Groups of Five sponsored only 17% of PSRs, SAHs 79%.²⁴⁵ It bears mention that, while only Groups of Five and Community Sponsors are bound by the requirement of s 153(1)(b), many other resettlement applicants have received a refugee determination by the UNHCR. In fact, all GARs have previously been identified as refugees by the UNHCR.²⁴⁶ It must be emphasized that a positive refugee status determination by the UNHCR or a foreign state is not a guarantee that the applicant will be determined to belong to one of the refugee classes by a Canadian visa officer. In every case, visa officers make their own independent determination as to whether an applicant is eligible and admissible, and they often come to different conclusions than the UNHCR. In fact, it was only recently that the Federal Court ruled that visa officers cannot in their assessments simply ignore

²⁴² *IRPA*, s 40(1)(a) refers to “directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act.”

²⁴³ *IRPR*, s 153(1)(b).

²⁴⁴ See Labman, *Crossing Law’s Border*, *supra* note 45 at 75-76.

²⁴⁵ Immigration, Refugees and Citizenship Canada, “Evaluation of the Resettlement Programs”, *supra* note 164 at para 5.7.

²⁴⁶ See UNHCR, *Resettlement Handbook*, *supra* note 228 at para 7.2.

a UNHCR designation altogether.²⁴⁷

That being said, the requirement under section 153(1)(b) is problematic for several reasons. Not all refugees have access to a state or UNHCR refugee status determination. The UNHCR does not conduct refugee determinations in every state nor for every refugee population. In situations of mass influx of refugees, UNHCR refugee determination procedures can be halted. At the height of the Syrian refugee movement, for example, it was practically impossible for Syrian refugees to obtain a UNHCR status determination in neighbouring states, including Turkey, Lebanon, and Jordan. That the government temporarily lifted the requirement for Syrian refugees illustrates that refugees in need of resettlement may be unable to obtain refugee status documentation. Afghan refugees in Pakistan, Burmese refugees in Thailand face similar barriers in accessing UNHCR's refugee determination system, as do refugees in an urban setting.²⁴⁸ Relying on state-run refugee determination systems is equally problematic, as many states signatory to the Refugee Convention do not recognize gender, sexual orientation, or sexual identity as persecution grounds.²⁴⁹ In addition, the 4.3 million Palestinian refugees coming under the mandate of United Nations Relief and Works Agency (UNRWA) do not have access to UNHCR refugee determination procedures.²⁵⁰ Another problem with the requirement arises from the fact that the Country of Asylum class under the *IRPR* is broader than the Convention

²⁴⁷ See *Ghirmatsion v Canada (MCI)*, 2011 FC 519 at para 58. See also *Kidane v Canada (MCI)*, 2011 FC 520; *Weldesilassie v Canada (MCI)*, 2011 FC 521; *Woldesellasi v Canada (MCI)*, 2011 FC 522.

²⁴⁸ See Canadian Council for Refugees, "Comments on notice of intent – changes to the Private Sponsorship of Refugees Program" (9 January 2012), online (pdf):

<https://ccrweb.ca/sites/ccrweb.ca/files/g5_comments_jan2012.pdf>.

²⁴⁹ *Ibid.*

²⁵⁰ Article 1D of the 1951 Refugee Convention provides:

This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

See UNRWA & UNHCR, "The United Nations and Palestinian Refugees" (2007), online (pdf):

<<https://www.unrwa.org/userfiles/2010011791015.pdf>>.

refugee definition. Requiring that refugees meet the Convention refugee definition effectively disqualifies refugees who would qualify under the Country of Asylum class from being sponsored by Groups of Five or Community Sponsors.²⁵¹

3.8.2 The Syrian refugee movement and exceptional measures in 2015-16

Without a doubt, the Syrian refugee movement has redefined the role of refugee resettlement in Canada. In the lead-up to the November 2015 federal election, the heart-wrenching photo of the body of young Alan Kurdi, a Syrian refugee who drowned in Greek waters, captured public attention.²⁵² Canadians soon learned that Kurdi's family was seeking resettlement to Canada, and that their aunt's sponsorship application had been rejected.²⁵³ During the election campaign, the Liberal Party promised to resettle 25,000 Syrian refugees within two months of forming government.²⁵⁴ In the end, just over 40,000 Syrian refugees were resettled to Canada between November 2015 and January 2017, specifically 21,876 GARs, 14,274 PSRs, and 3,931 BVORs.²⁵⁵

Paradoxically, Canada has *not* incorporated Article 1D into domestic law, meaning that Palestinian refugees falling into the care of the UNRWA are not excluded from claiming asylum in Canada. See Baglay & Jones, *supra* note 14 at 201-02; 206-07.

²⁵¹ *Ibid.* Ironically, in some situations, the fact that an applicant has refugee status granted by a state who is a party to the Refugee Convention is the very reason why visa officers deem the applicant to have a durable solution in that country.

²⁵² Nahlah Ayed, "Little Alan Kurdi, washed ashore, suddenly refocuses Syrian tragedy", *CBC News* (3 September 2015), online: <<https://www.cbc.ca/news/world/little-alan-kurdi-washed-ashore-suddenly-refocuses-syrian-tragedy-nahlah-ayed-1.3213893>>; Nicholas Keung, "How Alan Kurdi's tragic death changed thousands of lives", *Toronto Star* (1 September 2016), online: <<https://www.thestar.com/news/immigration/2016/09/01/how-alan-kurdis-tragic-death-changed-thousands-of-lives.html>>.

²⁵³ Nil Köskal & Lisa Mayor, "The family of Alan Kurdi, the Syrian 'boy on the beach,' is coming to Canada", *CBC News* (27 November 2015), online: <<https://www.cbc.ca/news/world/alan-kurdi-family-canada-refugees-1.3338703>>.

²⁵⁴ "Justin Trudeau's promise to take 25,000 Syrian refugees this year 'problematic'", *CBC News* (28 October 2015), online: <<https://www.cbc.ca/news/politics/trudeau-syria-refugees-settlement-groups-1.3291959>>.

²⁵⁵ Canada, "#WelcomeRefugees: Key figures", online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/welcome-syrian-refugees/key-figures.html>>.

Between 2015 and 2017, a number of temporary exemptions were adopted through ministerial instructions to facilitate the resettlement of tens of thousands of Syrian refugees in just a few months. These exceptions included allowing SAHs to sponsor Syrian refugees outside their annual allocation,²⁵⁶ allowing G5s and CSs to sponsor Syrian (and Iraqi) refugees without a UNHCR or state refugee designation,²⁵⁷ allowing G5s and CSs to sponsor Syrian (and Iraqi) refugees through the BVOR program,²⁵⁸ waiving of travel loans,²⁵⁹ and assessing all Syrians on a loosely defined *prima facie* basis.²⁶⁰ In addition, IRCC massively increased human resources in visa offices near Syria (Ankara, Beirut, and Amman), and fast-tracked Syrian cases. During this period, Syrian refugee cases were processed in as little as 2 months, whereas the general processing time was 3 to 5 years.²⁶¹ While the Syrian resettlement movement involved individualized selection, it does share some similarities with earlier “group resettlement” initiatives.²⁶²

²⁵⁶ House of Commons, Standing Committee on Citizenship and Immigration, *Report 7 - After the Warm Welcome: Ensuring that Syrian Refugees Succeed* (8 March 2016) at 26, online (pdf): <<https://www.ourcommons.ca/Content/Committee/421/CIMM/Reports/RP8555094/cimmrp07/cimmrp07-e.pdf>>.

²⁵⁷ See Immigration, Refugees and Citizenship Canada, “Temporary public policy to facilitate the sponsorship of Syrian and Iraqi refugees by Groups of Five and Community Sponsors” (19 December 2016), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/sponsorship-syrian-iraqi-refugees-groups-five-community-sponsors-2017.html>>. The exemption from the refugee status document requirement was achieved through the use of the Humanitarian and Compassionate exemption under section 25.1(1) of the *IRPA*.

²⁵⁸ See Refugee Sponsorship Training Program, “Sponsoring Syrian Refugees through the Blended Visa Office-Referred (VOR) Program”, online (pdf): <<http://www.rstp.ca/wp-content/uploads/2014/03/Syrian-BVOR-Info-Sheet-Jan-2016-1.pdf>>. The standard criteria of the BVOR program has since changed and all sponsor types can now sponsor the BVOR program.

²⁵⁹ See House of Commons, *supra* note 256 at 34.

²⁶⁰ See Canada, “Internal Audit of Operation Syrian Refugees Identification and Processing” (1 June 2017) at para 8, online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/reports-statistics/audits/operation-syrian-refugees-identification-processing.html>>.

²⁶¹ See Immigration, Refugees and Citizenship Canada, “Syrian Refugee Resettlement Initiative – Looking to the Future”, online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/welcome-syrian-refugees/looking-future.html>> [Looking to the Future]. See also House of Commons, *supra* note 256.

²⁶² See Labman, *Crossing Law’s Border*, *supra* note 45 at 140-48; Robert Batarseh, *Searching for a “Clean Population”: A Study of Canada’s Group Processing Program* (PhD Thesis, York University, Department of Political Science, 2017) at 208-16.

3.8.3 Interviews and application procedure

Contrary to inland refugee claimants, resettlement applicants cannot access state-funded legal assistance.²⁶³ The overwhelming majority of resettlement applicants navigate the system without the assistance of legal counsel or an immigration consultant.²⁶⁴ The initial steps in the application procedure differ for GARs and PSRs. PSR applications involve two separate applications: a sponsorship application and a permanent residence (refugee) application. In many cases, often because of language barriers, someone other than the refugee applicant completes the refugee's application.²⁶⁵ The sponsor side of the application is processed at IRCC offices in Canada.²⁶⁶ If the sponsorship application is approved, the case is forwarded to a visa office abroad and the applicant interviewed in person by a visa officer.²⁶⁷

²⁶³ It should be noted, however, that access to legal aid for inland asylum seekers varies from province to province and is not recognized as a constitutional right. Legal aid is not universally available and some asylum seekers go unrepresented. See Sean Rehaag, "The Role of Counsel in Canada's Refugee Determination System: An Empirical Assessment" (2011) 49 Osgoode Hall LJ 71 at 79, 94-103. Existing legal aid programs for asylum seekers are vulnerable to budgetary cuts, as evidenced by the Government of Ontario's 2019 decision to cease all legal aid funding for asylum seekers. See Sharry Aiken and Sean Rehaag, "Ontario's Cuts to Legal Aid for Refugees: Racist, Xenophobic and Possibly Unconstitutional", *The Conversation* (16 April 2019), online: <<https://theconversation.com/ontarios-cuts-to-legal-aid-for-refugees-racist-xenophobic-and-possibly-unconstitutional-115615>>. See also Emily Bates, Jennifer Bond, & David Wiseman, "Troubling Signs: Mapping Access to Justice in Canada's Refugee System Reform" (2016) 47:1 Ottawa L Rev 1.

²⁶⁴ In the past, some visa officers refused that applicants have their lawyer attend the interview. In *Ha v Canada (MCI)*, 2004 FCA 49, the Federal Court of Appeal ruled that such a practice was a violation of procedural fairness. The court also held that a blanket directive issued by CIC prohibiting lawyers and representatives from attending interviews was invalid because it fettered visa officers' discretion to consider each case on their facts and determine whether to allow lawyers to attend the interview. It is also worth noting that the Refugee Sponsorship Support Program, established in 2015, provides some measure of *pro bono* legal services to sponsors in every Canadian province except Quebec. See Kelsey Lange, "Mobilization of the Legal Community to Support PSR Applications through the Refugee Sponsorship Support Program" in Shauna Labman & Geoffrey Cameron, eds, *Strangers to Neighbors: Refugee Sponsorship in Context* (Montreal & Kingston: McGill-Queen's University Press, 2020) 212.

²⁶⁵ In the present dataset, many cases were refused on the basis that the written application was inadequate or conflicted with the in-person interview, even though the applicants stated at the interview that someone else had completed the form and that they were not aware of the contents because they do not speak English.

²⁶⁶ During the time of this study, and until April 2017, sponsorship applications were screened at the Resettlement Operations Centre in Ottawa (ROC-O). Applications are now processed at the Centralized Processing Office in Winnipeg (CPO-W).

²⁶⁷ See Citizenship and Immigration Canada, "Overseas Selection and Processing", *supra* note 215 at 10.4.

GAR cases generally begin with the UNHCR. Cases that are evaluated by the UNHCR for resettlement purposes come by way of internal, external or unsolicited pre-referrals.²⁶⁸ Refugees considered for resettlement by the UNHCR must have had a prior positive individual refugee determination. It is however possible for the UNHCR to submit referrals on behalf of refugees who have been recognized on a *prima facie* basis, and non-refugee stateless persons.²⁶⁹ Candidates are then interviewed by the UNHCR for the purpose of determining whether they are in need of resettlement considering their specific needs and the prospect of alternative durable solutions.²⁷⁰ UNHCR submissions fall into one of seven categories: refugees with legal and physical protection needs, survivors of torture or violence, refugees with medical needs, women and girls at risk, refugees in need of family reunification, children and adolescents at risk, and refugees who lack a foreseeable alternative durable solution.²⁷¹

If the refugee is found to be in need of resettlement, the UNHCR determines the most appropriate country of submission, taking into account family links in resettlement states, the urgency of the case considering the resettlement country's processing time, the particular selection criteria of resettlement states, the annual quota of resettlement states, the refugee's language(s), and the refugee's expressed preference.²⁷²

Most applicants (GARs and PSRs) are interviewed, but IRCC operational guidelines allow, in some cases, for positive and negative decisions to be made solely on the basis of the written

²⁶⁸ UNHCR, *Resettlement Handbook*, *supra* note 228 at para 5.6. In a few visa offices, referrals have been obtained from other agencies, including the Hebrew Immigrant Society and Refuge Point (see Immigration, Refugees and Citizenship Canada, "Evaluation of the Resettlement Programs – Extended Report" (Spring 2016) at para 6.3 ["Evaluation of the Resettlement Programs – Extended Report"]).

²⁶⁹ *Ibid* at para 7.2.

²⁷⁰ *Ibid*, c 5.

²⁷¹ *Ibid*, c 6. See Labman, *Crossing Law's Border*, *supra* note 45 at 27.

²⁷² UNHCR, *Resettlement Handbook*, *supra* note 228 at para 7.6.

application.²⁷³ Interpreters are provided by IRCC at the interview.²⁷⁴ Interviews are not transcribed or recorded. Visa officers take notes themselves and enter them into IRCC's internal database.²⁷⁵ During the interview, which generally lasts 40 minutes to 1 hour, applicants and their family members are asked to provide details, in their own words, on why they fled their country of origin, why they cannot return, why they cannot stay in their current country of asylum, their ability to establish, family composition, potential inadmissibility such as criminal history and involvement in inadmissible groups, and any other detail deemed relevant by the visa officer.²⁷⁶ The assessment of GAR applicants is streamlined as compared to PSR applicants, given that their narrative has already been scrutinized by the UNHCR.²⁷⁷ IRCC guidelines specify that family members can be interviewed separately if deemed appropriate by the visa officer.²⁷⁸ In some cases, a second interview is arranged. If a visa officer has concerns about the application that have not been properly addressed during the interview, they may prepare a "procedural fairness letter" outlining their concerns and inviting the applicant to make written submissions within a certain timeframe. The guidelines provide that procedural fairness letters are required when third-party information has come to light after the interview.²⁷⁹

Under the 1976 *Immigration Act*, all negative refugee decisions (both PSR and GAR) were reviewed by a senior immigration officer. That is no longer the case since the implementation of

²⁷³ Citizenship and Immigration Canada, "Overseas Selection and Processing", *supra* note 215 at paras 10.4, 10.5. In the inland refugee system, by contrast, no refugee claimant (whose application is properly submitted) is denied asylum without the benefit of an in-person hearing.

²⁷⁴ *Ibid* at paras 11.3, 11.4, 12.1.

²⁷⁵ *Ibid* at para 16.3. The transfer of notes does not always happen immediately and sometimes can take months, which has led to allegations that the process was not properly documented.

²⁷⁶ *Ibid*, c 13 & 14. The duration of a typical interview was explained in a visa officer affidavit in file IMM-3934-13.

²⁷⁷ Immigration, Refugees and Citizenship Canada, "Evaluation of the Resettlement Programs", *supra* note 164 at para 5.5.2.

²⁷⁸ Citizenship and Immigration Canada, "Overseas Selection and Processing", *supra* note 215 at para 11.1.

²⁷⁹ *Ibid* at para 10.5.

the *IRPA*.²⁸⁰ Rejected applicants receive a written refusal letter by regular mail or email. Program guidelines state that refusal letters “should refer to evidence provided by the applicant, and how and why this evidence does not meet the requirements” of the refugee classes.²⁸¹ However, as will become clear in the following analysis, the decision letter often discloses little, if any, information as to why the case was rejected. To get a sense of why the application was rejected, applicants must request the notes taken by the officer by way of a formal Access to Information request under the *Access to Information Act*.²⁸²

3.8.4 Avenues for review, judicial deference, and the *Charter*

The avenues for review for failed resettlement applicants are slim to none. Generally speaking, decisions denying permanent residence applications are not appealable internally.²⁸³ A failed refugee resettlement applicant can request a reconsideration of the decision by submitting written representations and supporting documents to the visa office.²⁸⁴ Reconsiderations are highly discretionary. In a case included in this study’s dataset, Justice Strickland explained:

The authorities are also clear that there is no general duty to reconsider an application for permanent residence upon receipt of new information or to provide detailed reasons for deciding not to do so. ... Further, an officer is not obliged to reconsider a decision... The obligation of an officer is to take into account all relevant circumstances in deciding whether to exercise the discretion to reconsider...²⁸⁵

²⁸⁰ See Citizenship and Immigration Canada, “PSR QA Project”, *supra* note 236 at 57.

²⁸¹ Citizenship and Immigration Canada, “Overseas Selection and Processing”, *supra* note 215 at para 27.2. In the case of refusals based on successful establishment, the same manual states that “[t]he refusal letter must give clear and detailed reasons why the applicant does not have the potential to resettle successfully in Canada” (*ibid*).

²⁸² *Access to Information Act*, RSC 1985, c A-1.

²⁸³ The only exceptions are decisions not to approve Family Class sponsorships, which can be appealed by the sponsor to the Immigration Appeal Division of the IRB (*IRPA*, s 63(1)).

²⁸⁴ See Citizenship and Immigration Canada, “Overseas Selection and Processing”, *supra* note 215 at 27.3. In the case of GARs, the UNHCR can seek an informal review. See Canada, “Country Chapter: Canada”, *supra* note 217 at para at 6.5.

²⁸⁵ *Zakia Balkhi et al v Canada (MCI)* (13 MAY 2014), IMM-6740-13 (FC) at 6.

The only recourse for failed resettlement applicants provided by law is to seek judicial review before the Federal Court in Canada.²⁸⁶ Access to judicial review is limited by several practical and legal factors.²⁸⁷ The financial and logistical task of hiring a lawyer and coordinating litigation in Canadian courts is excessively difficult for the vast majority of displaced persons abroad. This will be discussed further in Chapter 6.

Unlike an appeal, the result of a positive judicial review is not a reversal of the decision. It results in the decision being quashed and remitted for redetermination by a different visa officer.²⁸⁸ Also, overseas refugee applicants must obtain permission, or “leave”, before they can proceed with their application.²⁸⁹

Interestingly, under the 1976 *Immigration Act*, all visa officer decisions were exempt from the leave requirement.²⁹⁰ The leave requirement for visa officer decisions, introduced with the *IRPA*, was officially justified by the need to avoid unnecessary litigation and also to ensure consistency in treatment between overseas visa applicants and inland refugee claimants (to whom the leave requirement already applied).²⁹¹ As explained by the Canadian Bar Association, the consistency argument is a flawed one - the absence of a leave requirement for visa officer decisions existed precisely because persons being evaluated by visa officers do not benefit from the same

²⁸⁶ See Labman, *Crossing Law's Border*, *supra* note 45 at 66-76. In contrast with judicial review in the inland system, where the Minister can seek a judicial review of a positive decision made by the IRB, positive refugee resettlement decisions are not subject to review.

²⁸⁷ See Macklin, *supra* note 118 at 103-05.

²⁸⁸ *Federal Courts Act*, RSC 1985, c F-7, s 18.1(3).

²⁸⁹ *IRPA*, s 72(1). See Sean Rehaag, “Judicial Review of Refugee Determinations: The Luck of the Draw?” (2012) 38 *Queen's LJ* 1 at 7-9 [Luck of the Draw].

²⁹⁰ *Immigration Act*, SC 1976-77, c 52, s 82.1(1).

²⁹¹ Citizenship and Immigration Canada, *Building on a Strong Foundation for the 21st Century: New Directions for Immigration and Refugee Policy and Legislation* (1998) at 54, online (pdf): <<http://publications.gc.ca/collections/Collection/Ci51-86-1998E.pdf>>.

procedural protections as inland refugee claimants:

It should go without saying that the principle of consistency has to be applied consistently. One reason for the present inconsistency in access to the Federal Court is to compensate for another inconsistency in access to a fundamentally just determination system.

The refugee determination system abroad is far different from the refugee determination system in Canada. Abroad, instead of oral hearings in front of an expert, independent tribunal, with right to counsel, there are discretionary interviews with public servants whose main tasks have nothing to do with applying the refugee definition. Policy is not to permit counsel to attend, in those cases when interviews are granted, although exceptions are sometimes made.²⁹²

The authors of the report also note that, given the high success rate of judicial reviews of visa officer decision, there is no need to curtail “unnecessary litigation:”

Federal Court statistics show that approximately 45% of judicial reviews of overseas decisions are resolved in favour of the applicant. By comparison, applications for leave for judicial review of inland decisions are denied without reasons in the vast majority of cases, approximately 80%. These figures indicate that imposition of a leave requirement for overseas decisions will simply serve to insulate CIC from its own poor decisions.²⁹³

Under the current framework, Federal Court judges normally do not issue reasons in leave decisions and leave decisions are not appealable.²⁹⁴ The test for when leave should be granted is not defined in the legislation and is rarely addressed in the jurisprudence of the Federal Court. It is clear, however, that the test is, at least in theory, a very permissive one.²⁹⁵ In his study on leave applications in the inland refugee context, Rehaag writes:

The test for leave has therefore been variably described in the following terms: a reasonably arguable case; a fairly arguable case; a serious question to be tried;

²⁹² Canadian Bar Association, National Citizenship and Immigration Law Section, *Response to Building on a Strong Foundation for the 21st Century: White Paper for Immigration and Refugee Policy and Legislation* at 46. See also Canadian Council for Refugees, “Comments on Building on a Strong Foundation for the 21st Century” (March 1999), online: <<https://ccrweb.ca/en/white-paper-comments>>.

²⁹³ Canadian Bar Association, *ibid* at 93.

²⁹⁴ *IRPA*, s 72(2)(e).

²⁹⁵ See *Bains v Canada (MEI)* (1990), 47 Admin LR 317 (FCA); *Virk v Canada (MEI)* (1991), 13 Imm LR (2d) 119 (FCTD).

and whether it is plain and obvious that the applicant has no reasonable prospect of success. However formulated, the test is highly permissive: leave should be granted unless it is clear that the judicial review application has no reasonable chance of success, namely, where it is so obvious that the application must fail that a determination on the merits is unnecessary.²⁹⁶

For cases that are granted leave, the *Federal Courts Act* provides that the Federal Court may quash a decision in certain circumstances, including if it determines that the decision-maker acted without jurisdiction, failed to observe a principle of procedural fairness, erred in law, made an erroneous finding of fact, acted by reason of fraud or perjured evidence, or acted in another way that is contrary to law.²⁹⁷ Judicial review is also subject to the evolving administrative law jurisprudence on the standard of review, which is based on the principle that reviewing courts should show deference to administrative decision-makers. In the 2011-2015 period, the standard of review analysis was governed by the *Dunsmuir* decision, where the Supreme Court established that the reasonableness standard applies to questions of fact, mixed fact and law, and most questions of law.²⁹⁸ Reasonableness is described in *Dunsmuir* as being

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.²⁹⁹

Questions of procedural fairness, however, always attract the standard of correctness.³⁰⁰ That being said, while the jurisprudence is not entirely consistent, the Federal Court has often applied

²⁹⁶ See Sean Rehaag, “The Luck of the Draw”, *supra* note 289 at 9.

²⁹⁷ Section 18.1(4).

²⁹⁸ *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 52-61. Legal questions that attract the correctness standard include questions of law that are of “central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise”, constitutional questions and “true questions of jurisdiction or vires.” See also *Alberta (Information and Privacy Commissioner) v Alberta Teachers’ Association*, 2011 SCC 61 at paras 30-55.

²⁹⁹ *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

³⁰⁰ *Sketchley v Canada (AG)*, 2005 FCA 404 at paras 52-54.

the correctness standard in the immigration context for many questions of law, particularly where the courts have established a “clear legal test.”³⁰¹ In the recent *Vavilov* trilogy, the Supreme Court reworked the standard of review framework in favour of a strong presumption of reasonableness, but reaffirmed the requirement of justification.³⁰² The potential impact of the *Vavilov* framework will be discussed further in chapter 5.

In the landmark *Baker* case, the Supreme Court determined that the level of procedural fairness owed in administrative proceedings varies according to a list of factors, including: the nature of the decision being reviewed, the nature of the statutory scheme and the terms of the statute, the importance of the decision to the individual or individuals affected, the legitimate expectations of the person challenging the decision, and the choices of procedure made by the agency itself.³⁰³ The Federal Court has drawn a sharp distinction between the inland context and the overseas context in terms of how it assesses decisions and how it considers its reviewing role. The approach adopted in the resettlement context is a very deferential one. Because resettlement decisions are considered “purely administrative”, and because visa officers are considered to exercise “extensive discretion” in their decision-making, the Federal Court accords them “considerable latitude.”³⁰⁴ The fact that resettlement refugee applicants are outside Canada and do not face potential removal from Canada is also considered a factor limiting the duty of fairness of visa officers.³⁰⁵ There is however case law suggesting that the level of procedural fairness owed to refugee resettlement applicants is not at the lowest end of the spectrum. In the

³⁰¹ *Sakthivel v Canada (MCI)*, 2015 FC 292 at paras 25-30. See also Sean Rehaag, “The Luck of the Draw”, *supra* note 289 at 10.

³⁰² *Canada (MCI) v Vavilov*, 2019 SCC 65.

³⁰³ *Baker v Canada (MCI)*, [1999] 2 SCR 817, [1999] SCJ No 39.

³⁰⁴ *Jallow v Canada (MCI)*, [1996] FCJ No 1452 at 18. See also *Qarizada v Canada (MCI)*, 2008 FC 1310 at para 27.

³⁰⁵ *Oraha v Canada (MCI)*, [1997] FCJ No 788, 72 ACWS (3d) 140 at 9.

2004 *Ha* decision, the Federal Court of Appeal reasoned:

In *Baker*, supra, the Supreme Court of Canada expressly recognized that a person does not necessarily have to have a legal entitlement to enter or remain in Canada in order to be entitled to increased procedural protections. Rather, the Court simply stated [at paragraph 25]: “[T]he more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated.” The fact that the appellants are applying for permanent resident status as Convention refugees suggests that this decision is potentially of great importance in their lives.³⁰⁶

It remains the fact that the doctrinal environment surrounding judicial review in resettlement is deeply deferential. The root of this approach to overseas refugee decisions lies in Canadian courts’ approach to the extraterritorial application of the *Charter*. In the precedent-setting *Singh* decision, Justice Wilson stated that “the Charter applied to every human being who is physically in Canada and by virtue of such presence amenable to Canadian law.”³⁰⁷ This interpretation did not *preclude*, however, the application of the *Charter* to someone outside Canada but still “amenable to Canadian law.” Macklin writes that the *Singh* decision leaves open the issue of whether the conduct of Canadian officials acting under Canadian authority is subject to *Charter* scrutiny. She adds that

[e]xamples where these issues might arise include the processing of immigration applications in offices abroad, the participation of Canadian officials in the interrogation of Canadian citizens detained in foreign prisons, and the conduct of Canadian troops in Afghanistan.³⁰⁸

In the subsequent *Khadr*³⁰⁹ and *Hape*³¹⁰ cases, the Supreme Court determined that the *Charter*

³⁰⁶ *Ha v Canada (MCI)*, 2004 FCA 49 at para 61. See also *Krikor v Canada (MCI)*, 2016 FC 458 at paras 12-13.

³⁰⁷ *Singh v Canada (MEI)*, [1985] 1 SCR 177 at para 35.

³⁰⁸ Macklin, *supra* note 118 at 85, note 32.

³⁰⁹ *Canada (Prime Minister) v Kadr*, 2010 1 SCR 44.

³¹⁰ *R v Hape*, 2007 SCC 26.

can also apply to a Canadian citizen outside Canada. The issue of whether the *Charter* can apply to non-citizens outside Canada who are also “amenable to Canadian law”, and in particular visa applicants, has yet to be determined by the Supreme Court, and lower courts decisions are not entirely consistent. In *Slahi*,³¹¹ the Federal Court of Appeal concluded that the *Charter* did not apply in circumstances similar to those in *Kadr*, but where the applicant was a non-citizen. In *Crease*, however, the Federal Court found that the *Charter* did apply to a non-citizen outside Canada who sought a declaration that he was eligible for Canadian citizenship.³¹² The reasoning in *Crease* has had little impact on subsequent Federal Court case law. In the case of *Jallow*, cited above, a refugee resettlement applicant sought to have the decision rejecting their application quashed on the ground that, following the Supreme Court’s decision in *Singh*, the decision-making process in place was in breach of section 7 of the *Charter*. Justice Rouleau held that the *Singh* decision - and we should understand, the *Charter* itself - does not apply to foreign nationals outside Canada:

In reviewing *Singh, supra*, it is clear to me that the process which was eventually put in place in Canada is not applicable to claimants outside the country. Wilson J. makes numerous references in her reasons wherein she emphasizes the duty of fairness on decision makers but it is very clear to me that other consequences which flowed from the decision are only applicable to Refugee claimants within Canada.³¹³

3.9 Slow processing times, low approval rates, and concerns over decision-making

Over the years, a variety of challenges have developed in the administration of the refugee resettlement program. This section will focus on three interrelated issues that have been central concerns of advocacy and sponsor groups: high refusal rates, slow processing times, and

³¹¹ *Slahi v Canada (Minister of Justice)*, 2009 FCA 259.

³¹² *Crease v Canada*, [1994] 3 FC 380.

³¹³ *Jallow, supra* note 304 at 17. The reasoning in *Jallow* was followed in *Oraha, supra* note 305.

inconsistent and poor-quality decision-making.

i) Slow processing times

Slow processing times - especially in the PSR program - have been a major concern of both the government and the sponsorship community for some time. Already in 1992, the problem of ballooning processing times was acknowledged by Employment and Immigration Canada.³¹⁴ At the time, PSR cases were taking between 18 to 24 months to process. The government set a processing target of 6 to 9 months for PSRs.³¹⁵ Processing times have since steadily increased. In 2001, it was taking up to 17 months to process 80% of PSR cases. That number grew to 35 months by 2005 and 54 months by 2015.³¹⁶ This is a far cry from the 6 to 9 months target the government set in the early 1990s. Throughout the 2000s and 2010s, calls to reduce processing times in the PSR program intensified.³¹⁷ During the Syrian refugee movement, Syrian cases were fast-tracked, but refugees of other nationalities continued to face long processing times. A Canadian Council for Refugees 2016 report deplored the nationality-dependent variable processing times, arguing that slow processing times have a severe negative impact on both refugees and sponsors:

³¹⁴ Employment and Immigration Canada, “Discussion Paper”, *supra* note 173 at 3. See also Treviranus & Casasola, *supra* note 172 at 187.

³¹⁵ Employment and Immigration Canada, “Discussion Paper”, *ibid* at 4.

³¹⁶ Citizenship and Immigration Canada, “Summative Evaluation of the Private Sponsorship of Refugees Program” (2007) at para 3.2.3 [“Summative Evaluation”].

³¹⁷ See Canadian Council for Refugees & Elected Sponsorship Agreement Holder Representatives, “Comments on Private Sponsorship of Refugees evaluation” (2007), online (pdf): <<https://ccrweb.ca/files/psrevalcomments.pdf>>; Immigration, Refugees and Citizenship Canada, “Evaluation of the Resettlement Programs”, *supra* note 164 at para 5.5.2; Canadian Council for Refugees, “The Private Sponsorship of Refugees Program: Current Challenges and Opportunities” (2006), online (pdf): <<https://ccrweb.ca/files/psrpbriefing.pdf>> [“Current Challenges”]; Casasola, “Legislative Review”, *supra* note 124 at 19; Thomas R Denton, “Understanding Private Refugee Sponsorship in Manitoba” (2003) 4:2 J Intl Migr & Integration 257 at 267; Chapman, *supra* note 165 at 5. See also Treviranus & Casasola, *supra* note 110 at 187.

The Private Sponsorship of Refugees Program has been plagued by extremely long processing delays overseas. Some refugees arrive quite quickly: some Syrian refugees have arrived after only a month or two. Other refugees, notably those from Africa, have waited four or five years before they are finally able to travel to Canada.

The excruciatingly slow processing times are completely unacceptable for a program that is supposed to protect refugees in danger. The long delays also discourage potential sponsors from getting involved.³¹⁸

The reason for the overall ballooning of processing times is simple: the number of annual applications has vastly exceeded the admission targets set by the government. Processing times have however begun to decrease in recent years. The introduction, in 2012, of annual caps for SAHs and the UNHCR documentation requirement for G5s and Community Sponsors, were designed as measures to decrease the number of applications.³¹⁹ These measures did lead to a moderate decrease in case backlog, but proved insufficient to bring processing times to acceptable levels.³²⁰ More importantly, these measures led to backlogs accumulating on the SAH side rather than on the government side. Processing times only began to decrease following

³¹⁸ Canadian Council for Refugees, “Renewing Canada’s Sponsorship Program” (2016) at 2-3, online (pdf): <<https://ccrweb.ca/sites/ccrweb.ca/files/renewing-psr-jan-2016.pdf>>. See also Immigration, Refugees and Citizenship Canada, “Evaluation of the Resettlement Programs”, *supra* note 164 at para 5.5.2:

PSR processing times were perceived as very long by the sponsor community and refugees. In addition, the sponsor community stressed that long processing times made it difficult for them to keep the sponsorship group, and the larger supporting community, engaged in the process. Some of these difficulties included the upfront work to build interest in sponsoring a refugee, and the level of effort needed to complete an application. On top of these difficulties, since applications took years to process, changing refugee family compositions would alter the resettlement needs of a particular case. In some cases, this may result in one-year window sponsorship issues in Canada if refugees do not alert the department of these family composition changes before they depart. Moreover, members of a sponsor group often needed to be replaced and resources needed to be sought elsewhere as the length of processing time increases. PSR also noted that in addition to the stress associated with the lengthy processing times, there was the lack of available updates on the application. Some key informants, SAH representatives, and sponsor focus group participants, therefore, cited the need for a better online method for them to monitor PSR application status.

See also Canadian Council for Refugees, “Current Challenges”, *supra* note 317.

³¹⁹ Immigration, Refugees and Citizenship Canada, “Evaluation of the Resettlement Programs – Extended Report”, *supra* note 268 at para 5.5.2.

³²⁰ *Ibid.* In 2013, the year-end inventory was reduced by 20%, and by a further 8% in 2014.

significant increases in annual admission levels as of 2015. In 2016, the Canadian government pledged to eliminate the PSR backlog and reduce processing times to 12 months by 2019.³²¹ As of July 23, 2020, 25 visa offices were posting processing times for PSR applications. Processing times ranged from 14 months in Egypt and in Kenya to 46 months in Djibouti, for an average processing time of 25 months.³²²

ii) Low and varying approval rates

Low approval rates have been cited as a concern by both the government and private sponsors.³²³ Between 1998 and 2005, approval rates averaged 51% for PSRs and 69% for GARs.³²⁴ In 2007, a CIC evaluation reported that the low approval rates were affecting program efficiency and were responsible for the growing backlog of cases. The same report attributed the high refusal rates to failures in screening by sponsors, a finding that was challenged by sponsor groups.³²⁵ The report also indicated that the majority of Constituent Groups had in fact high approval rates - close to that of GARs - but that the overall rates were driven down by a minority of Constituent Groups that submit a large number of cases with low approval rates.³²⁶ It was reported that for sponsors, the problem of high refusal rates is compounded by the fact that no clear reasons are received for refusals.³²⁷ The sponsorship community reacted to the report by pointing out that it incorrectly assumed that all refusals are correctly rejected, and that it further

³²¹ Canadian Council for Refugees, “Private sponsorship of refugees in 2017” (January 2017), online: <<https://ccrweb.ca/en/private-sponsorship-refugees-2017>>.

³²² Processing times listed at <https://www.canada.ca/en/immigration-refugees-citizenship/services/application/check-processing-times.html>.

³²³ See Canadian Council for Refugees, “Current Challenges”, *supra* note 317; Canadian Council for Refugees, “Survey of Refusals of Privately Sponsored Refugees - Summary of Results” (2015); Treviranus & Casasola, *supra* note 110 at 187; Casasola, “Legislative Review”, *supra* note 124 at 19.

³²⁴ Citizenship and Immigration Canada, “Summative Evaluation”, *supra* note 316 at para 3.2.4.

³²⁵ *Ibid.*

³²⁶ *Ibid.*

³²⁷ *Ibid.*

failed to assess how many refusals are linked to issues outside the control of sponsors, such as changes in country conditions. In other words, the sponsorship community was arguing that the long processing delays contribute to inflated refusals based on changes in country conditions:

... [the report] implies that refusals necessarily represent cases that are correctly rejected, an assumption strenuously and repeatedly disputed by NGOs and never analyzed in the evaluation. Again the case of Iraqi refugees is illustrative – there has been a high refusal rate of Iraqi privately sponsored refugees. This is changing now, as the international interpretation of the needs of the refugees has developed. In at least one case, a family initially refused by the visa post was recently recognized as refugees and resettled to Canada. Were the private sponsors submitting the “wrong” cases, or was the visa office slow in recognizing the realities that Iraqi refugees are fleeing?

The evaluation does not address the possibility that a significant proportion of refusals might be for reasons that the sponsor could not know or anticipate when the application was submitted, such as a change in country conditions, the international political and protection context, a change in conditions for the applicants as a result of long delays, and many other possible factors that ultimately are recorded as refusals...³²⁸

Between 2011 and 2014, the average grant rate for PSR applications lay just below 70%, while GAR cases averaged between 88% and 93%, with the exception of 2013.³²⁹ A 2016 IRCC evaluation attributed this increase in approval rates to various changes implemented as a result of the 2007 PSR Evaluation and the 2011 GAR/RAP Evaluation, including the elimination of the Source Country class and increased training opportunities for both sponsors and visa officers.³³⁰ It should however be noted that the GAR refusal rate does not reflect the actual refusal rate of UNHCR submissions:

³²⁸ Canadian Council for Refugees & Elected Sponsorship Agreement Holder Representatives, *supra* note 317 at 4. See also Labman, *Crossing Law's Border*, *supra* note 45 at 104-05.

³²⁹ In 2013, a large number of cases were rejected in visa offices that had accepted applications under the cancelled Source Country class, abolished in 2012.

³³⁰ Immigration, Refugees and Citizenship Canada, “Evaluation of the Resettlement Programs – Extended Report”, *supra* note 268 at para 5.5.2. The implementation of the refugee status requirement in 2012 to refugees sponsored by Groups of Five and Community Sponsors is also likely to have had an impact on approval rates in the PSR program.

...where a UNHCR referral is likely to be refused (e.g., due to polygamous marriages, massive health needs, etc.), IRCC may recommend to the UNHCR that the referral be withdrawn in order to prevent a refusal and allow for timely referral to another resettlement country. These withdrawn applications are not officially counted in the data.³³¹

The Syrian refugee movement has had a major impact on approval rates in the PSR program. In 2015, 2016, and 2017, approval rates increased to 85%-90%, in large part because of the number of Syrian refugees being assessed on a *prima facie* basis. It appears that grant rates have since decreased to pre-2015 levels. Approval rates in the GAR program - which were already relatively high - have increased only slightly during the Syrian refugee movement. In the GAR program as well, approval rates have since decreased to pre-2015 levels. Approval rates in both programs remain significantly higher than they have been historically.

TABLE 3.1 - RESETTLEMENT APPLICATION APPROVAL RATES³³²

	PSR approval rate (principal applicants)	GAR+BVOR approval rate (principal applicants)
2011	68.78% (2,577/3,747)	88.91% (2,758/3,102)
2012	67.12% (2,378/3,543)	87.78% (2,183/2,487)
2013	68.54% (2,958/4,316)	68.94% (2,572/3,731)
2014	67.38% (2,018/2,995)	93.11% (7,876/8,459)
2015	84.74% (5,146/6,073)	93.86% (12,436/13,249)
2016	89.94% (7,723/8,587)	94.30% (6,930/7,349)
2017	88.23% (7,251/8,218)	86.30% (3,375/3,911)
2018	70.23% (8,841/12,589)	86.93% (3,272/3,764)

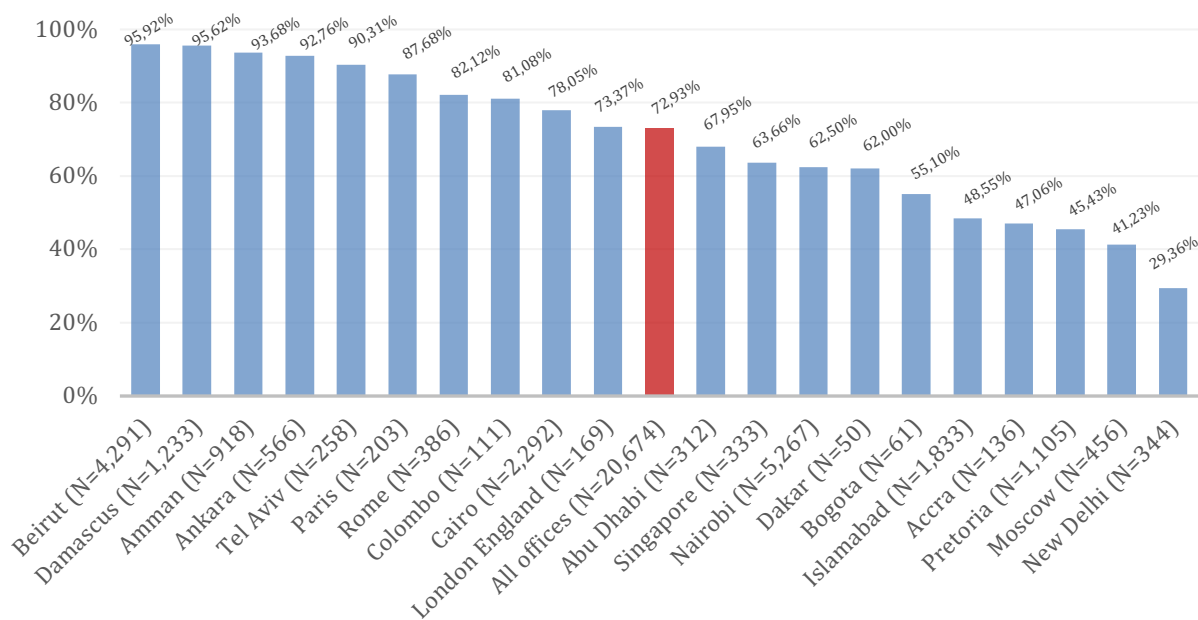
It is worth noting that approval rates vary widely between visa offices. From 2011 to 2015, PSR

³³¹ *Ibid* at para 5.5.2.

³³² Data compiled from customized statistical reports produced by IRCC and ordered by the author. The approval rates do not include PSR applications rejected at the in-Canada screening stage.

approval rates among offices processing 40 or more cases varied between 95.92% (Damascus) and 29.36% (New Delhi). The variation across visa offices was much less pronounced in GAR and BVOR cases. Excluding Bogota,³³³ GAR grant rates varied from 91.62% (Ankara) to 65.34% (Moscow). In both streams, there was a general alignment of visa offices along the approval rate scale. However, a few visa offices had a relatively high approval rate in one stream and a relatively low approval rate in the other. Both Paris and Colombo had a relatively high PSR approval rate and a relatively low GAR approval rate. Conversely, both Dakar and Accra had a relatively low PSR approval rate, and a relatively high GAR approval rate.

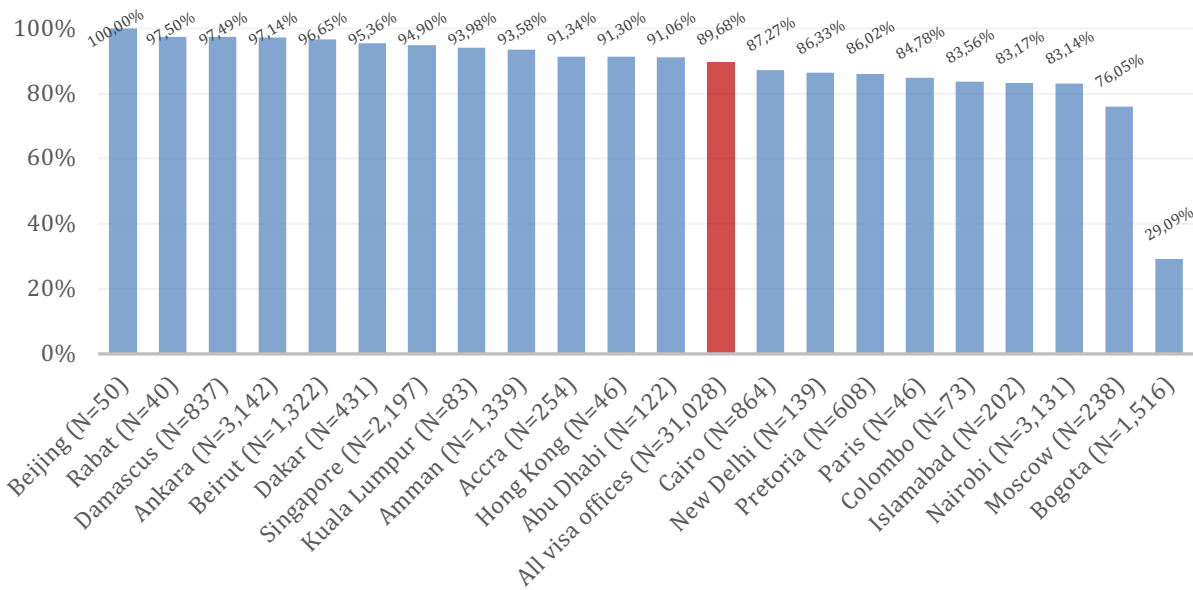
TABLE 3.2 PSR GRANT RATE (2011-2015)³³⁴



³³³ Bogota was one of the few countries that accepted applications under the former Source Country class, abolished in 2011. It appears that some applications under the Source Country that had been submitted but not yet processed when the class was abolished were rejected in 2013. That year, 864 GAR cases were rejected out of 883 cases processed at the Bogota office, for an approval rate just below one percent.

³³⁴ Grant rate by principal applicant among visa offices that processed 40 or more PSR cases in 2011-2015. Data obtained from customized statistical reports prepared by IRCC and on file with the author.

TABLE 3.3 GAR & BVOR GRANT RATES (%) (2011-2015)³³⁵



iii) Concerns over visa officer decision-making

The sponsorship community has voiced concerns over the quality and consistency of decision-making by visa officers since the 1980s. Many reports released by the Canadian government have acknowledged these concerns, and the federal government has released a few studies that assess the decision-making process from an empirical perspective. The substance of these various reports will be addressed in further detail in Chapter 5. However, I will present here some of the major issues that have been flagged by both the government and the refugee advocacy community.

Inconsistent decision-making was noted in EIC’s 1990 evaluation of the PSR program.³³⁶ In 1992, the problem was again noted, with EIC recognizing that visa officers have an “extremely

³³⁵ Visa offices that processed 40 or more GAR cases during that period.

³³⁶ See Treviranus & Casasola, *supra* note 110 at 187.

heavy workload.”³³⁷ Closer scrutiny of visa officer decision-making occurred in the late 1990s when the government was fashioning the successor legislation to the 1976 *Immigration Act*. CIC’s 1997 policy orientation report, entitled *Refugee Resettlement Model* acknowledged the existence of consistency problems in decision-making and recommended that visa officer training be increased.³³⁸ Consistency in decision-making was also a chief concern that led the Legislative Review Advisory Group (LRAG) to recommend in 1997 that both inland and overseas refugee determination be conducted by a single independent administrative tribunal.³³⁹ In 2006, the Canadian Council for Refugees conducted a review of 11 rejected applications from Iraqi refugees. The authors of the review noted several problems with the decisions, including excessively brief decisions devoid of substance, overzealous credibility findings based on peripheral considerations, misinterpretation of the Refugee Convention with regard to military service evasion, failures in applying the correct legal test for persecution, and failures to consider the Country of Asylum class.³⁴⁰ The Canadian Council for Refugees followed up this report with a larger assessment of refusals at the Cairo visa office in 2010. That report outlined widespread failures by one particular visa officer, including lack of knowledge of country conditions, lack of understanding of the refugee definition, faulty credibility assessments, bias against members of the Pentecostal faith, failure to take into account documentary evidence, poor interview techniques, and poor note-taking.³⁴¹ The report highlighted the program’s lack of

³³⁷ Employment and Immigration Canada, “Discussion Paper”, *supra* note 173 at 4.

³³⁸ See Casasola, “Legislative Review”, *supra* note 124 at 21.

³³⁹ Canada, LRAG Report, *supra* note 122. See also Casasola, *ibid*, at 19-20.

³⁴⁰ Canadian Council for Refugees, “Analysis of a Small Number of Iraqi Private Sponsorship Applications Refused at Damascus” (2006), online (pdf): <<https://ccrweb.ca/sites/ccrweb.ca/files/static-files/IraqiPSRrefusals.pdf>>. See also Canadian Council for Refugees & Elected Sponsorship Agreement Holder Representatives, *supra* note 317.

³⁴¹ These cases were filed at the Federal Court in November 2009. See Canadian Council for Refugees, “Disturbing Upsurge in Rejections Rates of Eritrean Refugees in Cairo by Canada” (2009), online: <<https://ccrweb.ca/en/bulletin/09/11/30>>; Canadian Council for Refugees, “Concerns with Refugee Decision-Making at Cairo” (2010), online: <<https://ccrweb.ca/en/concerns-refugee-decision-making-cairo-0>>

accountability:

The problems in these cases highlight the systemic shortcomings in refugee decision-making at Canadian visa offices. Visa officers are often inadequately trained, decisions are rarely reviewed by the courts or monitored internally, and there are few witnesses to interviews, which are not recorded. The system thus lacks accountability.

It is possible that there are similar patterns of flawed decision-making occurring at other visa offices, with no one available to draw attention to them.³⁴²

The report recommended that guidelines and training be strengthened, and that regular monitoring of compliance be instituted. The report also recommended the introduction of video recording of interviews. In 2011, a group of around 40 refugee applicants, all rejected by the same visa officer at the Cairo office, commenced judicial review proceedings at the Federal Court.³⁴³ The four lead cases were granted by Justice Snider and the others were settled.³⁴⁴ The terms of the settlement included the removal of the deciding visa officer from refugee decision-making.

In 2011, CIC published an extensive study of decision-making in the PSR program that looked at a random sample of 209 accepted and refused files decided in 2007 in the Middle East-Africa region.³⁴⁵ Consultations with the Canadian Council for Refugees and SAHs organizations were also conducted. The study focused on credibility assessments, gender-based decision-making, the application of the legal criteria, documenting decisions, and communication with sponsors. Various shortcomings were identified, including the failure to confront applicants with

[“Decision-Making at Cairo”].

³⁴² Canadian Council for Refugees, “Decision-Making at Cairo”, *ibid* at 3.

³⁴³ See Labman, *Crossing Law’s Border*, *supra* note 45 at 73.

³⁴⁴ *Ghirmatsion v Canada (MCI)*, 2011 FC 519; *Kidane v Canada (MCI)*, 2011 FC 520; *Weldesilassie v Canada (MCI)*, 2011 FC 521; *Woldesellassie v Canada (MCI)*, 2011 FC 522.

³⁴⁵ Citizenship and Immigration Canada, “PSR QA Project”, *supra* note 236.

credibility concerns, the scant use of objective country documentation, inadequate reasons, the failure to interview all family members, the failure to refer to the IRB Guidelines on Gender-Based Violence, and the failure to consider the Country of Asylum class. The report increased training for visa officers, the development of decision-making tools, and reverting to the former practice of having a senior immigration officer review all negative decisions. This study represents the most extensive refugee resettlement decision-making assessment conducted to date. Its findings and recommendations will be addressed in greater detail in Chapter 5.

In 2016, IRCC released an empirical study on the resettlement programs that covered the 2010-2015 period.³⁴⁶ The study relied on a large dataset of key informant interviews, focus groups, and surveys, with both government and non-government actors. While this study did not focus on quality of decision-making, visa officer training was reported to be lacking in many respects. Notably, it was reported that training was inconsistent between visa offices and that not all officers had access to training because it was oversubscribed.

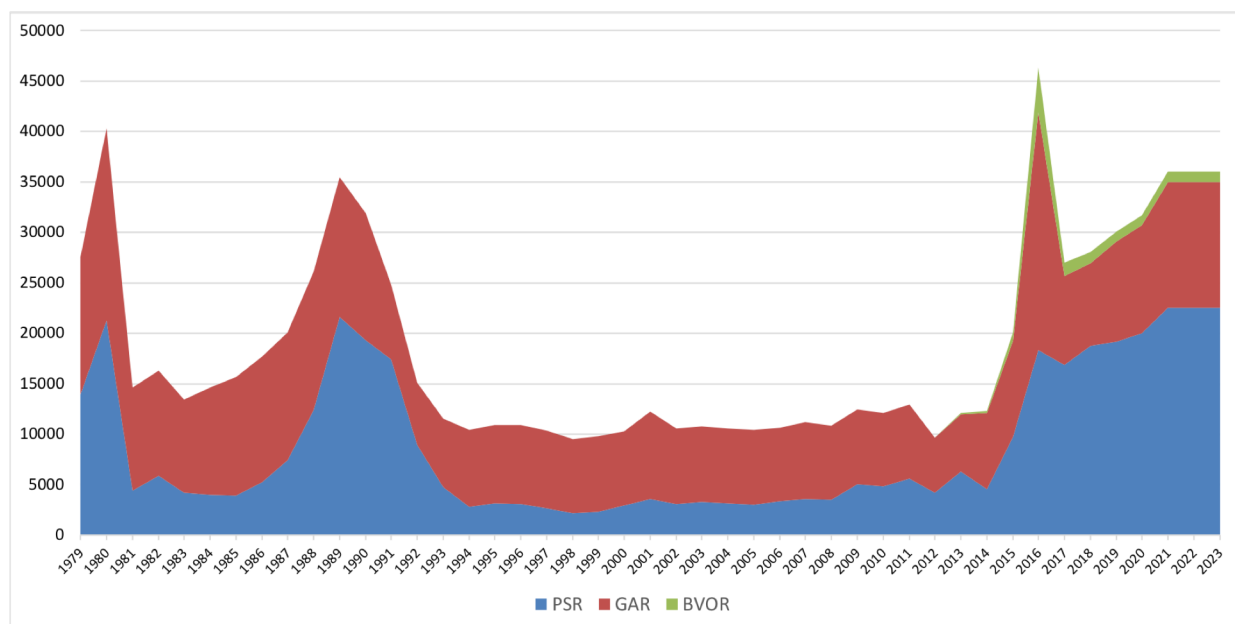
3.10 Resettlement in Canada – A glance at the Numbers

Between 1979 and 2018, a total of 707,421 refugees were resettled to Canada. A total of 313,401 refugees (43.30%) came through the PSR program, 385,014 through the GAR program (54.43%), and 9,006 (1.27%) through the BVOR program. Over this 41-year period, the yearly admission average was 17,254, but the numbers have varied widely. As the graph below shows, there have been three peaks of admissions. The initial peak in 1979-1980 corresponds to the Vietnamese, Laotian, and Cambodian movement and the birth of the PSR program. Admissions increased again in 1988-1991, mostly as a result of a large number of refugees selected under

³⁴⁶ Immigration, Refugees and Citizenship Canada, *Evaluation of the Resettlement Programs*, *supra* note 164.

the self-exiled category. The peak in 2016 corresponds to the Syrian refugee movement. Under the current government’s immigration level plans, total resettlement numbers for 2020-2023 are to remain well above program averages, climbing to 36,000 in 2021.³⁴⁷ It is worth noting that the COVID-19 pandemic has had a major impact on admissions through the resettlement stream as well as other immigration streams. At the time of finalizing this dissertation, partial data shows that, in the first 10 months of 2020, only 18.78% of the admission target was reached (15.55% of the PSR target; 22.28% of the GAR target; 2.5% of the BVOR target). Inevitably, total admissions for the year 2020 will fall well short of projected targets. Restrictions related to COVID-19 are likely to continue into 2021.

TABLE 3.4 - RESETTLEMENT TO CANADA (1979-2019) & 2020-2023 TARGETS³⁴⁸



³⁴⁷ See Immigration, Refugees and Citizenship Canada, “Notice – Supplementary Information for the 2021-2023 Immigration Levels Plan” (30 October 2020), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/news/notices/supplementary-immigration-levels-2021-2023.html>>.

³⁴⁸ Data collated from Canadian Council for Refugees reports, the Government of Canada OpenData Platform, and IRCC reports to Parliament.

The overall rise in resettlement numbers that followed the Syrian movement has been welcomed by refugee organizations, including the Canadian Council for Refugees. The Canadian Council for Refugees has deplored, however, the fact that the historical balance in the resettlement program is now compromised:

Canada's commitment to refugees must not be privatized: the government needs to take the lead by resettling more refugees than private citizens do. We are very concerned to see that the government is intending to resettle only half the number of Privately Sponsored refugees, especially as Government-Assisted Refugees are those identified by the UNHCR as the most vulnerable.³⁴⁹

3.11 Conclusion

This chapter began with a review of Canada's patchwork refugee policy in the 20th century. The analysis reveals that Canada was essentially absent from the international response to refugees until the 1950s. Today, Canada operates a robust refugee resettlement program that receives international recognition, although some elements of Canada's economically-driven refugee policy endure to this day.

The framework of refugee resettlement in Canada emerged through ad hoc, highly selective initiatives that were driven by humanitarian, but also by economic and ideological concerns. Refugee resettlement was formalized through the 1976 *Immigration Act*, and has remained largely unchanged since then. Admission levels under the program, however, have varied dramatically as a function of public and political support. These shifts attest to the

³⁴⁹ Canadian Council for Refugees, "Multi-year immigration levels welcomed, but government commitment to refugees falls short" (2 Nov 2017), online: <<http://ccrweb.ca/en/release/multiyear-levels-welcomed-commitment-falls-short?platform=hootsuite>>. The government's initial decision to consider BVOR arrivals as part of the government's commitment overall GAR commitment was also criticized by the refugee community as infringing on the principle of additionality: Immigration, Refugees and Citizenship Canada, "Evaluation of the Resettlement Programs", *supra* note 164 at 4.2.2; Canadian Council for Refugees, "Important changes", *supra* note 172.

fundamentally discretionary nature of the resettlement program. The 1976 *Immigration Act* also introduced the innovative PSR program. While elements of the PSR program have proven quite contentious, the program has been hugely successful over the years in harnessing humanitarianism in civil society, well beyond what the drafters of the 1976 *Immigration Act* had envisioned.

Important changes in refugee movements have occurred in the past 40 years. When the Canadian government moved to legislate refugee policy, refugee resettlement was the main element of Canada's refugee response. Since the increase in asylum seeker arrivals in the 1990s, this is no longer the case. Paradoxically, the refugee resettlement program has provided an opportunity for successive governments to legitimize rights-restrictive policies for asylum seekers, portrayed as 'bogus' or even 'illegal'. Refugee resettlement nevertheless remains a fundamental component of Canada's participation in the international refugee regime. Following the 2015-2017 Syrian refugee movement, the program has been receiving increasing attention from the international community. As many states are now looking at Canada's private sponsorship of refugees program as a model, it is imperative to critically assess the impacts of sponsorship and increased resettlement on other aspects of refugee protection.

Given the significance of refugee resettlement for Canada's humanitarian immigration policy, it is surprising that decision-making in refugee resettlement has thus far received little attention from scholars, and especially legal scholars. This is all the more surprising considering that refugee organizations have, for decades, expressed concerns over the quality of decision-making in visa offices. Similarly, the integration of the resettlement program into Canadian administrative law, and the role played by courts in the development and implementation of the

resettlement program, are issues seldom discussed in academic research and as international forums. The chapters that follow take on these issues.

CHAPTER 4 METHODOLOGY

4.1 Studying decision-making

The most common methodology used by legal scholars in refugee status decision-making studies, at least in the Canadian context, is to assess judicial review decisions as a window into first instance administrative decision-making. This focus on court decisions perhaps reflects a general methodological bias in administrative law, where the emphasis has traditionally been on “judicial review” more than “government action.”¹ Also, because court decisions are publicly available and most of them are accessible online, the study of judicial review presents clear advantages in terms of data gathering. However, the study of judicial review alone presents several limitations. In the context of overseas refugee determinations, judicial review decisions represent only the tip of the iceberg, as the vast majority of refugee determinations are not reviewed by the Federal Court. Perhaps more importantly, what judges write in judicial review decisions provides only a small window into how the decision-maker arrived at their decision. Administrative law’s focus on judicial review often results in a framework of analysis that looks exclusively at how the standard of review is applied by judges. In this dissertation, I am not - or at least not primarily - interested in whether visa officer decisions pass the test of judicial review. Principles of administrative law do play a major role in my analysis, but I am equally interested in examining *how visa officers make refugee decisions*. Questions such as how visa officers conduct interviews, how visa officers draft reasons, how they use country documents, are not matters that are necessarily relevant on judicial review. Even the overall role of judicial review in the resettlement program cannot be assessed relying on judicial review decisions

¹ See Harry Arthurs, “The Administrative State Goes to Market (and Cries ‘Wee, Wee, Wee’ All the Way Home)” (2005) 55:3 UTLJ 797; Harry Arthurs, “Rethinking Administrative Law: A Slightly Dicey Business” (1979) 17:1 Osgoode Hall LJ 1; Jennifer Raso, “Unity in the eye of the beholder? Reasons for decision in theory and practice in the Ontario Works program” (2020) 70:1 UTLJ 1.

alone.

In order to assess these kinds of issues, I determined that it was necessary to access detail information on the administration decision-making process itself. I initially sought to access a randomly selected sample of positive and negative visa officer decisions. Through access to information requests to IRCC, I requested anonymized copies of the first 10 decisions issued each year between 2011 and 2015. These were refused. Ironically, as a second-best strategy, I opted to access the decision-making process through judicial review. I was ultimately able to access a comprehensive pool of publicly available court files of judicial review applications in the refugee resettlement context. The added advantage of this method is that it allows for a double analysis, of both the first instance decision-making and judicial review for each case.

This component of my methodology yielded the entire court file in 403 judicial review applications of refugee resettlement decisions, representing the entirety of applications submitted to the Federal Court between 2011 and 2015. As described below, the court files were comprised of different elements depending on when the application was resolved. At a minimum, the files included the visa officer's decision.² Other files included the visa officer's notes, pleadings submitted by the parties, and the judge's decision.

The second component of my methodology includes the review of publicly available reports prepared by government institutions, international agencies, and civil society organizations involved in refugee resettlement. These are predominantly documents prepared by EIC/CIC/IRCC, the UNHCR, and the Canadian Council for Refugees (CCR). Thirdly, I have

² Applications for *mandamus*, naturally, did not include a decision.

reviewed customized statistical reports obtained through IRCC. These reports were ordered because the statistical data disclosed by IRCC was found to be insufficient for my purposes. Fourth, I have reviewed training documents obtained through access to information requests.

4.2 Identifying cases and study period

In order to develop a rich dataset that would lend itself to valid quantitative analyses, I strived to include the largest number of cases possible. Considering my capacities in terms of data collection and data analysis, I determined that a caseload of 300 to 500 cases was ideal. Based on an initial estimation of the number of judicial review applications filed each year, I determined that the study would cover a 5-year period (2011-2015). The 2015 cut-off point was also chosen in order to exclude from the dataset cases stemming from the Syrian refugee resettlement initiative, which was initiated in November 2015. As reviewed in the previous chapter, Syrian cases during a brief period following the election of the Liberal government in late 2015 were assessed on a *prima facie* basis, meaning that Syrian applicants were presumed to be eligible for resettlement unless there was evidence to the contrary. Visa officers focused only on security screening.³ As the goal of my analysis is to investigate the operation of the refugee resettlement system under ordinary circumstances, I determined that cases decided as part of the Syrian initiative should be excluded, hence the 2015 cut-off. Finally, considering that

³ See Immigration, Refugees and Citizenship Canada, “Syrian Refugee Resettlement Initiative – Looking to the Future”, online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/welcome-syrian-refugees/looking-future.html>>. Other exemptions were temporarily applied as part of the initiative: SAHs were allowed to sponsor an unlimited number of Syrian refugees outside of their annual cap allocation, Groups of 5 and Community Sponsors were allowed to sponsor Syrian (and Iraqi) refugees with no UNHCR status recognition, and immigration loans were waived for all Syrian refugees. See House of Commons, Standing Committee on Citizenship and Immigration, *Report 7 - After the Warm Welcome: Ensuring that Syrian Refugees Succeed* (8 March 2016) at 26, online (pdf): *House of Commons* <<https://www.ourcommons.ca/Content/Committee/421/CIMM/Reports/RP8555094/cimmrp07/cimmrp07-e.pdf>>.

CIC's PSR Quality Assurance Report was published in 2011, the chosen study period has the added benefit of lending itself to an impact analysis of the report.⁴

The dataset for this dissertation encompasses all judicial review applications of negative refugee resettlement decisions filed in the Federal Court between 2011 and 2015 inclusively. The cases were identified using two separate methods. First, two access to information requests were submitted to CIC/IRCC seeking the disclosure of the Federal Court docket number (IMM-201#-##) for every judicial review file involving permanent residence applications under the refugee classes between 2011 and 2015.⁵ These requests produced a total of 283 applications. In the course of gathering data, it became apparent that the list provided was incomplete, as some cases for which a reported decision had been issued were not included in the disclosure. In fact, I learned that neither IRCC, the Department of Justice, nor the Federal Court keep a reliable record of judicial review applications based on the precise nature of the underlying decision. In order to capture the remaining cases, I designed a strategy to review the entire caseload of the Federal Court during the study period. I first conducted an automated search of the Federal Court docket for potential overseas refugee cases. The automated search was coded in Python programming language. The search identified all docket entries categorized as "Imm – Appl. for leave & jud. review – Arising outside Canada" which contained as a keyword the location of a visa office that had decided a refugee resettlement case during the same calendar year or the previous two years.⁶ That search produced a total of 4,864 cases. All 4,864 cases were manually

⁴ Citizenship and Immigration Canada, "The PSR QA Project: Managing Quality Counts" (2011).

⁵ Citizenship and Immigration Canada, Access to Information Request #A-2015-01715 (23 October 2015) (for years 2011-2014); Immigration, Refugees and Citizenship Canada, Access to Information Request #A-2016-46785 (29 March 2017) (for year 2015).

⁶ The first entry in the online docket of judicial review application in respect of a refugee resettlement case typically had this format:

reviewed at a Federal Court location. A further 120 refugee resettlement cases were identified through the manual review, for a total of 403 cases.⁷ I have a high level of confidence that all judicial review applications were captured using this method. The reliability of this method was confirmed by cross-referencing the results of the search with the list of cases disclosed by IRCC through the ATI request.

4.3 Gathering the cases and analytical framework

In each of the 403 cases, the entire physical file was ordered and was manually reviewed. The bulk of relevant documents was scanned and remains on file. The content of the physical file varied depending on when in the judicial review process the application was resolved. Judicial review applications that were not perfected or discontinued before being perfected contained the least information. Some of these cases contained only a notice of application, but most contained also the visa officer's decision letter and the visa officer's notes.⁸ Cases that were perfected typically contained, in addition to the decision letter and the reasons, an affidavit from the applicant, and memoranda of argument from both parties. Some cases also contained an

Application for leave and judicial review against a decision CIC, JORDAN, AMMAN, 23-APR-2015, FILE #G0000***** filed on 21-SEP-2015. Written reasons not received by the Applicant
Tariff fee of \$50.00 received

The relevant visa offices were identified using customized statistical reports obtained from IRCC, on file with author. In overseas matters, applicants are allowed to file a judicial review application within 60 days after they receive a decision (IRPA, s 72(2)b)), which would suggest that in the year 2011, only decision made in 2011 and 2010 would have been judicially reviewed. However, in the refugee resettlement context, it is frequent for applicants not to immediately receive a decision and file a judicial application more than 60 days after the decision was *issued*. Therefore, out of an abundance of caution, visa offices having decided cases in 2010 and 2009 were included in the search for the 2011 year, and the same method was used for subsequent years. As it turned out, not a single case was judicially reviewed more than one year after the decision was issued.

⁷ See Appendix A for the full list of cases.

⁸ If an applicant states in the application for leave that reasons were not received, the Federal Court will request reasons from the visa office pursuant to rule 9 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22. The “reasons” in immigration matters include the decision letter and the notes taken by the officer. Some cases were discontinued before the rule 9 disclosure was placed in the record. In a few cases in the dataset, reasons were not requested by the applicant despite the fact that the reasons had clearly not been received, as none were included in the application.

affidavit from the visa officer, and, in a few cases, cross-examination of the visa officer. The most complete cases were those that were granted leave. These cases generally contained the full “tribunal record”, which includes, in addition to the above, all forms and supporting documents submitted during the application process.⁹ Cases that proceeded to a hearing naturally also included the Federal Court’s decision. During the study period, CIC transitioned from the Computer Assisted Immigration Processing System (CAIPS) to the Global Case Management System (GCMS). Notes entered in the GCMS system typically contain less biographical and application data than notes entered in the CAIPS system.¹⁰

For each case, qualitative and quantitative information was gathered from both the Federal Court docket and the physical file and collated in Excel. The information gathered pertained to both the administrative process (the immigration application) and the judicial review process. A coding handbook was prepared to ensure consistency in coding.

i) Administrative process

The quantitative variables pertaining to the administrative process include the following:

- a) Application date
- b) Decision date
- c) Principal applicant gender
- d) Principal applicant date of birth
- e) Dependents
- f) Location of visa office
- g) Name/code of visa officer
- h) Whether reconsideration was requested
- i) Whether a lawyer or consultant was on file
- j) Type of application (GAR or PSR)
- k) Type of sponsor (in the case of PSR applications)

⁹ *Federal Courts Citizenship, Immigration and Refugee Protection Rules, ibid*, r 15, 17. The full tribunal record was not routinely scanned.

¹⁰ Notes in the CAIPS system usually contained an information sheet that indicated the principal applicant’s date of birth, family composition, type of sponsorship, name of sponsor and city of destination.

- l) Country of origin
- m) Country of asylum
- n) Basis of application (religion, political opinion, violation of human rights, etc.)
- o) Basis of rejection (credibility, durable solution, nexus, inadmissibility, etc.)
- p) City/province of destination
- q) Whether case law was cited by the visa officer
- r) Whether country documents were cited by the visa officer
- s) Number of lines relevant to the applicant in the visa officer's decision
- t) Whether the applicant had UNHCR/state refugee status
- u) Whether a procedural fairness letter was sent to the applicant

In addition to these quantitative data points, a summary of the refugee narrative and the refusal rationale was created for each case, where possible. Based on the foregoing, a second analytical framework was created based on apparent problematic aspects in visa officer decision-making.

The categories in this framework include:

- a) Cases where language issues/translation issues may have led to the negative decision
- b) Cases where the visa officer approached gender claims in a problematic fashion
- c) Cases where the visa officer failed to take into account the mental health or physical limitation of the applicant
- d) Cases that present a problematic assessment of testimony
- e) Cases that present a problematic assessment of personal documents
- f) Cases that present a problematic assessment of objective documents
- g) Cases where the visa officer failed to consider the central element of the claim
- h) Cases where the visa officer confused the concepts of generalized risk and local integration
- i) Cases where the visa officer appeared to have an unreasonable expectation in terms of memory
- j) Cases where the visa officer appeared to make a microscopic examination of the evidence
- k) Cases where the visa officer appears to have breached procedural fairness
- l) Cases where the visa officer appears to have made a problematic credibility determination

ii) Judicial review process

With regard to the judicial review process, each case was coded for the following data points:

- a) Date of JR application
- b) Federal Court office
- c) Name of lawyer

- d) Whether the application was perfected, discontinued before being perfected, or not perfected
- e) Whether leave was opposed
- f) Name of leave judge, leave outcome, and leave date
- g) Whether the case was discontinued following a positive leave
- h) Whether there is evidence of case settlement
- i) Name of hearing judge, date of decision, and hearing outcome
- j) For positive judicial review decision – a classification of the grounds for quashing the visa officer’s decision (unreasonable credibility finding, breach of procedural fairness, etc.)
- k) Whether the decision was published (reasons) or unpublished (order)
- l) Whether a question for certification was submitted, by which party, and whether it was certified
- m) Whether the Federal Court decision was appealed
- n) Whether the respondent submitted a substantive affidavit from the visa officer and whether the visa officer was cross-examined by the applicant

A plain-language summary of the applicant’s arguments on judicial review, and a summary of all Federal Court decisions on the merits was also created.

4.4 Publicly accessible reports

Many publicly reports and guidelines were accessed and reviewed. Specifically, I reviewed several reports and guides issued by the UNHCR, including the influential *Resettlement Handbook*, as well as annual *Global Trends* and *Projected Resettlement Needs* reports. I have also reviewed various operating manuals, program evaluations, and statistical reports issued by EIC/CIC/IRCC and other government agencies. The statistical platform Open Data proved to be a valuable source of statistical information. Reports prepared by various non-governmental organizations, such as the Canadian Council for Refugees, were also reviewed

4.5 Customized statistical reports

While the Open Data platform contained precious statistics on overseas refugee applications, it proved insufficient for two reasons. First, the data on overseas refugee processing available on

Open Data is currently not broken down by visa office. Only global numbers are provided. Second, the datasets for the relevant years were presented in terms of *persons*, as opposed to *applications*. Because my own dataset relies on *principal applicants* as the primary measure, and because the number of dependents included in each application is not always apparent on the record, I sought additional data through IRCC's customized statistical service, including the number of refugee resettlement applications received, processed, and rejected by each visa officer, broken down by the type of application (GAR, PSR, BVOR).

4.6 Training material

Two packages of visa officer training material were obtained through access to information requests. The first is dated July 2015 (102 pages - handout documents) and the second April 2020 (90 pages - PowerPoint presentation).¹¹ Both disclosures include documents prepared by International Region Training (RIRT) trainers. As both disclosures differ in form and content, it remains unclear whether there exists other training material.

4.7 Limitations

This study's methodology has three significant, inherent limitations. First, the body of overseas refugee cases in respect of which a judicial review is launched is not a representative sample of overseas refugee decisions. Presumably, before a decision is made to launch a judicial review application by a refugee applicant or their sponsor (if there is one), a problem has already been identified. Problematic decisions are therefore overrepresented in the dataset. That being said, considering the difficulty in accessing judicial review for overseas refugee applicants, it is likely

¹¹ Access to Information Request #2A-2020-01732 (8 October 2020); Access to Information Request #A-2015-09399 (29 June 2015).

that problematic decisions routinely go unchallenged. Second, the dataset includes very few GAR applicants - which is in itself a telling substantive finding. Decision-making in the GAR stream remains a blind-spot. To be clear, the dataset is not presented as a representative sample of visa officer decisions, and no inferential statistical analysis is conducted. Caution must be exercised when drawing conclusions as to the prevalence of the identified trends in the wider body of cases. Third, the dataset is only comprised of *negative* visa officer *decisions*. As reported in CIC's PSR Quality Assurance report, important variations in decision-making practices exist depending on the outcome of a particular case.¹²

In closing this chapter, I want to emphasize three broader points. This study makes no attempt to document the subjective experience of refugee applicants themselves. The irony is that the experience of refugees in the Canadian immigration system is ultimately what really matters here. In fact, too many refugee studies fail to account for the agency of refugees in navigating and shaping the global refugee regime. However, in my opinion, doing justice to refugees' perspectives and experiences would require a dedicated research focus. Ultimately, I had to limit the scope of this already broad research and leave the matter for another day. I also want to acknowledge that the voices of women refugees are minimized in the dataset because of the resettlement system's focus on the "principal applicant", which in the family context is overwhelmingly the male head of the household. Finally, it should be noted that the overall group of cases processed in visa offices is not necessarily representative of the body of refugees awaiting resettlement. As observed in section 3.6, between 2012 and 2017, SAH-sponsored refugee cases processing in certain visa offices was restricted by sub-caps. The visa offices

¹² Citizenship and Immigration Canada, "The PSR QA Project: Managing Quality Counts" (2011).

affected by the measure included Islamabad, Nairobi, Cairo, and Pretoria.¹³ As pointed out previously, the sub-caps disproportionately affected refugees from sub-Saharan Africa. It was nonetheless interesting to note that, despite the sub-caps, those four visa offices remained the top four visa offices in terms of both cases refused and cases judicially reviewed during the study period.

¹³ Immigration, Refugees and Citizenship Canada, Evaluation Division, “Evaluation of the Resettlement Programs (GAR, BVOR, PSR and RAP)” (July 2016).

CHAPTER 5 ASSESSING VISA OFFICER DECISION-MAKING

5.1 Introduction

Determining refugee status is considered one of the most difficult and complex adjudication tasks facing administrative decision-makers. Writing on Canada's inland refugee determination system, Cécile Rousseau et al explain that this complexity

stems from the need of the decision-maker to have sufficient knowledge of the cultural, social, and political environment of the country of origin, a capacity to bear the psychological weight of hearings where victims recount horror stories, and of consequent decisions which may prove fatal, and an ability to deal with legal issues such as the subtle international definition of the refugee or the procedures of quasi-judicial hearings involving various pieces of evidence.¹

In the overseas program, the task facing decision-makers is arguably more difficult. Visa officers arrive at their decision without detailed arguments from counsel, and process a larger caseload. Visa officers also lack the in-depth training and resources provided to IRB members. As compared with the inland refugee system, few overseas refugee cases are reviewed by the Federal Court, and the program receives very little outside scrutiny. Under such circumstances, shortcomings in decision-making can easily develop and persist. In section 3.9, I have provided an overview of concerns expressed by civil society organizations and government over the quality of decision-making in the overseas refugee program. In this chapter, I present the results of a detailed analysis of visa officer decision-making in the 403 cases comprising the dataset. I begin this analysis with an overview of the core characteristics of the dataset, including the type of application, processing times, country of origin and country of asylum, visa officer and visa offices, gender and family composition, as well as grounds for application and refusal. This is

¹ Cécile Rousseau et al, "The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making process of the Canadian Immigration and Refugee Board" (2002) 15:1 J Refugee Stud 43 at 43-44.

followed by an analysis of procedural shortcomings I have identified in the cases, including language matters, the treatment of vulnerable applicants, problematic interview conduct and visa officer bias, the issue of documenting decisions, and delays in assessing cases. The next section addresses trends in more substantive areas of decision-making: the treatment of gender-based claims, the assessment of personal evidence and country documents, the assessment of local integration, the assessment of successful establishment, the assessment of inadmissibility, and, finally, credibility and plausibility determinations. In the last section of this chapter, I will present a few recommendations that would in my view contribute to increasing the quality of decision-making in the overseas refugee system.

5.2 Overview of refugee applications

i) Type of application

The dataset includes 403 discrete applications. However, many of the 403 judicial review applications involved multiple linked “principal applicants” who were grouped together for the purpose of judicial review. In total, 492 separate principal applicants are represented in the dataset. The 403 judicial review applications cases also include four *mandamus* applications *i.e.*, applications for an order compelling the government to make a decision in a particular case where no decision had yet been made. Three hundred and ninety-three (393) applications were identified as PSR applications (475 principal applicants). One of these applications was identified as a *mandamus* application. During the same period, 10 judicial review applications (17 principal applicants) in the GAR stream were initiated. Two of those cases were *mandamus* applications (9 principal applicants).

TABLE 5.1 - OVERVIEW OF APPLICATIONS

PSR				GAR			
JR applications	% of dataset	Principal applicants	<i>Mandamus</i> applications [†]	JR applications	% of dataset	Principal applicants	<i>Mandamus</i> applications [†]
393	97.52%	475	1	10	2.48%	17	9

[†] Principal applicant equivalent

Amongst the 393 privately sponsored cases, 224 were sponsored by a SAH (57.00%);² 138 were sponsored by a Group of Five (35.11%);³ and one (1) was sponsored by a Community Sponsor (0.25%). In 30 of the privately-sponsored cases (7.63%), it was impossible to determine the type of sponsor. In most of these cases, the application had not been perfected and there was no decision in the court record. In the case of the SAH-sponsored applications, it was often impossible to determine whether the sponsorship involved a co-sponsor or a constituent group, and, as a result, that data point was not coded.

TABLE 5.2 - TYPE OF SPONSOR

Type of Sponsor	# of cases	% of dataset
SAH (with or without constituent group / co-sponsor)	224	57.00%
Group of Five	138	35.11%
Community Sponsor	1	0.25%
Unknown	30	7.63%
<i>Total</i>	<i>393</i>	<i>100%</i>

ii) Cases per year and processing times

The table below shows that the number of cases filed in the Federal Court each year ranged from a low of 59 cases in 2013 to a high of 106 cases in 2015. Taking into consideration the varying number of rejected cases each year, there is no discernible trend over time.

² This includes sponsorships conducted through a “personne morale” or a “personne morale + individu” in Quebec.

³ This includes sponsorships conducted through a “parrainage collectif par un group de 2 à 5 personnes” in Quebec.

TABLE 5.3 - JR APPLICATIONS PER YEAR

Year	# of cases
2011	94
2012	82
2013	59
2014	62
2015	106
<i>All years</i>	<i>403</i>

It is noteworthy that processing times during this period were quite lengthy. It was possible to determine the delay between the date of reception of the application at the visa office and the date the final decision was issued in 189 cases (185 PSR cases & 4 GAR cases - 46.90% of all applications). The delays *do not* include any time required for in-Canada processing of PSR applications, which can add a number of months to the process.⁴ The average processing time for PSR cases was 1,092 days (3 days shy of 3 years) and the median PSR processing times was 1,016 days (2 years, 9 months and 16 days). The processing times for PSR cases ranged from 74 days to 3,353 days (9 years, two months, and 17 days). Eighteen PSR cases (9.73% of the PSR cases surveyed) took over 5 years to process. Interestingly, the 4 GAR cases had a higher average processing time than PSR cases (1,711 days).⁵ Within PSR cases, there was a steady increase in average processing times over the study period, from a low of 678 days in 2010 to a high of days in 1,353 in 2015. These processing times for PSR cases in this dataset closely match reported overall processing times.⁶

⁴ In-Canada processing is especially lengthy for Groups of Five. IRCC notes that only 5% of Groups of Five sponsorship applications are accepted upon initial submission, and that Groups of Five applications are returned to the sponsor on average three times before it is accepted (Immigration, Refugees and Citizenship Canada, Evaluation Division, “Evaluation of the Resettlement Programs (GAR, BVOR, PSR and RAP)” (July 2016) at para 6.2.5 [Evaluation of the Resettlement Programs]).

⁵ This is interesting because GAR cases are normally processed faster than PSR cases (*ibid* at 5.5.2).

⁶ IRCC’s evaluation reported that 80% of PSR cases were processed within 36 months in 2010 and 54 months in 2015, compared to 35 months and 62 months in this study’s dataset (*ibid* at 5.5.2).

TABLE 5.4 - AVERAGE PROCESSING TIME (PSR CASES)

Year of decision	# of days
2010	678
2011	1,061
2012	1,097
2013	1,242
2014	1,123
2015	1,353
<i>All years⁷</i>	<i>1,092</i>

iii) Country of origin and country of asylum

There were 18 countries of origin represented in the dataset. Four countries accounted for more than 75% of the cases: Afghanistan (137 cases - 34%), Somalia (74 cases - 18%), Eritrea (57 cases - 14%), and Sri Lanka (47 cases - 12%). It was impossible to determine the country of origin in 11 cases. The diversity in terms of third country was greater, with 37 countries in total. Pakistan was by far the most frequent third country with 106 cases – 26%. It was impossible to determine the country of asylum in 5 cases.

⁷ Weighted average.

TABLE 5.5 - COUNTRIES OF ORIGIN

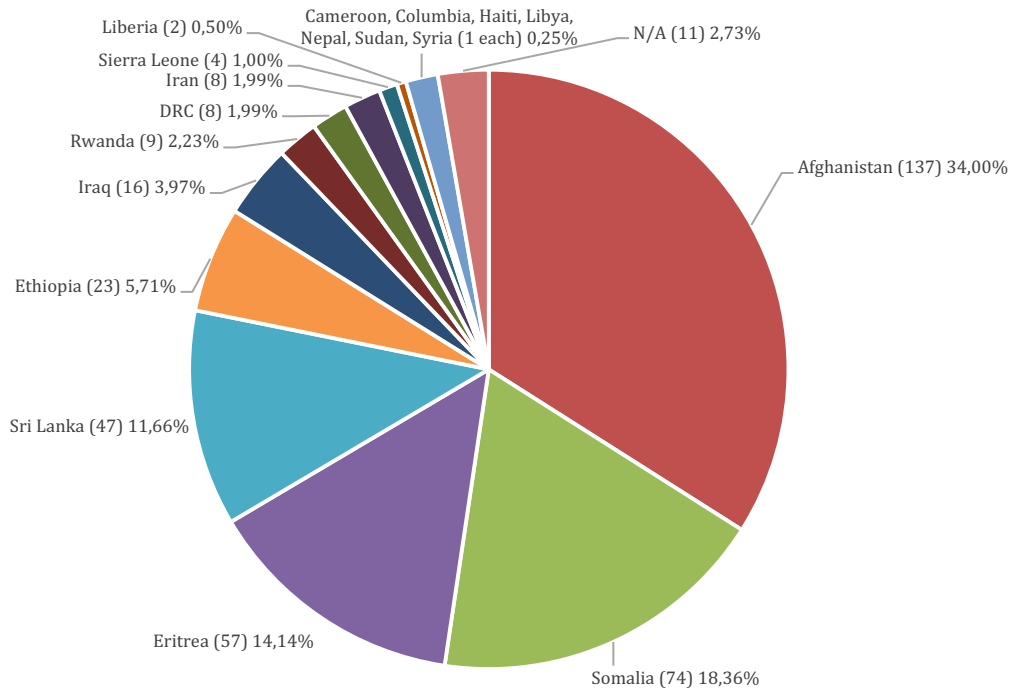
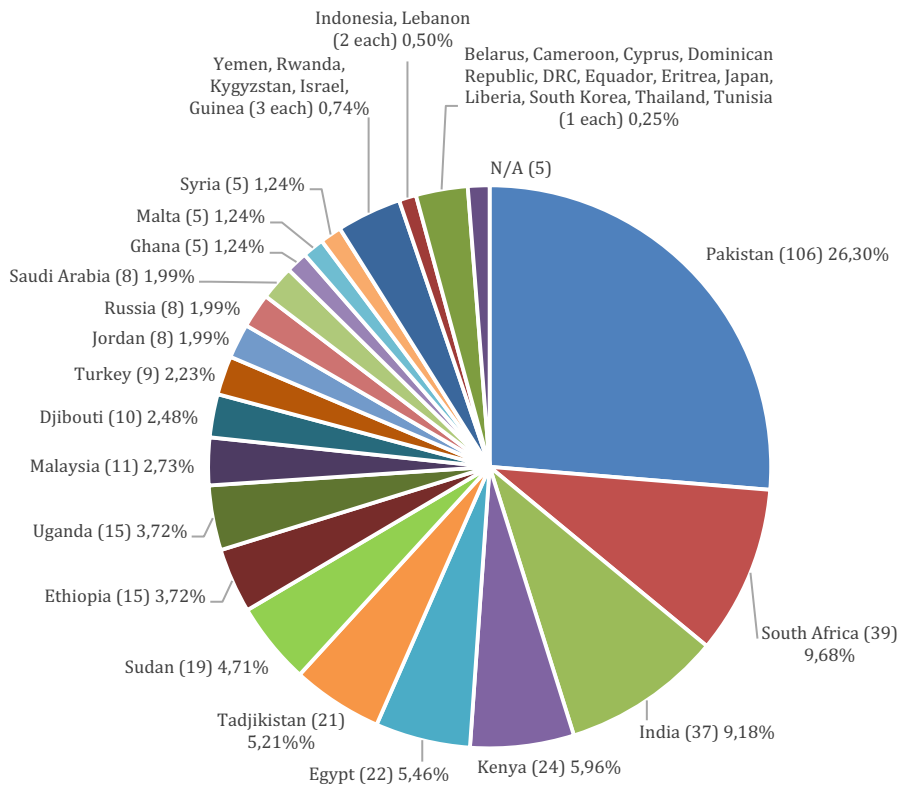


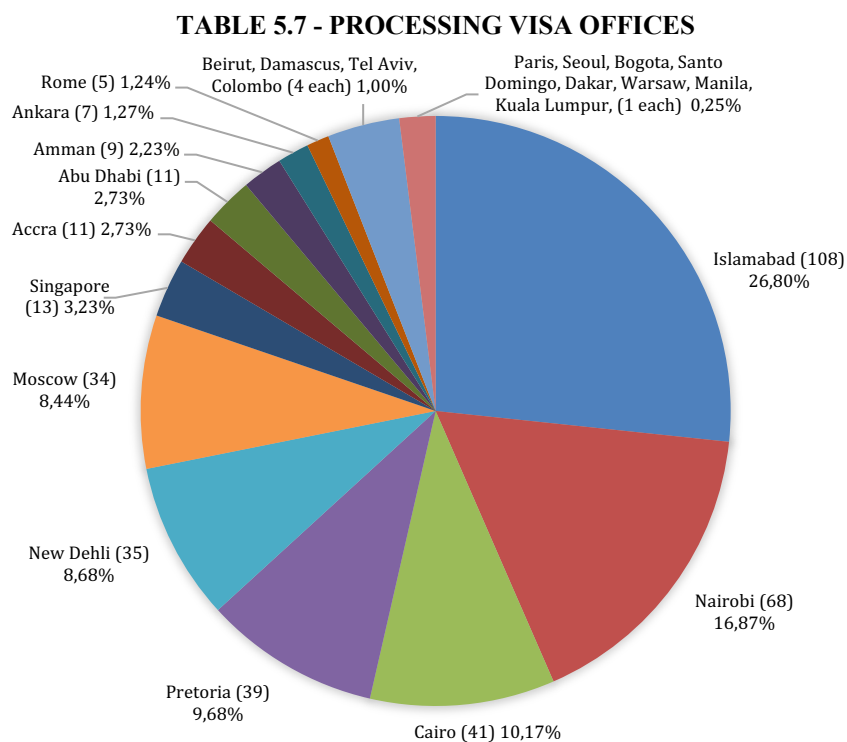
TABLE 5.6 - THIRD COUNTRIES



A clear trend in terms of flight path was apparent in two notable cases: 102 of the 137 Afghan applicants in the dataset sought refuge in Pakistan (74.45%) and 35 of the 47 Sri Lankan applicants sought refuge in India (74.47%).⁸

iv) Visa offices and visa officers

The location of the processing visa office does not map perfectly over the countries of asylum, as many visa offices are responsible for processing applications from multiple countries. There were 24 separate visa offices represented in the dataset, with 6 visa offices being responsible for more than 75% of all applications (Islamabad, Nairobi, Cairo, Pretoria, New Delhi, and Moscow).



It was interesting to note that some visa offices were much more likely than others to have their refusals challenged in court. Among visa offices with 40 or more PSR refusals in 2011-2015,

⁸ See Appendix B - Flight Paths.

the likelihood of a refugee refusal being challenged in judicial review varied from 17,07% (Ankara) to 0% (London, England).⁹

TABLE 5.8 - LIKELIHOOD OF PSR JR BY VISA OFFICE (2011-2015)

Visa office	PSR refusals	JRs	JR rate
Ankara	41	7	17.07%
Amman	58	9	15.52%
Accra	72	11	15.28%
New Delhi	243	35	14.40%
Moscow	268	34	12.69%
Islamabad	943	108	11.45%
Abu Dhabi	100	11	11.00%
Singapore	121	13	10.74%
Cairo	503	41	8.15%
Damascus	54	4	7.41%
Rome	69	5	7.25%
Pretoria	603	39	6.47%
Nairobi	1,975	68	3.44%
Beirut	175	4	2.29%
London England	45	0	0
<i>All included offices</i>	<i>5270</i>	<i>389</i>	<i>7.38%</i>

It was not always possible to determine the identity of the visa officer. The signature of the deciding visa officer was almost always illegible in decision letters, and the typed “name” under the signature almost invariably read “Immigration Officer”, or a similar anonymous title. In the visa officer notes also, the identity of the visa officer was not clearly indicated. Identifying the visa officer was especially difficult in cases processed under the GCMS system. In some cases, a code was used to identify the visa officer. In other cases, no visa officer is identified by code. In addition, Federal Court decisions only mention the visa officer by name in exceptional cases. As a result, I have only conducted one analysis that relies on the identity of the visa officer.¹⁰

⁹ The disparity between visa offices remains even when taking into consideration the proportion of cases decided in 2015 that may have been judicially reviewed in 2016.

¹⁰ See section 5.4.7.

v) Gender and family composition

The gender of the principal applicant was apparent on the record in the vast majority of cases. Three hundred seventeen (317) principal applicants were identified as male (66.74%), while 158 were identified as female (33.26%). In the majority of cases involving a married couple, the husband was designated as the principal applicant. The presence or absence of dependents was apparent on the record in 378 cases. One hundred and thirty-six cases (35.98%) proceeded with a single applicant, while 242 included dependents (64.02%). Female principal applicants were slightly more likely to proceed without dependents than male principal applicants (40.54% compared to 35.68%). Almost invariably, female principal applicants with dependants were single mothers.

5.3 Overview of application and refusal grounds

i) Application grounds

I was able to determine the type of risk being alleged in 366 cases. Identifying risk grounds was not always straightforward. Applicants proceed without a lawyer and do not typically frame their narrative in terms of regulatory eligibility criteria. It also seems that visa officers - at least in the case of rejected applications - do not always categorize the type of risk they are assessing in terms of eligibility criteria. In addition, most applications in the dataset involved more than one ground of persecution or risk described in the Country of Asylum Class. For example, in the vast majority of claims from Sri Lankan nationals, the risk feared was linked to both civil war and race. Similarly, the majority of claims from Afghan nationals involved a variety of grounds including civil war, and persecution based on religion, race and gender. The Country of Asylum ground “seriously and personally massive violations of human rights” was quite difficult to code, as it was essentially ignored as a standalone ground by visa officers, or blended into

Convention persecution grounds.

TABLE 5.9 - APPLICATIONS GROUNDS

Ground	# of cases	% of cases ¹¹
Affected by civil war	196	53.55%
Political opinion	114	31.15%
Religion	96	26.23%
Race	94	25.38%
PSG - woman	58	15.85%
PSG - clan or tribe	34	9.29%
PSG - family member	20	5.46%
Nationality	12	3.29%
PSG - sexual orientation	2	0.55%

ii) Grounds for refusal

The grounds for refusal were identifiable in 393 cases.¹² In the vast majority of cases, multiple grounds for refusal were invoked by the visa officer. Credibility was by far the most common ground for refusal, cited in over half of the decided cases.

TABLE 5.10 - GROUNDS OF REFUSAL

Ground	# of cases	% of cases ¹³
Credibility	198	50.38%
Durable solution - repatriation	86	21.88%
Durable solution - integration	63	16.03%
No nexus to a Convention ground	63	16.03%
“Does not reside in country of application”	46	11.70%
No objective basis for fear	45	11.15%
Identity not established	36	9.16%
No subjective fear	27	6.87%
Inadmissibility	15	3.82%
Failed to attend interview/submit forms	9	2.29%
Internal flight alternative (IFA)	7	1.78%
Successful establishment	7	1.78%
Settlement in third country	3	0.76%

It was interesting to note that some grounds for refusal correlated strongly to particular refugee populations and particular countries of asylum. For example, the vast majority of Sri Lankan and Afghan applicants were found to be able to repatriate to their country of origin, whereas the

¹¹ Among the 366 cases where an application ground was apparent.

¹² The refusal ground was unclear in 6 cases, in addition to the 4 cases where judicial review was launched before the case was decided (*mandamus* cases).

¹³ Among the 393 cases where a refusal ground was apparent.

vast majority of applicants in South Africa were found to have locally integrated in their country of asylum.

5.4 Trends in decision-making

This section presents a detailed qualitative assessment of problematic trends identified in visa officer decisions, divided between “procedural matters” and “substantive matters.” In order to provide a rich context, the analyses make extensive reference to case file notes. The analyses also engage with both IRCC and UNHCR guidelines. While the overall role of judicial review is addressed in greater detail in chapter 6, Federal Court pronouncements on cases that have been decided on the merits will be examined. Throughout this section, I also present some quantitative data related to the frequency of certain elements in the dataset. I reiterate here that my dataset is not a representative sample of the body of refugee cases decided during the study period, and that therefore this study makes no claim as to the prevalence of certain elements within the wider body of cases.

5.4.1 Procedural matters

5.4.1.1 Language

Difficulties around language contribute to making refugee status determination an extremely challenging adjudicative task.¹⁴ The quasi-totality of interviews were conducted through an in-person interpreter. Interpreters do much more than simply transfer meaning from one language to another, they are mediators of culture. Much “cultural content” can get lost in the

¹⁴ See Audrey Macklin, “Asylum and the Rule of Law in Canada: Hearing the Other (Side)” in Susan Kneebone, ed, *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives*, (Cambridge: Cambridge University Press, 2009) 78 at 85; Laura Smith-Khan, “Different in the Same Way? Language, Diversity, and Refugee Credibility” (2017) 29:3 Intl J Refugee L 389 at 390.

interpretation process:

Because of the close links between language and culture, however, even excellent translators fulfill this task only when they attempt to communicate in their translations the cultural context of words and concepts. Interpreters used in the asylum procedure often not only lack this sophistication; sometimes they are also not qualified or they make mistakes because of fatigue resulting from a lengthy hearing. All this may distort the communication between asylum-seeker and refugee. Of special importance is a structural problem created by the necessity of using interpreters.¹⁵

It appears that practices around the use of interpreters may vary depending on the visa office. CIC's processing manual states that visa officers should preferably use visa office employees as interpreters, although UNHCR staff, or friends and family members of an applicant can be used if necessary.¹⁶ The manual also provides that visa officers should be sensitive to the importance of using female interpreters with female applicants,¹⁷ and includes the following directions for assessing the fluency and impartiality of the interpreter:

The officer must be completely satisfied that every interpreter is fully fluent in the languages of both the interviewer and the applicant, and that the translation is correct and free of bias.

If at any time the officer is not satisfied that an interpreter is translating accurately, the officer should verify their suspicion by rephrasing the answers that have raised doubts, and ask the applicant to confirm that the officer has understood correctly. If necessary, identify another interpreter or reschedule the interview.

The officer should also advise applicants to tell them at any point during the interview if there is anything that they do not understand or if there are any other difficulties.¹⁸

¹⁵ Walter Kalin, "Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing" (1986) 20:2 Intl Migr Rev 230 at 233. See also Smith-Khan, *ibid.*, at 394.

¹⁶ Citizenship and Immigration Canada, "OP 5: Overseas Selection and Processing of Convention Refugees Abroad Class and Members of the Humanitarian-Protected Persons Abroad Classes" Manual (2009) at para 11.4 ["Overseas Selection and Processing"].

¹⁷ *Ibid* at para 12.1.

¹⁸ *Ibid.*

The manual also cautions against being overly zealous in looking for inconsistencies in an applicant's testimony, especially where the applicant is speaking through an interpreter.¹⁹ The manual clearly states that visa officers should "not trust an interpreter who may come from a rival ethnic or tribal group."²⁰

It is important to note that, while an interpreter is provided at interviews, applicants receive no assistance in completing application forms, which must be completed in English or French. Applicants not fluent in these languages, and those who are illiterate, often rely on family members, friends or neighbors to translate and transcribe their refugee narrative. Some rely on third-party translation services. Errors can easily arise in the process.

Language was identified as having played a problematic role in 29 cases. In 15 cases, interpretation issues at the interview appears to have hindered the communication between the visa officer and the applicant. In a further 17 cases, the applicant, being either illiterate or not fluent in English, had relied on someone else to complete the forms, and for that reason may not have been fully aware of what was stated in the written application.²¹ In the pages that follow, I summarize 13 such cases and discuss both the impact of language barriers on the administration of the resettlement program and potential avenues to minimize language barriers.

i) Interpretation

IMM-4531-11 involves, ironically, a young Afghan man who had worked as an interpreter with Canadian and American forces in Afghanistan. After an Islamic group began suspecting his

¹⁹ *Ibid* at para 13.1.

²⁰ *Ibid* at para 11.1.

²¹ Some cases presented a problem with regard to both forms and interpretation.

involvement, he fled with his family to Tajikistan. The visa officer found both that they lacked credibility, and that they could locally integrate in Tajikistan. With regard to credibility, the visa officer took issue with the fact that the applicant had not informed his superiors about his problems with the Islamic group. The decision letter reads:

You were interviewed with the assistance of an interpreter fluent in English and Dari. You did not indicate that you had any difficulty in understanding the translator or in having the translator understand you.

The applicants' affidavit submitted on judicial review, however, tells an entirely different story. They explain that the interpreter did not speak Dari but a "Tajik Persian slang" that was partly unrecognizable to them. They stated that they raised their concerns with the visa officer, who told them to simply ask the interpreter to repeat the questions if there was a problem. The visa officer also refused the applicants' request for their son - who had worked as a Dari-English interpreter - to act as the interpreter during the interview. Leave in this judicial review application was granted unopposed, and the case was eventually settled.

IMM-5037-15 is the case of a Hazara Afghan man who fled to Pakistan with his four children after his wife was killed in a rocket attack. The visa officer rejected the application on the basis that the applicants had repatriated to Afghanistan, and were not residing in Pakistan. As with the previous case, the visa officer stated: "You did not indicate that you had any difficulty in understanding the interpreter or in having the interpreter understand you." In their affidavit submitted in judicial review, however, the applicants explain that the interpreters (there were two interpreters) were ethnic Pashtuns or Tajiks and had limited abilities in the Dari language. The applicant stated that he has an intermediate level of English, and he was aware at the interview that certain terms were not being correctly translated. The applicant further stated in his affidavit that he made this known to the visa officer and even attempted to communicate

directly with her in English. The applicants also noted in their affidavit that the interpreter was Pashtun, and that Pashtuns are long-time enemies of the Hazara. They argued that the inadequate interpretation may have resulted from the interpreter's bias against them. In this case, too, leave was granted unopposed, and the application was settled.

IMM-4927-11 is the case of an Afghan family that fled to Tajikistan during the Taliban regime. In this case, the visa officer concluded that the applicants did not fear persecution in Afghanistan, but rather did not want to return due to general instability. Shortly after the refusal, the applicant's sponsor wrote to the visa office requesting reconsideration for the following reasons:

... it seems that the family did have problems with the interpreter. They thought something was not being translated correctly, and questioned the person translating for them. The interpreter told them to "be quiet... quit complaining... and not to say anything negative about their situation".

This case was denied leave at the Federal Court.

In IMM-3863-13, an Eritrean man of Pentecostal faith claimed that he had escaped Eritrea after having been detained and beaten by state authorities because of his religion. The application was rejected on credibility grounds. The visa officer states in his reasons:

Unwilling to provide more detail. Subject is reticent and did not provide any details even when asked. It was very difficult to extract information. ... Because the applicant is unwilling or unable to provide any details concerning his refugee claim, I have questions as to his credibility. I would expect him to be able to provide details to substantiate his story.

The judicial review application suggests that inadequate interpretation is what caused the applicant to be unable to provide the full details of his claim. The applicant indicated in his application that he required interpretation in Tigrinya. However, the interview notes show that

the visa officer began the interview with the wrong file, that of an Ethiopian applicant. The interpreter present at the interview was not a Tigrinya interpreter, but an Amharic interpreter, an official language of Ethiopia. After the mistake was discovered, the officer proceeded with the correct file, but never asked the applicant if he needed an interpreter in another language. As the applicant did not speak Amharic, he answered the visa officer's question in English, a language he barely spoke. This case was granted leave and judicial review was granted on consent.

IMM-2716-13 is the case of a Somalian woman who fled to Saudi Arabia with her children after her husband was killed by members of Al-Shabab. The case was refused because the visa officer found that they would not be at risk in Somalia and instead left for economic reasons. The interview took place using "3-way interpretation." An interpreter provided translation from English to Arabic, while the principal applicant's son translated from Arabic to Somali. The applicants stated in their affidavit that this method of interpretation led to various misunderstandings. The Federal Court found that this did not amount to a breach of procedural fairness because the applicants had not requested that the interpreter be replaced.²²

In IMM-4782-15, an Afghan, Shia Ismaili family claimed that they would suffer persecution in Afghanistan because of their religion and ethnicity. The visa officer believed that they were not residing in Pakistan but had returned to Afghanistan. In addition, the visa officer made a number of negative credibility findings. One of these was based on the fact that the principal applicant's employment card contained a "POR number." This was found to be inconsistent with the applicant's statement that he was never issued a POR card:

²² *Mohamed v Canada (MCI)*, 2014 FC 192.

Your employment card has a POR number EC-311-0063922? Can you explain?
It is a mistake. Why would the employer put a POR number on your card? Do not know maybe someone put it there. ...

His employment card has a POR number on it. PA cannot explain.

As with some of the above cases, the visa officer wrote in the decision letter that the applicants had not indicated that they had problems with the interpretation. However, the principal applicant's son, who has a basic understanding of English, stated in his affidavit to the Federal court that he objected to the interpretation on numerous occasions during the interview. He stated that his father's answer with regard to the POR card was not properly translated:

Another incident occurred when my father was asked about why a POR card number was recorded on my father's employment Card even though he testified that he had no POR card. My father explained to the Officer that he did not have a POR card or POR card number. One of his supervisors was a fellow Afghan and in order to help my father get the job he recorded his own POR card number on my father's employment card. The interpreter summarized the explanation in one sentence stating "It is not my card number." Again I objected to the translation and told the Officer in English that the interpreter was not giving the full explanation. Again she did not confront the interpreter on the issue, and told me not to interrupt.

This case was granted leave by the Federal Court (unopposed) and ultimately settled.

The above cases confirm that the interview process is fertile ground for linguistic misunderstandings. The interpreters provided are not necessarily professionals, and it can be difficult to find interpreters in certain dialects in certain regions. What is troubling is that it appears that visa officers consistently use boilerplate text in their decision indicating that the applicant did not complain about the quality of the interpretation, regardless of whether such observation was actually made during the interview.

ii) The challenge of completing forms

Literacy poses significant problems in refugee and immigration proceedings. The Council of

Canadian Administrative Tribunal reports:

Citizenship and immigration is an area of administrative law where literacy and the understanding of law presents a daily challenge. Matters coming before immigration boards and tribunals involving the issue of literacy are often in the context of citizenship requirements - namely, the applicant's knowledge of the official language, as well as knowledge of Canada and the responsibilities and privileges of citizenship. Similarly, low literacy presents an obstacle for individuals required to complete potentially complex and confusing documentation in a clear and accurate manner.²³

The data shows that many applicants had difficulty completing the forms, and that omissions in the written forms and inconsistencies between the forms and the interview testimony are a frequent basis of refusal in refugee claims. Illiterate applicants, and those speaking neither English nor French, must rely on third parties to translate and transcribe their refugee narratives. Translation can be of poor quality, inaccurate or incomplete. Applicants who rely on third-party translation are also exposing themselves to potentially fraudulent services. Even for applicants who have the language abilities to complete forms themselves, it can be difficult to determine the level of detail required.

In IMM-1481-15, a Tamil family from Sri Lanka stated at the interview that they fled their country because their sons were being targeted to join the Liberation Tigers of Tamil Eelam (LTTE). They stated that LTTE members had come to the family home on numerous occasions. The visa officer faulted the principal applicant for not mentioning these visits in the forms. The applicant replied that he had provided the information to his son in Canada, who omitted to include them in the written translation. The visa officer notes include the following exchange:

Who wrote this narrative? I told my son in Canada and he wrote it. ...

²³ Council of Canadian Administrative Tribunals, "Literacy and Access to Administrative Justice in Canada: A Guide for the Promotion of Plain Language" (2005), online (pdf): <<http://www.ccat-ctac.org/CMFiles/Publication/Literacyandjustice.pdf>>.

Why is there no mention that the LTTE came to your house so frequently and, as you state, forcing your sons to join? I did mention. ... I told them that but I don't know what happened in the translation.

Your son in Canada wrote this? I sent my Tamil script to my son and I don't know if he translated himself or gave to someone else. ...

So why is it not in the narrative? I wrote everything, don't know what went wrong with translation.

The judicial review application was not perfected.

IMM-6857-11 concerns a family that fled Somalia. The principal applicant stated at the interview that his father, his mother, and his two brothers were killed because of armed fighting. He also stated that he was detained by a militia for a month and freed after his aunt paid off his captors. While testimony provided by the other applicants confirmed these events, the visa officer took issue with the fact that the written forms indicated that the principal applicant had been detained one *year* (not one *month*), and the forms did not mention the role played by his aunt in his escape.²⁴ On judicial review, the applicant argued that the discrepancies were due to poor translation made by a man who spoke hardly any Somali. Indeed, the visa officer notes indicate the following:

... who helped you fill out your application form? A Somali man who lived here for so long who also knows a little Somali and that time I didn't speak good English.

This case was granted leave but refused on the merits. The court rejected the above argument because the applicant had not voiced this concern at the interview.

In IMM-6677-14, an Afghan family told the visa officer that they fled to Russia after a commander demanded to marry their daughter and threatened to kill the principal applicant. The

²⁴ The visa officer also rejected the case because the applicant had a durable solution in Ethiopia through his spouse's citizenship.

family also stated that they were beaten and faced persecution because of their Hazara ethnicity. The case notes indicate that the visa officer questioned at length the principal applicant about his military service and his political involvement. The visa officer initially made a positive determination in the case, but three weeks later sent a procedural fairness letter to the applicant requesting updated Schedule A forms. The visa officer wrote:

Please note that for the “Personal History” and “Addresses” sections, you must provide details from the age of 18 (disregard the part about the 10 year limit). There must be no gaps (even a month long).

The applicant sent updated forms, but these were also considered inadequate by the visa officer because a few months were missing from the personal history. A second procedural fairness letter was sent to the applicant. The second set of updated forms were also deemed inadequate, and the case was rejected. The rejection letter states that because of the missing months, the visa officer is “not satisfied that you and your dependents are not inadmissible under the Act.”²⁵ On judicial review, the principal applicant outlined in his affidavit that he had difficulty understanding what was requested of him because he does not speak English. He indicated that after attempting to translate the email in Dari using Google, he contacted a friend who had helped the family complete the original application. This friend prepared a new Schedule A form by hand, relying on information the applicant was providing. The applicant stated that the friend never mentioned that months were missing from his personal history. The case was denied leave.

IMM-3505-12 concerns an Afghan family that fled to Pakistan. At the interview, the principal applicant stated that he had been beaten, jailed, and tortured by the Taliban, and that the Taliban had killed his son. The visa officer noted during the interview that in the written forms the principal applicant had not mentioned the death of his son or the abuse he endured at the hands

²⁵ This problematic type of conclusion on inadmissibility will be reviewed later in section 5.4.6.

of the Taliban. In response, the principal applicant's daughter told the visa officer that her father is illiterate and that he did not complete the forms himself. She said that her father had signed a blank form, which was then completed by family friends in Canada who asked questions to the applicants by telephone. Ultimately, the visa officer rejected the application, partly because of the credibility issues resulting from this inconsistency. This case was granted leave and judicial review was granted by Justice Manson, who found that the credibility finding was unreasonable:

The Officer's negative credibility finding is, at first blush, reasonable, given the fact that the PA first raised the allegations of having been jailed, beaten, tortured and extorted by the Taliban and that the Taliban had killed his son at the interview and had not mentioned these serious claims on his application form for permanent residence. While it seemed reasonable for the Officer to reject the PA's and dependents' explanation that the PA had signed a blank form and that the form was completed over the telephone by friends in Canada who were co-sponsoring the family. (SIC) ... However, and most importantly, given the fact that the Officer did not mention the interviewees' explanation that the PA is illiterate, and that the PA's son in Canada is illiterate, it was unreasonable for the Officer to ignore that part of the explanation. The Officer erred in this regard.²⁶

In IMM-1852-12 and IMM-1854-12, two Eritrean cousins had fled to Sudan. Both had been detained after attempting to evade national service. They were detained at the same camp and escaped around the same time. The visa officer took issue with the fact that their written forms contained identical wording. In response, one applicant state that they had a nearly identical experience, and that the similarities in wording were due to the fact that they had relied on the same person to complete the forms:

The person who wrote the testimony was one person, we gave him our story and in his own way he wrote. We each have our own experience, the person writing our story was the same person. Because we can't write, everybody tells him their story, even my cousin told him, and the person wrote the story you read now.

Neither case was perfected on judicial review.

²⁶ *Ismailzada v Canada (MCI)*, 2013 FC 67 at para 28.

In IMM-8334-14, a young Ethiopian woman applied for resettlement in Kenya. In her application, it was written that her father had been abducted for perceived sympathy toward the Oromo Liberation Front (OLF), and that her mother was killed by members of the Ethiopian People's Revolutionary Democratic Front. The forms also indicated that she was detained by state authorities on suspicions of hiding OLF documents, and that during detention, she was raped and forced to cook and clean. The visa officer rejected the case on credibility grounds for the sole reason that the dates of detention indicated in the forms (*March 5, 2010 to April 20, 2010*) did not match the dates mentioned at the interview (*April 20, 2010 to May 4, 2010*). When confronted with the discrepancy, she explained that the person who she hired to write the forms must have made a mistake:

Why the discrepancy? Maybe the person who wrote it made a mistake. But who gave them the information? I did. Who wrote the information? I don't know. I couldn't write it so somebody who could English wrote it. ...

PA responded that she didn't know why the dates were different. She stated that she didn't understand why he would have written that, that maybe she didn't pay him enough.

At the Federal Court, Justice Fothergill considered that the visa officer's credibility assessment was reasonable and rejected the judicial review.²⁷

There is ample evidence in the dataset indicating that completing the forms can be exceptionally challenging for refugee applicants. They are often unable to complete the forms themselves, and are unable to verify the accuracy of the statements made in their name. Inconsistencies and omissions are often fatal to an application. I am not suggesting here that it is improper for visa officers to draw negative conclusions from inconsistencies or omissions. As I explain further

²⁷ *Hamdiya Kasim Abdella v Canada (MCI)* (14 October 2015), IMM-8334-14 (FC).

below, I do believe however that visa officers should exercise caution in this regard.

iii) Bridging the language gap

The above cases show that language barriers can seriously impair an applicant's ability to present her case to the deciding visa officer. Language difficulties can develop at two critical stages of the application process - the in-person interview and the drafting of the forms. It appears that visa officers are not always sensitive to the language barriers facing applicants. In this section, I want to discuss steps that could be undertaken to minimize such barriers, beginning with interpretation.

I want to acknowledge here that, because visa officer interviews are not recorded, it can be difficult to assess the validity of claims made by applicants on judicial review regarding the accuracy of interpretation. It is also worth noting that, on judicial review, the bar for quashing decisions based on inadequate interpretation is quite high. The court will only intervene on matters of inadequate interpretation if the applicant voiced his or her concern to the decision-maker. For example, in IMM-2716-13, described above, the Federal Court refused the applicant's argument about interpretation because he had not mentioned it to the visa officer. This raises an obvious question: how can an applicant who does not speak English or French be expected to notice inaccuracies in interpretation during the interview? Normally, inaccuracies will only be noticed if the visa officer notes are scrutinized after the fact. Nevertheless, it is telling that in the vast majority of the cases cited above, the judicial review was either settled or granted on consent, which suggests that government lawyers gave credence to the statements contained in the applicants' affidavits.

At minimum, IRCC should take further steps to ensure that interpretation is provided by a competent interpreter who speaks not only the *language* of the applicant, but her particular *dialect*. IRCC directs visa officers to avoid using an interpreter from a rival group. This policy should be applied with more consistency. I acknowledge that finding interpreters can be challenging, especially if the language spoken by the applicant is infrequently spoken in that particular area. Nevertheless, guidelines to assess the competency of interpreters should be strengthened and applied consistently. Three-way interpretation should never occur, and family members should be allowed to provide interpretation if the applicants so request. Applicants are the best judges of whether an interpreter is fluent in their language. If there is any doubt as to whether the interpretation is adequate, the interview should be postponed until an appropriate interpreter can be found. Finally, IRCC should implement systematic audio recording of interviews. This would not only allow for accurate *post facto* assessments of whether the applicant's testimony was accurately translated, it would also provide visa officers with a useful tool to review interviews.

With regard to the written forms, the cases reviewed indicate that many applicants do not have first-hand knowledge of what is written. Applicants typically rely on friends, family members, neighbours, or their sponsor in Canada to complete the forms with information they provide orally. It can be difficult for applicants to determine the level of detail to include in the written forms. Question 3a) in IMM0008 Schedule 2 requests the following information:

Set out in chronological order all the significant incidents that caused you to seek protection outside your home country. You should include any action taken against you, your family members or any other individuals in a similar situation.

The answer box for question 3a) includes only 5 lines. The Refugee Sponsorship Training Program stresses that this is the most important section of the application, and that applications

should include a separate narrative detailing the applicant's flight in as much detail as possible.²⁸ It is doubtful that applicants who do not benefit from *pro bono* legal help from Canadian lawyers know to provide additional information on a separate sheet. In any case, most applicants have no means to verify that the information is complete and accurate, yet they are often faulted for omissions and inconsistencies. Visa officers should exercise caution in drawing negative inferences from omissions or inconsistencies in the written forms where there is evidence that the applicant did not complete the forms herself.

5.4.1.2 Vulnerable applicants

Research in the medical sciences indicates that refugees and asylum seekers experience a high prevalence of mental disorders, especially posttraumatic stress disorder (PTSD), depression, and anxiety.²⁹ Mental health disorders and cognitive deficits can pose challenges in refugee status assessments, where testimony, memory, and credibility play central roles. Janet Cleveland explains that mental health issues can affect a claimant's ability to coherently present their case before a decision-maker:

For example, a person who has experienced torture or rape may well have difficulty telling her story to the Board despite procedural adjustments. Her

²⁸ Refugee Sponsorship Training Program, "Handbook for Sponsoring Groups - Chapter 5: The Refugee Forms" at 52 (November 2017), online (pdf): <rstp.ca/wp-content/uploads/2014/03/Chapter-5-The-Refugee-Forms-NOV-2017-FIN.pdf>.

²⁹ Debbie C Hocking, Gerard A Kennedy & Suresh Sundram, "Mental Disorders in Asylum Seekers: The Role of the Refugee Determination Process and Employment" (2015) 203:1 *J Nervous and Mental Disease* 28 at 28. See also Cécile Rousseau, Abdelwahed Mekki-Berrada & Sylvie Moreau, "Trauma and Extended Separation from Family among Latin American and African Refugees in Montreal" (2001) 64:1 *Psychiatry* 40; Cécile Rousseau et al, "Appendix 11 - Post-Traumatic Stress Disorder: Evidence Review for Newly Arriving Immigrants and Refugees" (2011) 183:12 *CMAJ* 290; Rachel Kronick, "Mental Health of Refugees and Asylum Seekers: Assessment and Intervention" (2018) 63:5 *Can J Psychiatry* 290; Mina Fazel, Jeremy Wheeler & John Danesh, "Prevalence of Serious Mental Disorder in 7000 Refugees Resettled in Western Countries: A Systematic Review" (2005) 365:9467 *Lancet* 1309; Zachary Steel, Naomi Frommerb & Derrick Silove, "The Law and its Effects Failing to Understand: Refugee Determination and the Traumatized Applicant" (2004) 27 *Intl J L & Psychiatry* 511; Zachary Steel et al, "Association of Torture and Other Potentially Traumatic Events With Mental Health Outcomes Among Populations Exposed to Mass Conflict and Displacement: A Systematic Review and Meta-analysis" (2009) 32 *J Am Med Association* 537.

account may still be marred by inconsistencies, vagueness, omissions, late disclosure, apparent lack of emotion, or other characteristics that can easily be mistaken for signs of untruthfulness.³⁰

Trauma, in particular, can affect a person's ability to recall life events.³¹ Masinda explains that victims of trauma can develop dissociative disorders that renders them unable of remembering, verbally at least, a traumatic event. They may at some point recover their memory of the event, but the memory may include false elements.³² Various theories have been put forward to explain the impact of trauma on memory, including information surcharge, coping mechanisms, and the lack of "detached sensitivity" required to form metaphorical thoughts.³³ The UNHCR recognizes that decision-makers assessing refugee status must be sensitive to the mental health of asylum seekers and be prepared to adjust their decision-making strategy:

207. It frequently happens that an examiner is confronted with an applicant having mental or emotional disturbances that impede a normal examination of his case. A mentally disturbed person may, however, be a refugee, and while his claim cannot therefore be disregarded, it will call for different techniques of examination.

208. The examiner should, in such cases, whenever possible, obtain expert medical advice. ...

...

³⁰ Janet Cleveland, "The Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the Immigration and Refugee Board of Canada: A Critical Overview" (2008) 25:2 *Refugee* 119 at 119.

³¹ Hilary Evans Cameron, "Refugee Status Determinations and the Limits of Memory" (2010) 22:4 *Intl J Refugee L* 469; Jane Herlihy & Stuart W Turner, "Asylum Claims and Memory of Trauma: Sharing our Knowledge" (2007) 191 *Brit J Psychiatry* 3; Laurence J Kirmayer, "Failures of imagination: The Refugee's Narrative in Psychiatry" (2003) 10:2 *Anthropology & Med* 167; Zachary Steel, Naomi Frommer & Derrick Silove, "Part I - The Mental Health Impacts of Migration: The Law and its Effects - Failing to Understand: Refugee Determination and the Traumatized Applicant" (2004) 27 *Intl J L & Psychiatry* 511; Diana Bögner, Jane Herlihy & Chris R Brewin, "Impact of Sexual Violence on Disclosure During Home Office interviews" (2007) 191 *Brit J Psychiatry* 75; Jane Herlihy & Stuart W Turner, "The Psychology of Seeking Protection" (2009) 21:2 *Intl J Refugee L* 171; Rousseau et al, *supra* note 1; Mambo T Masinda, "Quality of Memory: Impact on Refugee Hearing Decisions" (2004) 10:2 *Traumatology* 131.

³² Masinda, *ibid* at 133.

³³ *Ibid.*

210. It will, in any event, be necessary to lighten the burden of proof normally incumbent upon the applicant, and information that cannot easily be obtained from the applicant may have to be sought elsewhere...

211. In examining his application, therefore, it may not be possible to attach the same importance as is normally attached to the subjective element of “fear”, which may be less reliable, and it may be necessary to place greater emphasis on the objective situation.³⁴

In various cases in the dataset, an applicant presented at the interview with apparent mental or physical disabilities. In my assessment, these impairments were not always adequately taken into account by the visa officer. In IMM-1792-13, for example, an Iraqi man who had fled to Syria was interviewed over video conference by a visa officer located in Beirut. He told the visa officer that a militia group had killed his two brothers, and that he himself had been shot by the militia because his brothers would not support the group. The notes of the visa officer indicate that he noticed immediately at the beginning of the interview that the applicant was mentally disabled:

From outset of interview, it appeared that the PA was mentally disabled. He was having difficulties understanding the question: asked by the interpreter. PA would repeat the questions asked by interpreter and then respond in every case.

Nevertheless, the visa officer rejected the case because of the applicant’s inability to recall relatively minor details, including details of his military service. For example, the visa officer faulted the applicant for not being able to recall the names of his superiors in the military. This case went unopposed by the respondent and was granted on consent before leave was decided. Sadly, the record indicates that the applicant disappeared in Syria two weeks after his interview in October 2013.

³⁴ UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva: 2011) at paras 208, 210-211.

In the case above, the visa officer observed that the applicant suffered from a mental disability, but seems to not have adapted his expectation in terms of memory recall. There are other cases where visa officers failed to notice (or at least, fail to note in the file) even severe mental disability. In IMM-4049-14, a young Tamil woman from Sri Lanka fled to India. In her written application, she stated that Sri Lankan soldiers suspected her of being a supporter of the LTTE, and that they had detained her and sexually assaulted her. Her interview proceeded through video conference. During the interview, she gave a more general explanation of why she left, referring to current conditions in Sri Lanka. The visa officer (who was female) never referred to the written narrative and never asked the applicant about the experiences of sexual assault. She rejected the case stating that the applicant had not established “specific or personalized reasons for fearing return to Sri Lanka.” The applicant had also mentioned at the interview that her parents had disappeared during the war, but she was unable to explain to the visa officer what had happened to them or who exactly told her that they had died:

She could not provide the year her parents disappeared, explain the circumstances of the disappearance, or provide the names of the persons who told her about the disappearance. It is reasonable to expect that a person would recall certain details of a significant life event, such as the disappearance of their parents.

On judicial review, the applicant submitted a report by a mental health practitioner diagnosing her with a deficit in intellectual and social functioning. The report states that she has the mental capacity of a young child. It could be the case that the fact that the interview was held by video conference hindered the visa officer’s ability to assess the applicant. Nevertheless, it is troubling to imagine that a decision-maker would not notice such a significant impairment, and would fault the applicant for not being forthcoming about past sexual violence. At the Federal Court, leave was granted (opposed) and the application was settled between the parties.

Another notable case is IMM-3409-15. In that case, the visa officer asked the principal applicant if he had any “serious disease of mental disorder”, to which he replied “no.” However, the principal applicant’s son told the visa officer “My father has mental problems. He does not remember ... It is not serious but because of shocks, he forgets things.” The son’s statement was dismissed and no accommodation was made. Ultimately, the visa officer rejected the application on credibility grounds because of the applicant’s inability to recall the name of the Mogadishu neighbourhood he lives in, and inconsistencies between the father’s recollection of certain details and his sons’. On judicial review, this case was granted leave and then discontinued. As will be further discussed in section 5.4.3, the visa officer’s conclusions in this case were, in addition, not supported by the evidence.

In another case, IMM-7959-11, the notes indicate that the applicant repeatedly told the visa officer that “his head was no good.” The applicant in this case had witnessed his sister and father dying in a bombing. He also testified that his sister had been raped before the bombing. The visa officer found the applicant not credible because he did not know that another sister of his had also been raped (she was a separate applicant). The visa officer also faulted the applicant because it was indicated in the written forms that the applicant’s sister had died from the rape and not from the bombing:

You said earlier head not good. What did you mean? Asked what happened about his father, he gets headaches; suffered from seeing his father die. I can’t find him credible as he is getting more dramatic and gesturing in a superficial way, and telling me he is not lying, he is telling me the truth.

The judicial review application in this case was discontinued after a declaration by the respondent that leave would not be opposed.

In IMM-122-13, it was clear at the interview that the applicant suffered from hearing and/or anxiety problems and that he had trouble understanding the questions posed to him:

PA had to have question clarified three times. ... Clarifying with PA. ... Repeat question. ... PA doesn't seem to understand. ... wants me to repeat the question. ... PA wants question repeated again. (Repeated question 3X). PA is agitated. ... Repeat question pls. Repeated. ... Interpreter must clarify. ... PA's behaviour is odd. ... Have reviewed interview and appear that there were difficulties.

During the interview, the visa officer made no attempt to inquire into the cause of the communication problems or clarify whether the applicant understood the interpreter. The visa officer refused the application on the grounds that the applicant had left not because of the civil war in Somalia, but because he was offered a sponsorship to come to Canada. The applicant's sponsor requested that the case be reconsidered and confirmed that the applicant was hard of hearing and had difficulty hearing the interpreter. At the Federal Court, this case was denied leave.

The five cases reviewed above tell us that resettlement applicants can present with a variety of physical and mental impairments, including intellectual deficits, memory problems, and hearing issues. In each of the reviewed cases, it appears that the applicants' mental or physical state hindered their ability to present their case to the visa officer. An important finding is that visa officers in these cases made no effort to better understand the vulnerability of the applicants. Visa officers were not sensitive to these vulnerabilities and did not attempt to adapt the interview in light of the recognized impairments. Neither did they adapt their expectations of memory and consistency. That is perhaps unsurprising. Beyond general statements in IRCC material that visa officers should be sensitive to "medical condition, age, or mental or

psychological incapacity”,³⁵ my research has identified no guideline or directive to visa officers for the processing of vulnerable applicants other than fast-tracked processing,³⁶ resorting to the Joint Assistance Program,³⁷ and exempting the applicant from the successful establishment criteria.³⁸ The training materials reviewed do not cover vulnerable applicants either. It is worth noting that in 2006 the IRB issued a guideline with respect to vulnerable persons appearing before the IRB. The guideline recognizes that a person’s vulnerability may affect memory and behaviour, and therefore may cause them to provide inconsistent and incoherent testimony, and may also cause them to be reluctant or unable to talk about their experiences.³⁹ The guideline states that the identification of vulnerability should be made early in the process so as to allow for procedural accommodations to be made.⁴⁰ Possible procedural accommodations include proceeding by videoconference, allowing the participation of a support person, creating a more informal setting, varying the order of questioning, excluding non-parties from the hearing room, and “allowing any other procedural accommodations that may be reasonable in the circumstances.”⁴¹ It should be noted that empirical studies conducted in the inland context suggest that IRB members have a poor understanding of the impact of trauma on refugee claimants.⁴² In addition, Janet Cleveland writes that the IRB guideline fails to address the more substantive challenges faced by vulnerable claimants:

The Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the IRB (Guideline 8) addresses only one of these issues, that of procedural adjustments designed to attenuate some of the difficulties faced by

³⁵ Citizenship and Immigration Canada, “Overseas Selection and Processing”, *supra* note 16 at para 11.5.

³⁶ *Ibid* at para 24.

³⁷ *Ibid* at paras 6.31, 15.4.

³⁸ *Ibid* at para 22.5.

³⁹ Immigration and Refugee Board, “Chairperson Guideline 8: Procedures with Respect to Vulnerable Persons Appearing Before the IRB” (amended 15 December 2012) at para 4.1, online: <<https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir08.aspx>> [“Vulnerable Persons”].

⁴⁰ *Ibid* at para 5.1, 7.

⁴¹ *Ibid* at para 4.2.

⁴² Rousseau et al, *supra* note 1; Masinda, *supra* note 31.

vulnerable persons during IRB procedures. Although a praiseworthy initiative, the Guideline therefore falls far short of responding to all the needs of vulnerable persons appearing before the IRB.⁴³

It is also worth pointing out that most inland claimants benefit from the advocacy of lawyers to identify and inform their vulnerable state in the context of their refugee claim. Overseas applicants do not. Ensuring that the vulnerability of overseas refugee applicants is properly taken into account would require the development and implementation of a policy that places some of the responsibility of identifying vulnerability on visa officers and more clearly articulates the substantive consequences of various types of impairment.

5.4.1.3 Interview conduct and bias

There were very few cases in the dataset where bias was apparent on the record or argued on judicial review. Allegations of bias are notoriously difficult to make out before a court. The legal test to be met is a high one. In *Committee for Justice and Liberty*, the Supreme Court described the test for a reasonable apprehension of bias as:

...what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.⁴⁴

In the visa officer context, the Federal Court has sometimes adopted an even more stringent standard than that set out in *Committee for Justice and Liberty*. For example, in *Au*, Justice Nadon observed:

Since visa officers do not act in a judicial or quasi-judicial capacity, a test of bias similar to the test applied to judges or decision-makers acting judicially is not, in my view, appropriate. In my opinion, a less stringent test should be applied to

⁴³ Cleveland, *supra* note 30 at 120.

⁴⁴ *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 at 394.

visa officers, one which requires an absence of conflict of interest and a mind that is open to persuasion. ... The visa officer represents the Minister, and therefore cannot be expected to be as impartial as a judge should be.⁴⁵

In addition, in the case of visa officer decision, because visa officer case notes are cursory and almost entirely produced by the deciding visa officer himself or herself, it can be extremely difficult for an applicant to produce evidence of objectionable conduct. In one case in the dataset, however, the biased behaviour of the visa officer was clear. It is worth here going into some of the details of the case because it provides a rare window into the interaction between visa officers on the ground and their superiors in Ottawa. The case also illustrates how easily decision-makers can err in their risk assessment, and how removal practices can place failed refugee claimants at a higher risk.

IMM-610-12 concerns a Libyan family that had previously come to Canada in 2000 and made a refugee claim on arrival. Before the RPD, the principal applicant had claimed that he was at risk in Libya because of his brother's activities as an opponent of the Gaddafi regime. The RPD accepted that the brother was an opponent of the regime, but determined that the principal applicant himself was not credible and would not be at risk in Libya. In 2008, removal proceedings were initiated, and the applicant submitted a Pre-Removal Risk Assessment application (PRRA). In support of his application, the applicant submitted new evidence that the Libyan police had issued an arrest warrant for him, as well as a report on his brother's detention. The PRRA officer rejected the application, stating that the arrest warrant did not indicate specifically *why* the applicant was sought by Libyan authorities. The applicants were concerned

⁴⁵ *Au v Canada (MCI)*, [2001] FCJ No 435 at para 22. See also *Horvat v Canada (MCI)*, [2003] FCJ No 354 at paras 8-11.

that they would face an increased risk in Libya if they were to be identified as failed asylum seekers. They insisted on renewing their passport themselves and hoped that they would be able to travel as ordinary passengers. However, at the airport, CBSA officers delivered their passports directly to the flight crew, who then handed them over to Libyan authorities. As a result, the principal applicant was questioned immediately upon arrival, and sent to prison for several months. During his detention, he was tortured and questioned about his links to opponents of the Gaddafi regime. Subsequent to his release, the applicant learned that authorities were again looking for him. Through a bribe, the family obtained a European visa, and took a flight to Sweden, where they submitted a refugee claim. Their claim was not heard, however, and they were deported to Malta, the visa-issuing country, following the terms of the Dublin Regulations II.⁴⁶ In Malta, the family was able to secure counsel in Canada, who informed immigration officials of their situation and asked that they be brought to Canada, either as GARs or under humanitarian and compassionate considerations. What transpired afterwards is reminiscent of the facts in the landmark *Baker* case.⁴⁷ The record shows that there was extensive communication between management officials, who were keen on accepting the case, and visa officer Beaulieu,⁴⁸ who was adamant that the applicants not return to Canada. It is worth here quoting at length officer Beaulieu's notes:

I do not see what is Canada's obligation this case, they were heard and the applicant[s] received the attention they deserved. A decision was made, they returned to L[iby]a and then decided after some time, on their own, to leave L[iby]a again for Sweden and are now in Malta.

The other issue has to do with the four children, or at least one of them who appears to have a medical problem that may render him inadmissible. The two youngest children who are born in Canada are 10 and 8 years old. I note that the

⁴⁶ *Dublin II Regulation*, EU Council Regulation (EC) No 343/2003.

⁴⁷ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*].

⁴⁸ The name of the visa officer was mentioned in the Federal Court decision, a rather unusual step, which perhaps reflects the court's view of the conduct of the visa officer.

initial grouping of this family is 6 persons but the UNHCR has added the rest of the family (all other relatives living in Tripoli) 16 other individuals. ...

Both Adel Ben-Hmuda and his spouse Aisha Ben-Matug who was already in advance state of pregnancy, traveled to Canada as tourists on 4 July 2000 with two children Mohamed and Muawiya. ...

The family was removed from Canada on 12 August 2008. The applicant and his family spent 8 years in Canada at public expense. ...

The family hopes to gain entry to Canada by using the Canadian Citizenship of these two minor children, who because of their citizenship could not be considered refugee claimants. ...

I also note that Adel Ben-Hmuda declares suffering from diabetes and one son suffers from muscular dystrophy. It is likely that this family will be in need of social assistance and other social services.

Before formally deciding the case, visa officer Beaulieu was transferred to another visa office and lost carriage over the file. The case was reassigned to a second visa officer, who travelled to Malta to interview the applicants. She rejected the case on the basis that the applicants had had full access to Canada's refugee determination system, and that they were now asylum shopping because they would prefer to live in Malta rather than Canada. She also determined that the applicants would face no risk in Libya since, by then, the Gaddafi regime had been overthrown.

Visa officer Beaulieu's analysis, and that of the second visa officer, is riddled with factual errors, the most important of which is that the family's reason for leaving Libya *for a second time* was not assessed by the RPD or the PRRA officer. Their claim for resettlement was founded on events that transpired *after* their return to Libya. In addition, as the Federal Court pointed out, there was no evidence that the applicants had stayed in Canada "at the public expense", or that they would become a public charge if they returned to Canada. In any case, this was not a relevant consideration, as all resettlement applicants are exempted from

inadmissibility on the ground of causing excessive demand on health or social services. More importantly, the analysis of officer Beaulieu shows a troublesome attitude towards the applicants, a disposition toward gratuitous comments, and a lack of objectivity. The Federal Court found that the allegation of apprehension of bias had been made out and granted the judicial review. In her reasons, Justice Gleason highlighted the striking resemblance with the fact in the *Baker* case:

In my view, this case is on all fours with *Baker* and, indeed, bears a striking similarity to many of the facts in that case. There, an officer, who was someone other than the officer who had decided Ms. Baker's H&C application, compiled notes that the decision-maker reviewed before rendering the decision. These notes concluded that Ms. Baker would be a "tremendous strain" on the Canadian social welfare system for the rest of her life and mentioned her psychiatric condition, limited skills and training and number of children she had, using capital letters at several points for emphasis. ... Justice L'Heureux-Dubé concluded that a well-informed member of the community would perceive bias when reading the notes in *Baker*, which seemed to link Ms. Baker's mental illness, her training as a domestic worker and the fact she had a number of children with the conclusion that she was likely to be a strain on the social welfare system. ...

An identical conclusion must be drawn in this case. ... Officer Beaulieu's emails reflect a similarly troubling tone and lack of objectivity, evidenced, for example, by his needless comments regarding Ms. Benmatug's pregnancy and the comments regarding the number of members of the applicants' extended family in Libya. ... As in *Baker*, it is my view that a reasonable, well-informed member of the community would perceive bias in reading Officer Beaulieu's emails and therefore have a reasonable apprehension that the First Secretary did not have a mind that is open to persuasion.⁴⁹

Justice Gleason took the extraordinary step of ordering that the offending emails from officer Beaulieu be expunged from the applicant's file, and that the file be reassigned to a different visa office for redetermination, because officer Beaulieu had copied his emails to various individuals employed at the Rome visa office. Justice Gleason also took the extraordinary step of awarding

⁴⁹ *Benhmuda v Canada (MCI)*, 2012 FC 1222 at paras 35-36.

costs to the applicant. News reports indicate that the family was eventually accepted for resettlement and arrived in Canada in December 2013.⁵⁰

This case is probably rather exceptional, at least in that the visa officer put his objectionable views in writing and that senior officials advocated for the case to be granted.⁵¹ It illustrates nonetheless the potential perverse effect of the principle of non-interference in decision-making, and begs the question: what mechanisms are in place to prevent this type of conduct? I suggest that a policy of systematic review of negative decisions by senior visa officers would guard well against this type of attitude.

It is worth mentioning that there were a handful of cases in the dataset where applicants claimed, on judicial review, that the visa officer laughed at them,⁵² or was confrontational.⁵³ In these cases, the evidentiary basis to support the claims of bias on judicial review rested solely on the applicant's affidavit. I explained in previous sections that instituting the audio recording of interviews would allow for a more accurate review of interpretation matters. The recording would also allow for the scrutiny of other types of objectionable conduct, such as aggressive or confrontational behaviours.

5.4.1.4 Reasons

Reason-giving has been described as the “staple of the exercise of administrative function in

⁵⁰ Maureen Brosnahan, “Benhmuda Family Finally Returns After Facing Torture in Libya”, *CBC News* (10 December 2013), online: <<https://www.cbc.ca/news/world/benhmuda-family-finally-returns-after-facing-torture-in-libya-1.2457839>>.

⁵¹ See section 5.4.1.5, below for a discussion of the impact of the *Baker* decision on the level of candour in administrative reasons.

⁵² IMM-4740-11, IMM-5557-15.

⁵³ Files IMM-4531-11, IMM-2274-11, IMM-5765-14.

modern bureaucratic states.”⁵⁴ Paul Philip Graig explains that reason-giving has both instrumental and non-instrumental benefits.⁵⁵ From the instrumentalist perspective, a causal relationship is implied between the provision of reasons and the accuracy of the outcome. The act of providing reasons helps ensure that a matter was properly considered by the decision-maker, and reasons assist the courts in performing their supervisory review. From a non-instrumentalist perspective, the provision of reasons serves to increase public confidence in the administrative process.⁵⁶

IRCC’s processing manual states that visa officers are expected to take careful notes when interviewing an applicant:

The officer must enter notes in CAIPS, or in a paper file if CAIPS is not available. The notes must include a conclusion with a summary of the decision and a clear statement of how the applicant does not meet the relevant criteria. Officers should keep detailed notes to support their decisions; these will be needed should the case be brought to the Federal Court...⁵⁷

Visa officer training material stresses the importance to include the following elements in the record:

- Document sequence and content of the interview
- Cite open source searches (Claim, IFA and Credibility), to ground your approval or concerns
- Document your reasoning⁵⁸

In the case of refusals, visa officers are expected to prepare a substantive refusal letter that

⁵⁴ Mathilde Cohen, “When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach” (2015) 72:2 Wash & Lee L Rev 483 at 528.

⁵⁵ PP Craig, “The Common Law, Reasons and Administrative Justice” (1994) 53:2 Cambridge LJ 282.

⁵⁶ *Ibid* at 283-285.

⁵⁷ Citizenship and Immigration Canada, “Overseas Selection and Processing”, *supra* note 16 at para 27.1.

⁵⁸ Access to Information Request #2A-2020-01732 (8 October 2020) at 88.

provides information on why the case was rejected.⁵⁹ Documenting decisions was a major concern in CIC's PSR Quality Assurance Evaluation, which found inadequacies in both note-taking and decision letter drafting. It found for example that only 52% of case notes in refused applications were "complete and supported." The study also reports that "in 70% of refusal letters, the reasons presented to support the decision provided a substantive explanation as to why the application was refused."⁶⁰ A review conducted by the Canadian Council for Refugees of a sample of 11 decisions from the Damascus visa officer also reported exceedingly short decision letters:

The letters are all under 2 pages in length. Most of each letter is taken up with explaining the relevant sections of the Act and Regulations. In 10 out of 11 letters, the part of the letter addressing the applicants' fear of persecution and the reasons for the refusal consists of a single paragraph. In the 11th case, there were two paragraphs on these issues.

Given the short space allotted to addressing the application, it is clear that none of the letters provides much detail on the reason for the refusal. Many of the letters in fact tell the reader little or nothing.⁶¹

In this section, I present the results of my analysis of the content of visa officer decisions, focusing on reasons that are not reasons, boilerplate reasons, and inadequate decision letters.

i) Reasons that are not reasons

For lawyers or researchers familiar with Canada's inland refugee determination system, practices around reason-giving and case documentation in the resettlement system will appear rather astounding. There were a fair number of cases in the dataset where the case notes were so

⁵⁹ Citizenship and Immigration Canada, "Overseas Selection and Processing", *supra* note 16 at para 27.2.

⁶⁰ Citizenship and Immigration Canada, "PSR QA Project", *supra* note 11 at para 5.2.

⁶¹ Canadian Council for Refugees, "Analysis of a Small Number of Iraqi Private Sponsorship Applications Refused at Damascus" (2006), online (pdf): <<https://ccrweb.ca/sites/ccrweb.ca/files/static-files/IraqiPSRrefusals.pdf>>.

short or devoid of meaningful reasoning that they could hardly be considered “reasons.” For example, in IMM-71-11, the entirety of the visa officer notes consisted of the following 72-word conclusion, without any reference to responses or statements made by the applicant or any documentary evidence:

PA departed Eritrea in 2008 because husband (an Ethiopian) was arrested and imprisoned. She had lost husband and all family support (she was shunned for having married an Ethiopian). So came to Sudan.

Appears to have left simply because she and her children were all alone and seemingly had no future in Eritrea. No evidence of any sort of persecution on file.

Does not meet definition of refugee. Case to be refused.

The decision letter contains the same information but worded differently. Surprisingly, this case was denied leave at the Federal Court, and denied leave a second time following an application reconsideration.

IMM-6481-14 is a more concerning case in that the visa officer’s reasons consist of only a bare conclusion, without even a reference to the factors that weighed in the assessment. This case concerns an Afghan family of Hazara ethnicity that claimed that they were persecuted by the Taliban. The visa officer case notes contain no information regarding the interview, but only the following conclusion:

After a full review of the application, including PA’s explanations and responses, I am not satisfied that PAs reside in Pakistan as stated and find it more likely that they have repatriated or otherwise reside in Afghanistan, their country of nationality. As a result, they do not meet the criteria set out at section 96 of the Act or section 147 of the Regulations. Consequently, with reference to section 139(1)(e) of the Regulations and section 11 of the Act, the application is refused.

The notes in this case contain no information whatsoever regarding why the visa officer considered it more likely than not that the applicant had repatriated. On judicial review, the applicant stated in his affidavit that he had asked the visa officer for the opportunity to submit

further documents related to his residence in Pakistan, a request that does not appear in the case notes. The judicial review application went unopposed and was settled between the parties before leave was decided.

In many other cases, the case notes report the responses of the applicant to various questions, followed by a “conclusion” devoid of any assessment. In IMM-4010-15, for example, a female Afghan Hazara applicant was interviewed at the Islamabad visa office. The case notes indicate that the visa officer questioned the applicant regarding the events that caused her to leave Afghanistan. She told the visa officer that her brother had been killed in front of her, and that her father and another sibling were killed in a rocket attack. The case notes indicate that the visa officer also questioned the applicant about her life in Pakistan. These exchanges are followed in the notes by this bare assessment:

After a careful review of the information on file, I am not satisfied the applicants are Convention refugees or member of the Country of Asylum class, as they do not have a well-founded fear of persecution on any of the Convention grounds. Although they left Afghanistan after a traumatic event, I am not satisfied that they would continue to be seriously and personally affected by the civil war or armed conflict or massive violations of human rights in Afghanistan. Application Refused.

From the above assessment, even though the case notes include some responses provided by the applicant, it is impossible to determine why the case was rejected. On judicial review, leave was granted unopposed and the application was settled between the parties.

In IMM-6393-14, a Somali refugee was interviewed at the Pretoria visa office. He stated at the interview that he had left Somalia because of the war, and that he had been attacked many times in South Africa. The visa officer noted in the record the responses of the applicant to questions about his reason for fleeing and his situation in South Africa. This is followed in the notes by

this “conclusion” devoid of any substantive assessment:

CONCLUSION:

PA HAVE ANY QUESTIONS OR INFO TO ADD BEFORE DECISION IS TAKEN? None.

APPLICATION SIGNED? Yes.

EXPLAINED THAT PA WOULD BE CONTACTED IN WRITING WITHIN THE NEXT FEW WEEKS WITH MY DECISION AND/OR ANY OTHER REQUIRED STEPS.

COUNSELLED ABOUT IMM500 LOAN & REPAYMENT. LOAN APPLICATION SIGNED. END OF INTERVIEW.

The decision letter provides only a few additional details on the reasoning of the visa officer:

You currently reside in a country that is a signatory to the Geneva Convention on Refugees, South Africa. You have been able to benefit from the protection of South Africa and have been able to obtain asylum.

You have been unable to satisfy me that you do not have a durable solution in South Africa and therefore, you do not meet the provisions of this paragraph.

On judicial review, the applicant also brought to the attention of the court that the officer notes provided were incomplete on their face, as the entry did not end with information typically found in notes (date, visa officer code, file number). The judicial review application was unopposed and discontinued.

ii) Boilerplate notes

It was striking to find a large number of cases where the visa officer notes were almost identical to each other. This was especially prevalent for notes concerning Afghan refugees in Pakistan, many of whom were refused for the same reason, almost verbatim, by different visa officers. In the dataset, there were 102 cases involving Afghan applicants seeking refuge in Pakistan. Forty-five of these were refused because the visa officer believed the applicant was “residing” in Afghanistan. I will explain in Chapter 6 why incorporating in the refugee resettlement eligibility criteria a ‘residence’ requirement is an error of law on which the Federal Court finally ruled in 2015. Out of the 45 cases refused on the basis of residence, 23 included an identical or nearly

identical version of this paragraph, including the confusion between “reparation” and “repatriation”:

There is a high incidence of fraud in this office and a high number of applicants who incorrectly claim residence in Pakistan in order to pursue refugee applications with this office. Since 2002, more than 4.7 million Afghans have returned from Pakistan under the biggest facilitated voluntary return programme conducted by the UNHCR. This is in addition to the hundreds of thousands of Afghans that have returned outside the voluntary reparation [SIC] program. UNHCR estimates that a further 900,000 Afghans returned without assistance. Reports from the UNHCR indicate that returnees from a quarter of the current total population of Afghanistan, while as many as 1.6 registered Afghans remain in Pakistan. Application refused. I am not satisfied that the applicants reside in Pakistan as well as the documentation provided and explanation when asked to clarify is also not plausible. I have serious concerns about the applicants’ continued residence in Pakistan. This leads me to believe it is more likely that they have repatriated or otherwise reside in Afghanistan, their country of nationality. I have reviewed the application in full, and have considered all of their explanations and responses, but find that they do not allay my concerns. As a result they do not meet the criteria set out per section 96 of the Act or section 147 of the Regulations.

I recognize that similarities in reasons are not necessarily objectionable, especially if they describe country conditions through objective country evidence. In some instances, however, the resemblance between decisions is so striking that it puts into question whether the visa officer adequately put their mind to the personal circumstances of each applicant.

I also found there to be a high prevalence of boilerplate decision-making in cases decided at the Pretoria visa office. In 32 of the 37 refusals from Pretoria, the visa officer found that the applicant had a durable solution through local integration in South Africa. In 21 of these cases, the visa officer notes included a relatively short series of question and answers, followed by a 780-word boilerplate text on policy and legislative measures dealing with refugees in South Africa, and finally the sentence: “Subjects therefore have a durable solution in South Africa and

are ineligible for selection as refugees to Canada” or an almost identical phrase. In addition, 26 decision letters provided the following reasoning or a nearly identical one:

After carefully assessing your application I have determined that you do not meet these requirements. You have been accepted as a Convention refugee in the Republic of South Africa. You have been given the right to work and study in South Africa and are able to avail yourself of the protection of government agencies. You have mobility rights and the same rights as a South Africa citizen with the exception of voting rights.

These decisions present a number of problems with regard to assessing durable solutions, country condition documents, and personal evidence, each of which will be explored later in this chapter. It is clear that the overreliance on template decision-making has led visa officers to overlook the personal situations of applicants. These applicants were all considered to have similar access to durable solutions. But their experience in South Africa varied widely. Many told the visa officer that they had been the victim of xenophobic attacks in South Africa and had received little help from the police, which is inconsistent with the boilerplate decision they were issued. Applicants reported, for example, being the victim of racially motivated robberies,⁶² having their house burned by local residents,⁶³ and being stabbed or shot.⁶⁴ Others told the visa officer that they had in fact been *denied* refugee status or permanent stay in South Africa.⁶⁵ In numerous cases, the visa officer seems to have disregarded these claims entirely in favour of the boilerplate analysis.

As it turns out, the two lawyers who litigated the largest number of cases in this dataset brought the problem of boilerplate decision-making in Pretoria to the attention of the Federal Court in a

⁶² Files IMM-4927-15 & IMM-3722-15.

⁶³ File IMM-3139-13.

⁶⁴ Files IMM-3456-15, IMM-7347-13, IMM-1095-15, IMM-3933-15, IMM-6393-13 & IMM-3962-15.

⁶⁵ File IMM-7812-12.

few cases. Evidently, through litigating dozens of resettlement cases every year, they had come to notice nearly identical decisions from the Pretoria visa office in particular. In one judicial review application, the visa officer had decided that the applicant had a durable solution in South Africa, despite the fact that the applicant stated that he had been the subject of numerous xenophobic attacks, including being robbed, shot and stabbed. He told the visa officer that the authorities were unable to protect him against racially motivated attacks. On judicial review, the applicant's lawyer expressed his frustration over the visa officer's reasoning in these terms:

At some point, the endless boiler plate statements in Canadian visa office refusals that the Government of South Africa is hoping and trying to make things better have to be taken for what they are - Pollyanna, pie in the sky. When year after year, refugees are beaten, robbed and killed, at some point it becomes unreasonable to continue to rely only on Government promises that things will get better. The period of time one has to wait for the situation to improve ceases to be reasonable.⁶⁶

Justice Elliott rejected the argument:

While use of boilerplate text in some cases provides sufficient grounds to believe the decision was not personalized, it is acceptable when the boilerplate used addresses historic documents and actions taken by a country provided that it is clear the decision-maker put their mind to the actual issues and made an independent decision based on the evidence...⁶⁷

In another case,⁶⁸ the applicant told the visa officer that he operated a shop in South Africa, and had been the target of racially motivated robberies. He also stated that the police sometimes extracted bribes from him and sometimes "take the part of the criminal." The lawyer for the applicant noticed that the decision he was litigating was practically identical to *three* other decisions he had litigated in the past. He argued that the visa officer had merely copied his own reasons in other cases, without individual or independent analysis. That case was denied leave.

⁶⁶ File IMM-3456-15. The same argument was made in file IMM-3458-15.

⁶⁷ *Abdi v Canada (MCI)*, 2016 FC 1050 at para 26.

⁶⁸ File IMM-6788-13.

One wonders what the Federal Court would make of the same argument if presented with dozens of nearly identical unrelated decisions.

iii) Decision letters

IRCC's processing manual provides that refusal letters should include the following elements:

Refusals on admissibility

The refusal letter must give clear and detailed reasons why the applicant does not have the potential to resettle successfully in Canada. ...

Refusing on eligibility

A refusal letter:

- must explain why the officer does not think an applicant is a:
 - Convention refugee abroad; or
 - a member of one of the humanitarian-protected persons abroad classes; and
- should refer to evidence provided by the applicant, and how and why this evidence does not meet the requirements for recognition as a:
 - Convention refugee abroad; or
 - a member of the country of asylum class; or
 - a member of the source country class.⁶⁹

The manual also contains a template refusal letter. The template directs visa officers to explain the legal criteria of resettlement and then explain the decision following this format:

After carefully assessing all factors relative to your application, I am not satisfied that you are a member of any of the classes prescribed because (specify reasons; if the application is refused without an interview, also specify reasons that an interview was not required). Therefore, you do not meet the requirements of this paragraph.⁷⁰

In the dataset, the decision letters were generally two pages long. However, many of the

⁶⁹ Citizenship and Immigration Canada, "Overseas Selection and Processing", *supra* note 16 at para 27.2.

⁷⁰ *Ibid*, Appendix E.

decision letters reviewed contained *no information* specific to the applicant's case. 7.71% of refusal letters contained no information specific to the applicant. A further 11.41% contained only one to five lines of text, hardly enough to adequately explain the visa officer's reasoning. It was interesting to note that almost all boilerplate decision letters were issued to Afghan refugees in Pakistan and Sri Lankan refugees in India. Overall, Afghan applicants received boilerplate decisions in 12.80% of cases, and Sri Lankan refugees in 19.57% of cases. Interestingly, there was also an instance of a significant error in the boilerplate text of the decision letter in IMM-6792-11. In that case, the decision letter included in its description of the criteria of the Convention refugee definition the criteria for the "Source Country class."

5.4.1.5 Reason-giving in administrative law

The above assessment of reasons and documenting decisions brings us into the evolving debate in administrative law around reason-giving. Despite the strong theoretical rationale in favour of reasons, the common law has only rather recently imposed a general duty to give reasons on administrative decision-makers.⁷¹ In Canada, a duty to give reasons was first recognized by the Supreme Court in *Baker*.⁷² At issue in *Baker* was a decision made by immigration officer Caden refusing to grant Mavis Baker permanent resident status within Canada on "humanitarian and compassionate" grounds. The decision letter received by Ms. Baker only indicated that there were insufficient humanitarian and compassionate grounds to grant the application. No reasons were initially disclosed for the refusal. Through her counsel, the applicant was later able to obtain the notes of a second immigration officer - officer Lorenz - on which the deciding officer had relied. The notes of the recommending officer included the following conclusion:

⁷¹ See David Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 306-13.

⁷² *Baker*, *supra* note 47.

The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity. However, because of the circumstances involved, there is a potential for adverse publicity. I recommend refusal but you may wish to clear this with someone at Region.

This case is a catastrophe [sic]. It is also an indictment of our “system” that the client came as a visitor in Aug. ’81, was not ordered deported until Dec. ’92 and in APRIL ’94 IS STILL HERE!⁷³

The visa officer’s decision was challenged on *Charter* and administrative law grounds. Ultimately, Justice L’Heureux-Dubé found that the case notes gave rise to a reasonable apprehension of bias. Justice L’Heureux-Dubé took particular issue with the implied link between Ms. Baker’s mental illness, her work experience as a domestic worker and her several children, and the conclusion that she would be a strain on public services.⁷⁴ Justice L’Heureux-Dubé also found that the exercise of discretion was substantively unreasonable in that the immigration officer failed to give substantial weight to the applicant’s children’s best interests.⁷⁵

The issue that concerns us here, however, is Justice L’Heureux-Dubé’s pronouncement on whether there exists an obligation to provide reasons and whether that obligation had been met. Justice L’Heureux-Dubé explained that the content of procedural obligations on administrative decision-makers varies depending on the context. She proposed a non-exhaustive list of five factors that influence the degree of procedural fairness owed in particular cases, including (1) the nature of the decision being made and process followed in making it; (2) the nature of the

⁷³ *Ibid* at para 5.

⁷⁴ *Ibid* at para 48.

⁷⁵ *Ibid* at para 75.

statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself.⁷⁶ Justice L'Heureux-Dubé determined that procedural fairness *can* include the duty to provide reasons. In the case at bar, she found that, considering the importance of the decision on the applicant, the level of procedural fairness was relatively high and included the right to receive reasons:

In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. ... The profound importance of an H & C decision to those affected, as with those at issue in *Orlowski*, *Cunningham*, and *Doody*, militates in favour of a requirement that reasons be provided. It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.⁷⁷

In *Baker*, the notes of recommending officer Lorenz, which were not disclosed contemporaneously to the applicant, were considered adequate to fulfill the duty to give reasons. L'Heureux-Dubé explained that courts must be flexible in assessing the duty to give reasons.⁷⁸ This flexibility is what reconciles the right to procedural fairness with the needs of administrative agencies.⁷⁹ She writes that courts must recognize

⁷⁶ *Ibid* at paras 23-28.

⁷⁷ *Baker* at para 43.

⁷⁸ *Ibid* at para 40.

⁷⁹ See Mullan, *supra* note 71 at 310-311:

In response to the standard contrary arguments that to impose a reasons requirement would impede efficient administration, creating delays and imposing extra costs burdens, and also lead to a lack of candour in the sense of formulaic, boilerplate sets of reasons having as their principal aim the avoidance of judicial review or reversal on appeal, L'Heureux-Dubé J. countered that at least the first of these concerns could be met in large measure by judicial flexibility as to the form of the reasons that would be acceptable. This, in the particular case, the Court held that the obligation had been met by the notes of the front line immigration officer in which he or she outlined the basis for a recommendation that Baker's application be denied.

the day-to-day realities of administrative agencies and the many ways in which the values underlying the principles of procedural fairness can be assured. It upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that in the administrative context, this transparency may take place in various ways.⁸⁰

The *Baker* decision left a number of questions unanswered, including the issue of what can count as reasons, and the relationship between the assessment of the procedural adequacy of reasons, and the substantive assessment of the reasonableness of reasons.⁸¹ Scholars also pointed to a potential perverse effect of *Baker*: that decision-makers could become concerned with crafting reasons that are only sufficient to pass the *Baker* test, but devoid of meaningful analysis. Sossin writes that, because the Supreme Court offers no standard against which to evaluate reasons, we will see the proliferation of boilerplate reasons that serve only to satisfy the formal reasons requirement:

Given the result in *Baker* (i.e. the quashing of the decision and the remitting of the application back to a different immigration officer for a redetermination consistent with the reasons of the Court) we are unlikely to see such candor in administrative reasons in the future. Indeed, *Baker* may well serve as an incentive to give as few and as unspecific reasons as permitted by law. ...

... In this sense, the reasons provided in *Baker* are preferable to “boiler-plate” reasons that offer the affected party no insight into the individual values or systemic assumptions of decision-makers. This is especially important when the power being exercised is of a subjective and discretionary nature.⁸²

Indeed, given that the court in *Baker* did not impose a requirement that reasons be of a certain quality, or a requirement that reasons be immediately disclosed to applicants, it is questionable whether the duty to provide reasons provides any meaningful benefit to individuals. In

⁸⁰ *Baker* at para 44.

⁸¹ See Lorne Neudorf, “Inadequate Reasons: The Need for Tribunal Participation in Judicial Review Litigation” (2016) 54:1 *Alta L Rev* 219.

⁸² Lorne Sossin, “An Intimate Approach to Fairness, Impartiality and Reasonableness in Administrative Law” (2002) 27:2 *Queen's LJ* 809 at 836-838.

Newfoundland and Labrador Nurse's Union, Justice Abella confirmed that the duty to give reasons is a binary analysis: either reasons are provided, or they are not.⁸³ There is no requirement - under procedural fairness, that is - that reasons be of a certain standard. The adequacy of reasons is not “a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses - one for the reasons and a separate one for the result.”⁸⁴

That being said, reviewing courts do examine the substantive content of decisions in the context of the reasonableness analysis.⁸⁵ Paul Daly writes that the history of administrative law is one of the “inexorable rise” of the “culture of justification.”⁸⁶ Indeed, in the *Baker* case, Justice L’Heureux-Dubé insisted that decision-makers must be “alert, alive and sensitive” to the considerations of the individual.⁸⁷ Drawing from the *Baker* case, Mary Liston describes a general “ethos of justification” in public law.⁸⁸ In the 2008 *Dunsmuir* case, the Supreme Court further developed the reasonableness analysis, describing it as being concerned with “justification, transparency and intelligibility”, and with whether the decision falls within a range of “possible, acceptable outcomes.”⁸⁹ Paul Daly writes that the *Dunsmuir* decision was

⁸³ *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland and Labrador Nurses' Union*].

⁸⁴ *Ibid* at para 14.

⁸⁵ *Ibid* at paras 20-22.

⁸⁶ Paul Daly, “Vavilov and the Culture of Justification in Contemporary Administrative Law” (2020) Ottawa Faculty of Law Working Paper No 2020-18, online: SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3618743#> [“Vavilov and the Culture of Justification”].

⁸⁷ *Baker*, supra note 47 at para 75.

⁸⁸ See Mary Liston, “‘Alert, Alive and Sensitive’: Baker, the Duty to Give Reasons, and the Ethos of Justification in Canadian Public Law” in David Dyzenhaus, ed, *The Unity of Public Law* (Oxford: Hart Publishing, 2004) 113. See also Daly, “Vavilov and the Culture of Justification”, supra note 86.

⁸⁹ *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 at para 47.

only a hesitant step towards the culture of justification.⁹⁰ The *Dunsmuir* framework instructed reviewing courts to begin their analysis by looking at the *outcome*, and *then* proceed to scrutinizing the reasons. In addition, the approach to deference in *Dunsmuir* was justified by the presumption that all administrative decision-makers have relevant expertise. Paul Daly writes that, in any event, any movement towards a culture of justification that stemmed from the *Dunsmuir* language was essentially abandoned in subsequent Supreme Court decisions and replaced by a “culture of authority.”⁹¹ In *Agraira*, the Supreme Court retreated from the “justification, transparency and intelligibility” criteria and required only that the reasoning process be “comprehensible.”⁹² In *Newfoundland Nurses*, Justice Abella stated that reviewing courts should seek to *supplement* incomplete or unclear reasons. Justice Abella cited with approval the following passage from David Dyzenhaus:

“Reasonable” means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal’s proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective.⁹³

Neudorf writes that the Canadian law on the review of administrative reasons in the *Dunsmuir/Baker* era failed to deliver on the very principles that justified the imposition of the duty in the first place:

⁹⁰ Paul Daly, “Vavilov and the Culture of Justification”, *supra* note 86.

⁹¹ *Ibid* at 22.

⁹² *Agraira v Canada (MPSEP)*, 2013 SCC 36, [2013] 2 SCR 559.

⁹³ *Newfoundland and Labrador Nurses’ Union*, *supra* note 83 at para 12, citing David Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy”, in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279 at 304.

Administrative decision makers are therefore free to pay little attention to the quality of their reasoning as there is little risk that a decision will be quashed on this basis under procedural fairness. And on substantive review, when applying a reasonableness standard, courts will go to great lengths to supplement inadequate reasons or even invent reasons they think the decision maker *could* have given.

What incentive is there to produce well-written, quality reasons? Why do the hard work of writing clear, comprehensive, and logical reasons when the court will simply do the work for you? *Baker* struck a balance in favour of an increased scope of the duty to provide reasons at the cost of quality control. If anything counts as reasons, can it be claimed that reasons are truly providing the benefits expected of them? Canadian law on reasons is certainly problematic to the extent that individuals are required to challenge an administrative decision in court to properly understand why the original decision was made.⁹⁴

The cases in the dataset discussed in the previous section illustrate the pitfalls of the *Baker/Dunsmuir* framework. Decision letters often contained no meaningful information. Case notes were generally, but not consistently, more detailed, and many made use of boilerplate text. Moreover, these notes were never disclosed to the applicant unless judicial review was initiated or an access to information request was submitted. I want to reiterate that requiring visa officers to provide more fulsome decision letters would procure many benefits. It would have a disciplining effect in terms of improving decision-making and provide more opportunity for oversight. More fulsome reasons are also required so that applicants can ascertain why their case was rejected and make informed decisions about whether to seek judicial review. As access to information requests take some time to process, applicants contemplating judicial review often have no choice but to initiate judicial review before receiving the notes. Requiring more fulsome refusal letters would reduce the number of “place-holder applications” and free up Federal Court resources. I note that CIC’s 2011 PSR Quality Assurance evaluation recommended that further

⁹⁴ Neudorf, *supra* note 81 at 229-30.

decision letter templates be developed, as well as standard country of origin packages.⁹⁵ It is important that the use of such decision-making tools not come at the expense of individualized assessment.

I want to address two additional points in this section, beginning with the recent *Vavilov* decision.⁹⁶ The *Vavilov* decision was not applicable during the time of this study's dataset, but it is nonetheless worth looking at how the Vavilonian approach may (or may not) influence how visa officers make overseas refugee decisions. The *Vavilov* decision established a strong presumption in favour of the reasonableness standard of review, but reoriented the reasonableness review towards a more robust scrutiny of justification. Under the *Vavilov* framework, administrative decision-maker expertise is no longer presumed, it must be *demonstrated* through the decision.⁹⁷ Reviewing courts are instructed to begin their assessment not with the *outcome* of the decision, but to concentrate first and foremost on the *reasons* provided, and to assess if they *justify the outcome*. The court notes that "the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals

⁹⁵ Citizenship and Immigration Canada, "PSR QA Project", *supra* note 11 para 4.7, 5.3.

⁹⁶ *Canada (MCI) v Vavilov*, 2019 SCC 65 at paras 79-81 [*Vavilov*].

⁹⁷ *Vavilov*, *ibid* at para 93. The presumption of expertise of administrative decision-makers under the *Dunsmuir* framework was heavily criticized by administrative law scholars. David Mullan described the presumption as a "tautology", and explained:

What remains puzzling in all of this is why, even absent any statutory requirements for legal qualifications, a presumption of expertise exists ... It certainly cannot be based on empirical data nor do I suspect on informed intuition. Rather, it tends to be an add-on or make-weight reason deployed in support of other and more substantial justifications for differentiating between adjudicative tribunals and Ministers (David Mullan, "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action – The Top Fifteen" (2013) 42:1&2 Adv Q 1 at 9).

See also Lorne Sossin & Colleen Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law" (2007) 11:54 UTLJ 581 at 591; Lorne Sossin, "Empty Ritual, Mechanical Exercise or the Discipline of Deference? Revisiting the Standard of Review in Administrative Law" (2003) 27 Adv Q 478 at 492.

subject to it”,⁹⁸ and that decision must be “justified in relation to the constellation of law and facts that are relevant to the decision.”⁹⁹ The Court expressly recognizes that the process of drafting reasons “necessarily encourages administrative decision makers to more carefully examine their own thinking and to better articulate their analysis in the process.”¹⁰⁰ The court also explains that the expected level of responsiveness to an individual’s concerns rises with the importance of the decision.¹⁰¹ Importantly, the *Vavilov* majority steers away from the position in *Newfoundland Nurses’ Union* that reviewing courts must be ready to bolster inadequate or incomplete reasons:

Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. ... To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. ... To the extent that cases such as *Newfoundland Nurses* and *Alberta Teachers* have been taken as suggesting otherwise, such a view is mistaken.¹⁰²

Unfortunately, the *Vavilov* decision leaves unchanged the principle that reasons - where reasons are required - need not be disclosed as a matter of course. The vast majority of rejected refugee resettlement applicants will therefore continue to be left in the dark as to why their application was rejected unless they initiate judicial review or make an access to information request.

Vavilov remains solidly anchored in the principle of deference. It has however, “set a slightly

⁹⁸ *Vavilov, ibid* at para 95.

⁹⁹ *Vavilov, ibid* at para 105. See also Paul Daly, “Vavilov and the Culture of Justification”, *supra* note 86 at 6.

¹⁰⁰ *Vavilov, ibid* at para 80.

¹⁰¹ *Vavilov, ibid* at para 135.

¹⁰² *Vavilov, ibid* at para 96.

higher bar” for decision-makers in terms of justification, demonstrated expertise, responsiveness and contemporaneity.¹⁰³ It is too early to assess with clarity the impact *Vavilov* will have on courts reviewing immigration decisions. Daly’s review of recent Federal Court decisions shows that the Federal Court has indeed strengthened its scrutiny of reasons in immigration matters:

...in *Patel v Canada (Citizenship and Immigration)*, Diner J noted that *Vavilov* requires “basic responsiveness” to the evidence presented (and found it lacking here); in *Samra v Canada (Citizenship and Immigration)*, Favel J found a decision unreasonable because it “lacked analysis”: “the officer’s decision is merely a recitation of the evidence before him followed by a conclusion”; in *Li v Canada (Citizenship and Immigration)*, Fuhrer J struck down a sparsely reasoned study permit decision issued by a line officer who failed to “engage” with the applicant’s evidence; in *Slemko v Canada (Public Safety and Emergency Preparedness)*, Walker J held that brief reasons for refusing a humanitarian and compassionate application were unreasonable as they failed to consider and weigh all of the applicant’s submissions; and in *Albrifceni v Canada (Citizenship and Immigration)*, Strickland J noted that key findings were not justified by reference to the record, with an undefined term “QA” playing an important role [footnotes omitted].¹⁰⁴

This leads Daly to conclude that “boilerplate statements are now treated with suspicion by the courts”, even in cases decided by “line decision-makers.”¹⁰⁵ Also of significance for refugee matters is the renewed emphasis in *Vavilov* on the consequences of the decision on the affected individual.¹⁰⁶ There is strong evidence that courts are effectively now engaging in a more robust reasonableness review of refugee and immigration decisions. For our purposes, however, the more important question is *to what extent will the new doctrinal environment have an impact on how visa officers decide refugee cases?* Daly recognizes that the new criteria will pose a challenge for high-volume areas of decision-making, such as immigration:

¹⁰³ Paul Daly, “One Year of *Vavilov*” (Paper delivered at the CLEBC Annual Administrative Law Conference, 20 November 2020) at 6, online: SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3722312>.

¹⁰⁴ *Ibid* at 8.

¹⁰⁵ *Ibid*.

¹⁰⁶ See Jamie Chai Yun Liew, “The Good, The Bad, and the Ugly: A Preliminary Assessment of Whether the *Vavilov* Framework Adequately Addresses Concerns of Marginalized Communities in the Immigration Law Context” (2020) 98 Can Bar Rev 388 at 408.

Whilst most respectable administrative tribunals, those engaged in issue-driven analysis, point-first writing and active adjudication, are likely to continue to scale this bar with ease, other bodies might find it more imposing. Those operating in high-volume areas of decision-making (such as immigration) and those used to receiving a high degree of deference on the basis of their expertise (such as labour arbitrators) or electoral legitimacy (such as ministers) are, in my view, going to need to learn to jump higher than they have in the past.

This brings me to my second point, which is that the significance of judicial review doctrinal principles is probably exaggerated in the case of decisions that rarely get judicially reviewed, such as overseas refugee decisions. In that sense, administrative law scholarship's focus on judicial review at the expense of other modes of legality is perhaps misplaced. It is worth considering whether fairer procedures and outcomes could be better achieved not through judicial review, but through non-judicial interventions in administrative processes. In making this argument, I rely on Jennifer Raso's thesis that the gulf between public law doctrine and administrative practice is growing, leaving lawyers and scholars "ill-equipped to conceptualize and tackle the changing structure of public administration and the evolving relationships between courts, legislatures, and administrators."¹⁰⁷ Raso explains:

Because many legal scholars use appellate court decisions as a central source of evidence to conceptualize how administrative governance, or the rule of law, functions or ought to function, they scope their inquiry at the spatiotemporal scale of the judicially reviewable (and actually reviewed) administrative decision. Relying largely on judicial decisions as the raw material for public law theories, this vein of legal scholarship takes administrative decision making as it is represented, in a particular space and time, in judgments that review administrative decisions.¹⁰⁸

Raso's study looks at social assistance decisions by Ontario Works as a type of administrative

¹⁰⁷ Jennifer Raso, "Unity in the eye of the beholder? Reasons for decision in theory and practice in the Ontario Works program" (2020) 70:1 UTLJ 1.

¹⁰⁸ *Ibid* at 7.

decision that operates on a different “spaciotemporal scale” than judicial review. Granted, overseas refugee decisions are not as diffuse and are more identifiable than social assistance decisions. Nevertheless, they are judicially reviewed relatively rarely. Decisions in the GAR stream, in particular, almost never get judicially reviewed. As Raso writes, where there is no threat of judicial review, “administrative decision makers are less likely to provide richly articulated reasons.”¹⁰⁹ It is worth noting that even in the rare cases where judicial review is initiated, cases are often settled, thus bypassing judicial scrutiny. As the previous section illustrates, the most egregious decisions in the dataset were never scrutinized by the Federal Court.

In closing this section, I should state my skepticism that visa officers engage meaningfully with judicial development. To make a definitive statement on the matter, however, would require carefully studying the “judicial-executive dialogue” through more informal, organic conduits for the dissemination of judicial developments.¹¹⁰ Such, an inquiry is beyond the scope and methodology of this dissertation but holds promise for future research.

5.4.1.6 Delay in assessing cases

The average processing time of applications in the dataset was almost three years, with the longest case taking over *nine years* to process.¹¹¹ As reviewed in section 3.9, the problem of excessively long processing times in the PSR program has been a central issue taken up by the

¹⁰⁹ *Ibid* at 13.

¹¹⁰ See Lorne Sossin, “The Rule of Policy: *Baker* and the Impact of Judicial Review on Administrative Discretion” in David Dyzehaus, ed, *The Unity of Public Law* (London, Hart, 2004) 87 at 90. See also Lorne Sossin, “The Politics of Soft Law: How Judicial Decisions Influence Bureaucratic Discretion in Canada” in Marc Hertogh & Simon Halliday, eds, *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2004) 129.

¹¹¹ See section 5.2.

sponsorship community's advocacy campaigns.¹¹² The length of time required to process applications obviously causes extreme hardship to refugee applicants who remain in limbo in precarious refugee situations. Delays also cause challenges for sponsors groups in Canada who may struggle to maintain cohesiveness and integrity over a number of years.¹¹³ Beyond this, delays in processing and changing country conditions also severely affect substantive outcomes and make any assessment of refugee status conducted by sponsors extremely difficult. This concern has been voiced by the Canadian Council for Refugees on many occasions.¹¹⁴

Many applicants in the dataset would have qualified for refugee resettlement when the application was submitted, but no longer qualified when the application was assessed because of changes in country conditions. This was especially prevalent for Sri Lankan applicants. In the dataset, there were 47 Sri Lankan applicants, all of whom were Tamil with claims of persecution related to the Sri Lankan civil war. The vast majority of these applicants applied before the

¹¹² See Canadian Council for Refugees, "The Private Sponsorship of Refugees Program: Current Challenges and Opportunities" (2006) at 5, online (pdf): <<https://ccrweb.ca/files/psrpbriefing.pdf>> ["The Private Sponsorship of Refugees Program"].

¹¹³ See Thomas R Denton, "Understanding Private Refugee Sponsorship in Manitoba" (2003) 4:2 J Int Migr & Integration 257 at 267; Ashley Chapman, "Private Sponsorship and Public Policy: Political Barriers to Church-Connected Refugee Resettlement in Canada" (Citizens for Public Justice, 2014) at 5, online <<https://www.cpj.ca/private-sponsorship-and-public-policy>>.

¹¹⁴ See for example Canadian Council for Refugees, "The Private Sponsorship of Refugees Program", *supra* note 112 at 5:

Because of the long processing delays, there are changes in circumstances that mean that, by the time of the decision, the applicant is no longer a refugee (for example, there has been a change of government in the home country) or the applicant has found another solution (for example, been resettled to another country).

... due to the delays in processing, the cases being finalized now were submitted before detailed information and training were offered in recent years. Similarly, the long processing delays mean that feedback from visa offices, for example, that a certain category of persons generally does not meet the definition, doesn't reach sponsoring groups for years, by which time many hundreds of such cases may have been submitted, based on the information available at the time.

official end of hostilities (18 May 2009), but were processed after it.¹¹⁵ In 43 of these 47 cases, the visa officer concluded that since the war had ended, the applicant could repatriate to Sri Lanka. For example, in IMM-2010-11, a Tamil Sri Lankan family told the visa officer that they left because LTTE forces were forcing the eldest son to join them. They left Sri Lanka in 2007 and were sponsored in 2008. Their application was only assessed in 2011. The visa officer wrote:

I do not find reasonable grounds to believe that you have a well-founded fear of persecution because of the following concerns. You described incidents and threats that occurred during a period of protracted armed conflict which has since ended. You stated a general fear if you return, but I did not find reasonable ground to believe that you would be specifically targeted or persecuted by any groups.¹¹⁶

IMM-7211-11 illustrates how processing delays can put applicants at risk of deportation and

¹¹⁵ I am not suggesting here that I agree with the determination that all Sri Lankan Tamils refugees can necessarily repatriate to Sri Lanka because of the mere fact that the civil war has ended. The UNHCR reported in 2012 that LTTE members and supporters suffered violent reprisals at the hands of Sri Lankan authorities. The UNHCR also identifies numerous at-risk groups in post-war Sri Lanka, including opposition and human rights activists, journalists, witnesses of human rights abuse, and LGBTQ persons. See UNHCR, “Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka” (21 December 2012), online: <<https://www.refworld.org/docid/50d1a08e2.html>>.

¹¹⁶ At the Federal Court (*Kumarasamy v Canada (MCI)*, 2012 FC 290), Justice Hughes granted the judicial review because the visa officer had not considered the application of section 108(4) of the *IRPA*, which concerns refugee applicants whose reasons for seeking protection has ceased to exist:

108. (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:

...

(e) the reasons for which the person sought refugee protection have ceased to exist.

...

(4) Paragraph (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.

At issue in this decision was whether the harm suffered by the applicant was severe enough to trigger the application of section 108(4). Justice Hughes certified the following question:

Is an Officer obliged to consider section 108(4) of IRPA only in truly exceptional cases rising to the level of appalling or atrocious?

The case never proceeded to the Federal Court of Appeal. The argument that the visa officer had failed to consider section 108(4) was made in another four cases in the dataset, none of which were successful.

persecution. The applicant in this case was an Arabic-speaking Ahwazi Iranian claiming persecution for his political opinion and cultural activities in Iran. He fled to Syria in 2006, where he was accepted as a refugee by the UNHCR, and his file was referred to CIC for resettlement as a GAR. He attended two interviews with CIC, and was told that his application had been accepted. He was given medical forms and underwent a medical exam in November 2009. CIC failed to follow-up with the applicant. When he contacted CIC, he received an automated message saying that medical examinations can take up to six months to process and that they would not examine communications when the medical examination occurred less than six months prior. The applicant contacted the visa office again in October 2010, after twelve months had elapsed, and again received no reply. The situation in Syria at the time was becoming increasingly dangerous, and Ahwazi people were at risk of being forcibly deported to Iran. The applicant received a phone call from a Farsi-speaking man who claimed to be a UNHCR interpreter and asked him for a meeting at an unofficial location. The applicant decided then to flee to Turkey. In Turkey, he was informed that his visa was ready in Damascus. The applicant returned to Syria, but subsequently failed to obtain any response from the Canadian visa office in Damascus. The Syrian civil war was developing at the time, and the applicant was forced to flee to Lebanon. In Lebanon, he was informed by a Canadian official that an exit permit would be difficult to obtain from Lebanon and that his chances of receiving one would be better in Turkey. The applicant then made his way to Turkey. In Turkey, he was informed by Canadian officials that his medical certificate had expired and that he needed to undergo another examination, which the applicant did. The second medical report was submitted, but the applicant never heard back from the visa office. Two months later, a *mandamus* application was launched in the Federal Court. The record indicates that the application was settled before leave was decided.

5.4.2 Substantive matters

5.4.2.1 Gender-based claims

Although the Refugee Convention does not explicitly offer protection to victims of gender-based persecution, modern interpretations of the Convention hold that gender constitutes a “particular social group”:

It is surely axiomatic that a gender-based group is defined by an innate, immutable characteristic and hence within the *ejusdem generis* approach to social group. Indeed, acknowledgment that gender-based groups are clear examples of social subsets defined by an innate and immutable characteristic and are properly within the ambit of the social group category is now decades old. ...

Widespread state practice – across both common law and civil law states – no reflects the notion that women, sex, or gender may constitute a particular social group for the purpose of refugee law.¹¹⁷

The UNHCR *Resettlement Handbook* states that gender-related persecution can include “acts of sexual violence, family/domestic violence, coerced family planning, female genital mutilation and other harmful traditional practices, punishment for transgression of social mores, and discrimination against homosexuals.”¹¹⁸ In Canadian law, the Supreme Court in the watershed 1993 *Ward* case determined that a “particular social group” under the Convention included three possible categories:

- (1) groups defined by an innate or unchangeable characteristic;
- (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
- (3) groups associated by a former voluntary status, unalterable due to its historical permanence.¹¹⁹

Justice Laforest explicitly recognized that gender should be considered a particular social group

¹¹⁷ James Hathaway & Michelle Foster, *The Law of Refugee Status*, 2nd ed (Cambridge: Cambridge University Press, 2014) at 436-37.

¹¹⁸ UNHCR, *Resettlement Handbook* (Geneva: UNHCR, 2011) at 411 [*Resettlement Handbook*]. See also UNHCR, *Guidelines on International Protection No 1: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (HCR/GIP/02/01).

¹¹⁹ *Canada (AG) v Ward*, [1993] 2 SCR 689 at para 70.

under the first category:

The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists. The third branch is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one's past is an immutable part of the person.¹²⁰

Canadian decision-makers have been slow in embracing Laforest's reasoning to its full extent, often requiring in cases of gender-based persecution the formulation of unnecessarily complex social groups, instead of simply "women."¹²¹ The Federal Court has now recognized that gender-based persecution can be involved in "domestic violence, rape, detention or confinement, beating, female genital mutilation, forced marriage, forced abortion, force sterilization, persecution from being a victim of rape or bearing illegitimate children, and harm due to marrying against family wishes."¹²²

IRCC's processing manual expressly recognizes that gender constitutes a particular social group under the Convention.¹²³ The manual also contains a "Declaration on refugee protection for women", which highlights the importance of sensitivity in assessing gender-based claims:

¹²⁰ *Ibid.*

¹²¹ See Nicole LaViolette, "Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines" (2007) 19:2 Intl J Refugee L 169; Krista Daley & Ninette Kelley, "Particular Social Group: A Human Rights Based Approach in Canadian Jurisprudence" (2000) 12:2 Intl J Refugee L 148; Constance MacIntosh, "Domestic Violence and Gender-Based Persecution: How Refugee Adjudicators Judge Women Seeking Refuge from Spousal Violence - and Why Reform Is Needed" (2009) 26:2 Refuge 147; Melanie Randall, "Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Claims Based on Gender Persecution" (2002) 25 Harv Women's LJ 281; Audrey Macklin, "Refugee Women and the Imperative of Categories" (1995) 17:2 Hum Rts Q 213; Heather Potter, "Gender-Based Persecution: A Challenge to the Canadian Refugee Determination System" 3 Dal J Leg Stud 81.

¹²² See Donald Galloway, & Jamie Chai Yun Liew, *Immigration Law*, 2nd ed (Toronto: Irwin Law, 2015) at 323.

¹²³ Citizenship and Immigration Canada, "Overseas Selection and Processing", *supra* note 16 at para 6.24.

Gender sensitivity in Canada

The ability to question with sensitivity, awareness of the signs of gender-related persecution, and knowledge of conditions affecting women in source countries, are required of those who deal with refugee women. Citizenship and Immigration Canada is committed to the development of training and direction for all officers in Canada and abroad, for other staff, and for interpreters, to promote this sensitivity, awareness and knowledge.

Citizenship and Immigration Canada is also committed to achieving an equitable gender balance in the selection of staff throughout the organization. Citizenship and Immigration Canada recognizes that refugee claims by women may be jeopardized because they do not tell of experiences of sexual violence, they may be unwilling to speak of such experiences in front of their husbands, or they may be intimidated by the presence of male officials or interpreters.

Wherever operationally feasible, Citizenship and Immigration Canada will ensure that women making refugee claims have the option of being interviewed by female officers, with the assistance of trained female interpreters.¹²⁴

The manual also directs visa officers to consult IRB's *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution*.¹²⁵

As stated earlier in this chapter, the principal applicant was female in 158 cases in the dataset

¹²⁴ *Ibid*, Appendix B.

¹²⁵ Immigration and Refugee Board, *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution* (13 November 1996), online: <<https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir04.aspx>>. The IRB gender persecution guidelines, first adopted in 1993, have been hailed as a remarkable achievement that has impacted international refugee law. LaViolette reflected in 2007:

Canada's approach is undeniably avant-garde: the Guidelines were the first of their kind in the world and are now being used as a model elsewhere, including the United States, Australia, and the United Kingdom (LaViolette, *supra* note 121 at 178).

Nevertheless, the guidelines, updated for the last time in 1996, have been criticized as an imperfect framework to address gender-based refugee claims and a document in dire need of revision. In LaViolette's assessment:

Guidelines that are truly responsive to gender-related persecution must clearly reflect all the ways in which the gendered social hierarchies injure women and men. The concept of gender-related persecution, as it is currently defined in the Guidelines, must be revised in favour of the adoption of a more clearly social constructionist interpretation of the notion of "gender" (201).

In the same vein, Macintosh writes:

...the Gender Guidelines themselves require considerable revision if they are to serve as an effective tool for assisting adjudicators. Pivotaly, revisions are required to bring them in line with contemporary human rights instruments, and to provide better and more fulsome direction on a number of issues, such as how adjudicators are to use social and economic norms in their assessments of state protection. This indicates the pressing need for the Guidelines to not merely be revised on an issue-by issue basis, but to be put through a general review process (MacIntosh, *supra* note 121 at 163).

(33.26%). Unfortunately, the gender of the visa officer was not always apparent on the record. The gender of the interpreter was not once indicated. There were 58 cases where the refugee claim pertained to gender-based persecution. In these cases, the victim of gender-based violence was not always the principal applicant. In 19 cases, gender-based persecution was the only risk raised. As I explain in this section, there were many cases where the claim of gender-based persecution was either considered by the visa officer as irrelevant to refugee protection or was altogether ignored. There were also troubling instances of visa-officers displaying insensitive and offensive views towards the reality experienced by the women concerned. Furthermore, not a single reference to the IRB's *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* was made.¹²⁶

i) Insensitive assessments

IMM-6792-11 is a case of an Afghan family interviewed at the Islamabad visa office. They told the visa officer, Philippe de Varennes, that a mujahideen commander demanded that the principal applicant's two elder daughters, who were 16 and 14 years old at the time, be married to his sons. The commander told the principal applicant that, should he refuse, his daughters would be kidnapped and he would be killed. The principal applicant told the visa officer that the commander sent gifts to the family in order to convince them to go ahead with the marriage, and that eventually his daughters fled to Pakistan and married other men. Upon learning of this, the commander demanded that the principal applicant's youngest daughter - then 12 years old - marry his son. After the applicant refused this marriage, there was a failed kidnapping attempt on his youngest daughter, shortly after which the entire family fled to Pakistan. The visa

¹²⁶ CIC's 2011 study also found that none of decisions in gender-based claims reviewed had referenced the IRB's guidelines (Citizenship and Immigration Canada, "PSR QA Project", *supra* note 16 at para 3.3).

officer's assessment of the case is the following:

Story does not make sense. Traditionally, marriage are being arranged when both Parties reached an agreement. In this case an agreement was reached but PA says he was forced to. He nevertheless benefited of it in accepting the gift and advantages offered by the other party. Because of war, PA felt he could marry his daughters elsewhere since there was no news from other party. This is fair and this seems to have been accepted by the other party. Upon return, other party wants to have younger daughter. It is up to PA to reach an agreement [emphasis mine].

The visa officer never interviewed the youngest daughter, who was present at the visa office, and who was at the centre of the claim. Not only was the visa officer seemingly unconcerned with the possibility of forced marriage as gender-based persecution, he suggested that the commander had secured some kind of contractual right to marry the applicant's daughters to his son. On judicial review, this application was granted leave (opposed) and then settled between the parties.

The same officer made a similar decision in IMM-5962-11, another case of an Afghan family that fled to Pakistan because a daughter was being forced into marriage. Here, the male principal applicant told the visa officer that his father had promised in marriage his one-year-old daughter to his uncle, a local powerful warlord. Years later, the principal applicant and his daughter refused to honour the marriage. The applicant's uncle threatened to kill the principal applicant and force the daughter into marriage. He took the applicant's land and began threatening other children of the applicant. The daughter attempted to commit suicide by ingesting poison. The applicant told the visa officer that he sought the help of local police, who were unwilling to act against his uncle. In rejecting the case, visa officer Philippe de Varennes wrote:

Story does not make a lot of sense. Normally, father arranges marriage. Not grandfather. It is also considered an honor to marry within the family. If a problem exists, it should have been solved within the family, long ago [emphasis mine].

Here again, the visa officer not only fails to properly address gender persecution through the accepted legal framework, he makes light of forced marriage within the family, describing it as “an honor.” At the Federal Court, leave was granted (opposed) and judicial review was granted on the merits.¹²⁷ Justice Heneghan determined that the visa officer applied the wrong legal test in assessing whether the applicants had a well-founded fear of persecution – he stated that he was “not convinced” and “not satisfied” that the applicants had a well-founded fear of persecution, instead of determining whether there was a “reasonable chance” that persecution would take place. Surprisingly, Justice Heneghan did not fault the visa officer’s assessment of the claim of gender-based persecution, beyond finding that his understanding around the “honor to marry with the family” was not based on the evidence:

In this case, I am of the view that the Officer identified implausibilities that were not supported by the evidence, for example his finding that it “is also considered an honor to marry within the family”. The Officer gave no explanation for the source of this information. His manner of relying upon implausibilities, without identifying the evidentiary foundation, undermines his credibility findings. In these circumstances, I am not satisfied that the Officer’s ultimate conclusion meets the standard of reasonableness.¹²⁸

ii) Failure to consider gender-based violence as a Convention ground

In another group of cases, visa officers failed to properly consider gender-based violence as a ground on which to recognize refugee status. In IMM-4126-12, for instance, a young Afghan woman who fled to Tajikistan told the visa officer that she fled Afghanistan to escape a cousin who wanted to force her into marriage. After her immediate family had opposed the union, her cousin killed her father and threatened to kill her entire immediate family if the marriage did not

¹²⁷ *Hakimi v Canada (MCI)*, 2012 FC 800. Interestingly, this case is unpublished despite being styled “Reason for Judgment and Judgement” and being assigned a neutral citation.

¹²⁸ *Ibid* at para 13.

go forward. When other family members continued to oppose the marriage, the cousin murdered the applicant's sister and assaulted other family members. The visa officer who rejected the claim determined that the applicant's situation did not amount to persecution on a Convention ground:

I am not satisfied that this family situation amounts to the persecution of any or all of applicants as this appears to be more of a criminal issue within the family. The cousin may be a threat to the family; however in my opinion this is not persecution. This could happen anywhere in the world. Including Canada.

It is also worth noting that, in this case, the visa officer's assessment of the availability of state protection analysis is problematic in that it fails to consider whether the state efforts resulted in effective protection.¹²⁹ The visa officer added:

In addition, even if I were to consider that Marina and family have a well-founded fear of persecution. I am not satisfied that they have availed themselves to the protection of their country. When their cousin killed their father, he was arrested and put in jail. It appears that he served his time and was released. Justice was served in this case which demonstrates that the justice system in Kabul performed as it should. at least with respect to the crime of murder. When their sister was killed, the police arrived and were investigating their sister's death; however the family decided to leave before the investigation was concluded.

On judicial review, leave was granted unopposed and the application was settled parties.

IMM-2248-12 is the case of an Eritrean woman who fled to Egypt. She told the visa officer that she left Eritrea because of domestic violence at the hands of her husband. She also stated that in Eritrea she had been detained by authorities after having been captured during a Pentecostal religious gathering. Her application was refused for the first time in 2010. The first visa officer did not accept that the applicant was a Pentecostal believer, and did not mention in her reasons the incidents of domestic violence. This refusal was judicially reviewed along with 40 other

¹²⁹ See Galloway & Liew, *supra* note 122 at 190-91.

similar refusals from the Cairo office and ultimately settled after the Federal Court issued its decisions in the four lead cases.¹³⁰ The applicant was then interviewed by a different visa officer, at which point she submitted a letter from her local Pentecostal church. The second visa officer's refusal notes state:

States she left because of disagreement over religion in which children should be raised. Stated was beaten by husband, who was often drunk. Left husband in 2007. Children stayed with her until 2009, when she flew to Egypt. Kids stayed with sister in Eritrea. Stated she left Eritrea because husband constantly threatening her. He wanted her to come back to him to serve him.

Based on interview, am not convinced that PA qualifies as a refugee. Essentially, she left Eritrea over an ongoing domestic dispute. There was no well-founded fear of persecution.

On judicial review, this case was granted leave unopposed and granted on consent. This is a troubling instance of an applicant finding herself trapped in a loop of refusal-JR settlement. The record does not show how the case was handled for the third determination.

In IMM-3454-15, a Somali woman in her early twenties was interviewed in Ethiopia. She told the visa officer that a member of Al-Shabaab came to her shop and asked that she marry him, which she refused. This man then broke into her house, killed her brother, and assaulted her father. The applicant said that she escaped through a window and left the country shortly thereafter with the help of a neighbour. Despite the very specific claim presented by the applicant, the visa officer concluded that the applicant had failed to demonstrate how she was “personally affected.” The visa officer further noted that her experience with the member of Al Shabab was a “love-personal affair”:

General statements — failed to demonstrate how you are personally affected, Also, is not one of the convention grounds, but more a love/personal affair and situation.

¹³⁰ See section 5.4.7.

On judicial review, leave was granted opposed and the application discontinued.

IMM-2368-12 is the case of an Afghan family that owned a gold shop. The principal applicant told the visa officer that his twin brother was kidnapped by a group of men who mistook him for the applicant. The kidnappers demanded a ransom of 200,000USD for the release of the brother. The applicant could only make a partial payment. The kidnappers agreed to release his brother after they were promised the balance of the ransom. After the release, the kidnappers threatened to kill the principal applicant if he did not pay them. Eventually, the kidnappers demanded that the principal applicant's daughter be given in marriage in lieu of payment. The visa officer did not assess the threat of forced marriage, nor did he interview the daughter. Ultimately, he considered that the problems the applicants faced in Afghanistan were "criminal in nature":

I have reviewed file again and reviewed my notes. Description of brother's kidnapping and subsequent request for ransom payment which lead PA and family to leave Afghanistan were criminal in nature.

The judicial review application in this case was granted leave (unopposed) and discontinued by the applicant. It is likely that case was settled between the parties.

IMM-5343-15 is a case that presents a multiplicity of shortcomings in decision-making, coupled with an extremely compelling case of gender-based violence. It is worth here providing fuller details about the case. The applicant was a Nepalese woman in her twenties. She wrote in her application that, when she was ten years old, a war broke out between the Royal Nepalese army and Maoist rebels. The applicant's father had been a soldier in the Indian army and was perceived by the Maoists as an opponent of the movement. Throughout her teens, Maoist guerrillas demanded, amid both threats and violence, that the applicant join their movement. To escape the threats, the applicant's mother brought the applicant to a nearby village to be married

to a man she had never met. Two months later, the applicant accompanied her new husband on a “business trip” to Mumbai, India. Her husband brought her to what she believed was a hotel. He left her there, and she realized that she had been sold into prostitution at a brothel. She was held captive and forced into sexual acts for twenty months, before finally escaping. She managed to find police officers, who forced her to perform sexual acts. After two days of captivity and sexual slavery, the police officers gave her a train ticket to the Nepalese border. The applicant managed to return to her home village. The Maoists, who had solidified their control of the territory, accused her of having left to avoid joining the movement and threatened her. The applicant was also threatened by fellow villagers who came to know that she had been the victim of sex trafficking in India and called her a “dirty girl.” Once again, the applicant left her village for the nearby town. A woman agreed to take the applicant to Thailand and help her find work. This woman was however arrested on drug charges in Thailand and the applicant was left alone. Contrary to IRCC practice, the applicant was interviewed by a male visa officer instead of a female visa officer. Oddly, the visa officer made his final assessment of the case more than two years after the interview took place. His assessment shows a troubling lack of sensitivity to gender-based violence and sex trafficking. The visa officer found that the applicant’s story of sex trafficking was “not credible” for the following reasons:

... suddenly one evening after 15 months of forced prostitution, she opened the window and escaped. Just like that. ... She injured herself during the escape and did not go to the hospital as she feared that the staff would notify the brothel. Instead, she went straight to the police to seek assistance. I do not find it credible that she escaped from the location where she was confined and ran straight to the police. She stated that she did not seek protection from the police in her own country so I do not find it credible that the first thing she did after escaping was to seek protection from the police in a foreign country. She also stated she feared that the hospital staff would notify the brothel yet she did not fear that the police would do the same. I also do not find this credible. Moreover, there would have been a language barrier with the police officers. I also do not find it credible that the police would have decided to abuse her for 2 days and then be so generous to provide her with a train ticket and money.

Again, the above assessment of the case was conducted more than two years after the interview, and the officer's credibility concerns were not put to the applicant. The visa officer did not refer to any objective country documentation in discounting the applicant's claim of sex trafficking as "not credible." His assessment that the claim of the applicant is implausible relies solely on his own intuition of how a young Nepalese woman victim of sex trafficking would behave. It is apparent that the visa officer made no attempt to understand the dangers of women and girls sold into sex trafficking. On judicial review, the applicant's counsel submitted to the court ten objective reports that confirm that trafficking of Nepalese women and girls is a significant problem, and that anti-trafficking policies are lacking. Leave was granted unopposed and judicial review was granted on consent.

iii) Gender-based risk ignored

There were many other cases in the dataset where a fear of gender-based persecution was asserted at the interview or in the written application and simply ignored by the visa officer. For instance, in IMM-4503-12, an Afghan family was interviewed at the Islamabad visa office. The male head of the family told the visa officer that members of the Taliban beat him after they discovered that he operated a video rental shop. He also told the visa officer that the family left Afghanistan in order to protect his daughters:

ALSO MY DAUGHTERS WERE THERE. BECAUSE OF MY DAUGHTERS I LEFT. THEY WERE TAKING THE GIRLS. SO I CAME HERE.

Following this exchange, the visa officer inquired into the principal applicant's work experience, military experience, and education, but never asked what had happened to his daughters in Afghanistan, or what would happen to them if they returned. His assessment of the claim makes no mention of the risk faced by the applicant's daughters:

HIS DEPARTURE FROM AFGHANISTAN, A RESULT OF THE INCIDENTS OF HARASSMENT THAT HE MENTIONED, CAME NEAR THE END OF THE TALIBAN REGIME. WHILE HIS SECOND INCIDENT WITH THE TALIBAN WAS VIOLENT, AND HE WAS INJURED, THERE WAS NO PERSISTENT MISTREATMENT.

At the Federal Court, this case was perfected and discontinued before leave was decided.

In IMM-2821-14, an Afghan woman was interviewed in Kyrgyzstan along with her Kyrgyz husband, her son and her daughter. The female principal applicant stated at the interview that she left Afghanistan with her family at the age of eleven because of the civil war. She married her husband, a Kyrgyz national, in Tajikistan, and later left for Kyrgyzstan. She told the visa officer that the family could not stay in Kyrgyzstan, because her husband was being threatened by men who killed his brother-in-law. In addition, she said that in order to obtain Kyrgyz citizenship through her husband, she would need to return to Afghanistan to get a document attesting that she had not been married before. She further mentioned at the interview that she had experienced discrimination because of her gender in Afghanistan, was prevented from attending school, and was forced to wear a hijab. She also expressed concerns about her children – including her daughter – not being able to attend school. The visa officer made a cursory reference to the risk the applicant and her daughter would face in Afghanistan because of their gender:

I have considered that the applicant is of the female gender, has a school-aged daughter, and has been outside of Afghanistan for over 10 years.

Ultimately, the visa officer determined that that the female applicant had not demonstrated a well-founded fear of persecution on a Convention ground, and further determined that the applicant could obtain citizenship in Kyrgyzstan. At the Federal Court, leave was granted (opposed), and judicial review was granted after a hearing. Justice McVeigh found that the visa

officer's assessment of gender-based persecution was unreasonable:

There were gender and education concerns regarding her children that were raised by the Applicant but the Officer did not deal with them. These areas are important to the claim and yet the Officer did not analyse these risks or address these additional grounds.

I find fault with the Officer's decision with regards to the human rights and conflict situation in Afghanistan without using a gender lens. The Applicant spoke to the system of education for girls in Afghanistan but the Officer appears to have avoided answering the question of whether the Applicant is at risk in Afghanistan by finding a durable solution in Kyrgyzstan.

In addition the Board's analysis on Afghanistan is incomplete and unreasonable. The Applicant stated that she did not want her children, one of whom is a girl, to have to study in Afghanistan. Which in my view is a valid inquiry to undertake and which brings the Applicant within the scope of section 147, as it suggests she may continue to be seriously and personally affected by human rights abuses.¹³¹

In IMM-4049-14, a single Tamil female from Sri Lanka in her mid 30's was interviewed through videoconference. In her written form, she wrote that Sri Lankan soldiers and Tamil paramilitaries had on numerous occasions taken her from her home and sexually assaulted her. At the interview, the visa officer did not refer to these assertions, and concluded that the risk was not personalized:

The applicant was provided several opportunities at the interview to express why she faced a personalized subjective or objective fear of persecution if returned to Sri Lanka. PA was unable to provide specific details or examples of why she feared returning to Sri Lanka.

As reviewed previously in section 5.4.1.2, a report was submitted on judicial review attesting to the fact that the applicant suffers from a cognitive deficit and had the mental capacity of a young child, which could have explained her difficulty in providing details of her experience. Given the claim of gender-based violence, and because of her obvious cognitive disability, the visa officer could have, at the very least, referred to the assertions made in the written application. At

¹³¹ *Habibullah v Canada (MCI)* (29 June 2015), IMM-2821-14 (FC) at paras 20-22.

the Federal Court, leave was granted leave (opposed) and the application was settled between the parties.

In IMM-3211-15, IMM-3212-15, and IMM-3213-15, a 20-year-old Eritrean woman presented for an interview in Abu Dhabi, along with her adult brother and her parents. Her mother told the visa officer that she feared that both her son and her daughter would be forced into military service in Eritrea. The following exchange took place:

Q: What do you believe would happen if you returned to Eritrea?

We can return but our children will be put into military service forever. Your son or all or your children? Even daughters will be put into military service.

Q: Your overage sons in the military - have they encountered any specific problems in Eritrea from the military authorities?

They keep them forever. They don't even get pay.

Q: Any other problems you would face if you returned to Eritrea?

The military service for my children is the only reason.

The visa officer interviewed every member of the family, except the daughter. The notes indicate the following assessment with regards to the children's application:

In the case of children's' files, they have separate files but no further interviewing is required. Schedule 2 for all children are similar and state they face problems with limited education opportunities in KSA and that they cannot return to Eritrea due to mandatory military service. ... While unfortunate compulsory military service itself does not make the children meet either s. 96 or R147.

On judicial review, the applicant's counsel submitted several reports on the atrocious treatment of women in the Eritrean national service, including this excerpt from UNHCR's *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea*:

Sexual violence against female conscripts within the military is being reported by human rights monitors. Some female conscripts are reportedly subject to sexual harassment and violence, including rape, by their supervisors. It is reported that female conscripts are coerced into having sex with commanders, including through threats of heavy military duties, harsh postings, and denial of home leave. Refusal to submit to sexual exploitation and abuse is allegedly punished by detention, torture and ill-treatment, including exposure to extreme heat and

limitation of food rations. No effective mechanism for redress and protection exists within or outside the military, and perpetrators generally go unpunished.

All three linked applications were discontinued after having been perfected.

In IMM-2274-11, two unmarried Somali sisters in their early twenties were interviewed in Kenya along with their uncle. All three told the visa officer that they left Somalia because of the civil war. Their uncle stated that the family home was attacked during a fight between Islamic courts and militias. The two sisters also told the visa officer that they feared being raped:

WHY DID YOU LEAVE YOUR COUNTRY? THERE WAS BAD FIGHTING WITH KILLING, LOOTING AND RAPING. ...
ANY SOMALIS IS AT RISK, SO WHY ARE YOU MORE AT RISK THAN ANYBODY ELSE? I AM A LADY I AM AFRAID OF RAPE AND MY FRIENDS WERE KILLED. ...
CAN YOU RETURN TO SOMALIA? NO. WHY NOT? I WILL BE RAPED AND KILLED AND I DON'T KNOW WHERE MY PARENTS ARE. WHY WOULD YOU BE RAPED OR KILLED? MANY PEOPLE ARE KILLING YOUNG LADIES AND THERE IS NO GOVERNMENT.

The visa officer rejected this application on credibility grounds. The visa officer also took issue with the fact that the sponsorship was initiated shortly after their arrival, suggesting that the sponsorship was probably in the works before they left. The visa officer made no effort to assess the applicant's fear of being raped in Somalia, or consult objective documentation on the current situation of young single women in Somalia. At the Federal Court, this case was granted leave (opposed) and then settled between the parties.

iv) Improving decision-making in gender-based claims

The fourteen cases discussed in this section show troubling shortcomings in the assessment of gender-based claims. Visa officers often made insensitive assessments, showed a poor understanding of gender-based risk as a Convention ground, and sometimes altogether ignored

written or oral statements related to gender-based risk. As mentioned earlier, in the entirety of the dataset, there was not a single reference that the visa officer had consulted or considered the IRB's *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution*. Each of the reviewed cases had a positive outcome at the Federal Court. However, only *two* were heard on the merits. The other 12 - which include the most egregious cases - were settled and presumably sent for redetermination without the court weighing in on how it was decided. This is further evidence that judicial review plays a limited role in shaping decision-making practices in the overseas refugee system. The small likelihood of judicial review, combined with the practice of settling the most meritorious cases, arguably creates an environment where visa officers can become unconcerned with judicial oversight. It is crucial, in my assessment, to reinforce internal mechanisms of training and review with regard to gender-based claims. The 2015 visa officer training material reviewed refers to the statement in *Ward* on gender as a particular social group, and also includes two fact patterns dealing with gender-based risk. The 2020 training material, however, did not contain *any* reference to gender-based risk.

5.4.3 Assessing testimony, personal documentation and country documentation

Perhaps the most striking aspect of decision-making was the prevalence of glaring errors in the assessment of testimony and personal documentation. Problems were also identified in visa officer assessments of objective country documentation assessment. In fact, objective documentation was rarely relied on, and when invoked, visa officers often either misinterpreted it or appeared to cherry-pick among available documents.

i) Applicant testimony

Often, an applicant's testimony is the only source of evidence available to the visa officer. Visa

officers note interviewees' responses and review their notes before making a final decision. In more than 20 cases, visa officers made factual and determinative errors on the applicant's testimony that are apparent on the face of case notes. Take for example IMM-3409-15, IMM-3410-15, and IMM-3412-15, three linked cases concerning a Somali family interviewed in Djibouti who told the visa officer that they had fled because of the ongoing armed fighting in Somalia. The visa officer refused the case on credibility and identity grounds. The credibility finding rested on the applicant's lack of knowledge of their clan. The visa officer wrote in the decision letter:

I am not satisfied that you are a member of any of the classes prescribed because you were not able to provide credible explanation on the fact that you do not have knowledge of your clans and your sub clans. I found implausible that your father did not transfer this information to you because he was only trying to find food for his family. This response is not credible considering that the Somali society is organized and based on a clan system [emphasis mine].

The case notes reveal that the principal applicant – whom the visa officer confused with the principal applicant's father in the decision letter – did, in fact, know their clan and sub-clan, but did not know the “sub-sub-clan”:

VO: Nationality? Father: Somali
VO: Ethnicity? Father: Rahanwen
VO: Subclan? Father: Maymaye
VO: Subsubclan? Does not know the clan.

On judicial review, this case was granted leave unopposed and then discontinued.

IMM-577-12 is the case of an Iranian applicant in Pakistan. The applicant told the visa officer that he and his siblings were targeted by Iranian authorities because of their activities as democracy and human rights activists. The applicant told the visa officer that he had been imprisoned and tortured after he attended a protest and that one of his brothers had been imprisoned for five years for organizing a protest. The visa officer found that the applicant was

not credible and that he would face no risk if he returned to Iran. The visa officer noted that the applicant's brother and his sisters were living safely in Iran, despite the applicant having said in the interview that his two brothers were dead and that one sister was currently imprisoned because of her opposition to the Iranian regime. On the issue of credibility, the visa officer faulted the applicant for making contradictory statements about his age. Yet, a review of the case notes reveals that the applicant was entirely consistent about his age. On judicial review, Justice Boivin outlined the visa officer's error:

The applicant's year of birth is reported on his forms as being 1990... The applicant repeats twice during the interview that he is twenty-one (21) years old, which is consistent with a 1990 year of birth because the interview took place in 2011... He also makes consistent statements about his age by stating he was seventeen (17) when his brother died in 2007 (again, consistent with a 1990 year of birth ...) and turning eighteen (18) "this month" ... (also consistent with a 1990 year of birth ...).

In the CAIPS notes, the Officer states that the applicant said he was fourteen (14) when he came to Pakistan... In fact, the applicant stated he was 14 or 16... The age of sixteen (16) is in fact consistent with a year of birth of 1990 since he crossed the border in May 2006, as shown on the UNCHR papers. The only contradictory statement made by the applicant is an answer given using the Persian calendar where he stated year 1368 as his year of birth, and the officer added in parentheses "(1989) (22 YRS OLD)"... and while it is true that the NARA card provided by the applicant appears to contain errors, the applicant said "give it to me and I will explain"... but he was not offered an opportunity to provide his explanation to the Officer.¹³²

IMM-330-11 is the case of a Somali national who left Somalia as a child with his family in the early 1990s following the collapse of the Somali government. Afterwards, he lived with his family in Kenya. He told the visa officer that he returned to Somalia in 2001, and left again in 2005, this time for Yemen. The visa officer determined that the applicant had no subjective fear, and that he left Somalia for economic reasons:

¹³² *Mezbani v Canada (MCI)*, 2012 FC 1115.

You stated that you came to Yemen as you were expecting a better life, good jobs and good schools. You were unable to explain what events led you to leave Somalia other than the fact that you left for reasons of employment.

The interview notes show that, in fact, the applicant consistently stated that he left Somalia because of the civil war:

Why couldn't you have gone straight from Kenya to Yemen? ...

I did not have enough money to go directly from Kenya to Yemen. I wanted to live here as a refugee. Why? It is because in Somalia there is a civil war.

But you went back to Somalia, that doesn't explain why you wanted to come to Yemen? My main destination was Yemen. ...

Go back to Somalia? There is a civil war. You went there once to Bossaso?

Even in Bossaso the situation is not good. I heard on radio/tv some people being killed. ...

Expressed my concerns to PA that he came to Yemen looking for better economic opportunities and not fleeing from persecution

I left from Somalia, main reason was civil war and was expecting to find something better but was the same [emphasis mine].

At the Federal Court, leave was granted (opposed) and judicial review was granted on consent.

ii) Personal documentation and other personal evidence

Flawed analyses of personal documentation were also quite common in the dataset. IMM-5655-15 involves an Afghan family in Pakistan whose application was rejected because the visa officer did not believe the applicants “resided” in Pakistan and concluded that they were not credible. The officer’s conclusion with respect to the applicant’s residence was based on a number of factors, including the fact that the applicants had no “Tazkira cards”, and the fact that the utility bill submitted by the applicant was in a different name than the name of their landlord. The officer’s credibility concerns rested on the fact that the applicant’s allegation regarding his wife’s brother having been captured by the Taliban was not mentioned in the written application:

No POR cards, or Tazkiras.

RESIDENCY: Where are you living? Karum Colony #5. How long have you lived there? Six years. Who is your landlord? [redacted by author].

How much do you pay for you gas/electric? Some time more some time less.

How much do you pay? Whatever it is. The bills are in a different name than what you stated can you explain? Those are the papers we are given. ...

Why did you leave? Because my wife's brothers were taken by the Taliban. ...

Narrative in schedule two does not mention any of this.

As it turns out, each finding was erroneous. The applicants had submitted to the visa officer Tazkira cards. They had even used their Tazkira cards to enter the embassy premises. The name on the utility bills, too, matched that of the applicant's landlord, as stated at the interview. The applicant's Schedule 2 form provided details of the female applicant's brothers being captured by the Taliban. It is also worth mentioning that many other documents establishing residence were submitted, and went unaddressed by the visa officer, including birth certificates, school transcripts, and tuition fee sheets. The judicial review application was settled after having been perfected.

IMM-2890-14 is a case of an Afghan family applying in Russia. The visa officer determined that the family could locally integrate in Russia. This assessment rested on the fact that the applicants had been issued "Russian passports":

I have reviewed your response to the procedural fairness letter which outlined the concern that you may have a durable solution in Russia. You have provided copies of Russian passports for yourself and your dependents. I am therefore satisfied that you have a durable solution in Russia and your file is refused pursuant to section 139 of the Regulations.

In fact, what the applicants had submitted were not "Russian passports", but temporary travel documents. Judicial review was granted on the merits for that reason.¹³³

¹³³ *Rahim v Canada (MCI)* (2 July 2015), IMM-2890-14 (FC).

In IMM-5349-49, Afghan applicants were denied the opportunity to resettle because the visa officer believed they did not reside in Pakistan but had repatriated to Afghanistan. The applicants submitted several documents establishing residence, including utility bills, affidavits from past and present landlords, school transcripts, confirmation of student status, confirmation of transcripts, employer performance reports, and a death certificate. The bulk of the documents were simply ignored by the visa officer. With regard to the death certificate, one of the few submitted documents mentioned by the visa officer, the notes indicate:

Where did your husband pass away? At home. (death certificate no date provided on document).

On judicial review, the applicants noted that the death certificate in fact did include a registration date. The judicial review application was settled before leave was decided.

In IMM-3630-11, an Ethiopian couple told the visa officer that they had been displaced by the Ethiopia-Eritrea War. The female applicant had been detained by Ethiopian authorities on the suspicion of supporting the opposition. The visa officer was not satisfied that the applicants were credible or that they had established their identity. The decision letter reads:

I have determined that you are not a member of any at the classes prescribed because I did not find you credible on several material aspects of your application for permanent residence and refugee claim. As you have not provided any identification for yourself, I am not satisfied of your Identity. Therefore, you do not meet the requirements of this paragraph [emphasis mine].

Not only did the visa officer fail to bring up the issue of identity at the interview, it was established on judicial review that the applicants had submitted to the visa officer various identity documents, including a UNHCR registration document. Judicial review was granted on consent before leave was decided.

IMM-5360-15 is the case of a Somali man who left Somalia because he was being forced to join Al Shabaab during the civil war. The visa officer in Pretoria reasoned that, since the applicant had obtained refugee status in South Africa, he could locally integrate. The document provided by the applicant was, however, not a proof of refugee status, but an asylum seeker temporary permit, a permit that protects a refugee claimant from removal until their asylum claim is heard. At the Federal Court, the judicial review application was perfected and then discontinued before leave was decided.

IMM-8604-11 is another case where the visa officer wrongly understood an applicant's status documents in South Africa. The visa officer wrote in the CAIPS notes that he believed the male applicant would be granted refugee status because his spouse had been "conditionally approved" for refugee status:

Spouse has been conditionally approved by the Refugee Board in South Africa; as a result it is reasonable to believe that her spouse will also be granted refugee status as a result of their relationship.

In this case, there was no evidentiary basis for the visa officer's conclusion that the male applicant would be granted refugee status through his spouse. More importantly, the documents provided to the visa officer showed not only that the principal applicant's refugee claim had been rejected in 2008, but that his spouse's refugee claim had also been rejected, and that she was awaiting an appeal. The judicial review application was perfected and discontinued.

IMM-3413-12 is one of the rare cases in the dataset where the refusal was based on the successful establishment criteria. The case involves Somali adult siblings who were interviewed by a visa officer in Ethiopia. They told the visa officer that they were from a minority clan targeted in Ethiopia. The visa officer was concerned with the applicant's establishment potential

in Canada since they would be relying on support from a brother. The visa officer determined that the brother was without status in Canada, and that applicants wrongly believed him to be their sponsor:

Pa & all x-ref's believe that this brother is their sponsor, to the point where they confirmed that their brother completed the forms and that he would support them upon their arrival in CDA. However, his name does not appear anywhere on the forms (not listed under siblings on SCHED 2 which he reportedly completed) or on sponsorship applications. I have strong concerns regarding why he is concealing his identity, and whether or not he has legal status in CDA. I therefore have concerns regarding their ability to adapt, and the reliance of these 5 persons ... on someone in CDA without legal status who could possibly be removed from CDA at any time.

It was made clear on judicial review that the applicants' statements were correct: their brother in Canada *was* their co-sponsor, and his name *was* indicated on the form, which had been approved by CIC. He therefore had at least permanent resident status in Canada, as only permanent residents and citizens are allowed to sponsor refugees. The judicial review application was discontinued after having been granted leave unopposed.

The last case reviewed in this section is IMM-2805-15. This is a case of an Afghan family of Hazara ethnicity interviewed at the Islamabad visa office. At the interview, the visa officer had some concerns over the authenticity of the submitted school records. The principal applicant stated in his affidavit submitted on judicial review that the visa officer said that he would verify the authenticity of the document with the issuing school, and that if the school did not confirm the authenticity of the documents, the applicants would be called in for a second interview. The possibility of a second interview is not noted in the case notes. What the case notes do indicate is that following the interview, the visa officer contacted the school principal, who confirmed that the documents were not authentic. The applicants were never called in for a second interview. The applicants submitted on judicial review a letter from the same school principal

denying having ever told the visa officer that the documents were fraudulent. The judicial review application was settled after having been perfected.

iii) Objective country documentation

CIC's 2011 evaluation of decision-making in the PSR program concluded that visa officers were not relying on objective country documentation sufficiently:

Knowledge of conditions in the applicant's country of origin is an important element in assessing a protection claim. The results show that the record clearly cited sources of COI to support the decision in 8 percent of cases. An additional 5 percent of cases noted COI in the decision, but did not provide a reference to its source. In the remaining 87 percent of files, no direct reference was made to sources of COI. For refused cases, 16 percent of records had direct or indirect citations for COI.¹³⁴

The use of country documentation seems to have slightly improved, at least in quantitative terms. Country documents were cited by visa officers in 22.55% in this study's dataset. However, a closer look at these decisions reveals that in many cases (over 30) the assessment of country documentation was problematic. In addition, in a further 36 cases, the visa officer mentioned that they had relied on "country documents" or "reports" without citing which documents were used. In the cases where documents were cited, visa officers often relied on reports that supported their conclusion, while discounting without explanation other contradictory publicly available documents. In some cases, the visa officer's interpretation of a section of a report was contradicted by other sections of the same report. Refugee lawyers refer to this practice as "cherry-picking." Cherry-picking was especially prevalent in the case of Afghan refugees, where visa officers frequently relied on boilerplate text. It seems that in many Afghan cases, visa officers are not fully aware of the content of the reports they routinely cite in

¹³⁴ Citizenship and Immigration Canada, "PSR QA Project", *supra* note 11 at para 4.4.

their notes. The same is true of the reports cited in cases decided in South Africa, reviewed in section 5.4.1.4. Four cases are reviewed in this section to illustrate the kind of shortcomings identified in visa officers' assessment of country conditions documents.

IMM-3595-15 is a case of an Afghan Hazara Ismaili family that feared persecution at the hands of mujahideen because of their ethnicity and religion. The visa officer determined that the applicants could safely repatriate to Afghanistan. In her notes, the visa officer cited a number of reports indicating that the situation for Hazaras has improved since the end of the Taliban regime, that Hazaras are now safe at least in some parts of Afghanistan, and that millions of Afghans have repatriated from Pakistan to Afghanistan. Justice Southcott allowed the judicial review on the ground that the visa officer had not properly assessed country conditions documents. Justice Southcott found that not only were the documents cited not fully supportive of the visa officer's conclusion, there were also outdated, and contradicted by several more recent documents provided by the applicant:

The difficulty is that, as emphasized by the Applicant, the reference in the UK COI Report is to an article from the National Geographic magazine that appears to be significantly outdated. The UK COI Report, while itself dating to February 2013, refers to this National Geographic article as being an undated article that was accessed on October 1, 2012. However, the Applicant points out that the paragraphs quoted from the article indicate it to date to a period six years after the Taliban fell, which the parties agree was in 2001. As such, the Applicant correctly characterizes this as an article appearing to date back to 2007.¹³⁵

Hazara Shiite Afghan applicants in Pakistan were handed a similar decision in IMM-3215-15. The visa officer in that case cited a few documents as supporting the position that Hazara refugees can now live safely in Afghanistan. On judicial review, Justice LeBlanc took issue with

¹³⁵ *Haidari v Canada (MCI)*, 2016 FC 263 at paras 27-28.

the visa officer's reliance on outdated reports. Justice LeBlanc also found that the visa officer had not addressed contradictory information included in the cited documents:

...the Officer's GCMS ignores more recent reports of targeted attacks against Hazaras in Kabul. ...

While the Officer recognizes that the security situation in many parts of Afghanistan is still difficult, the Officer does not explain why she disregarded evidence contradicting her finding that the Applicant and his family will not suffer a reasonable chance of persecution due to their Hazara ethnicity if they were to return to Kabul nor does she refer to evidence directly contradicting her finding on this issue.¹³⁶

IMM-6254-14 is another case involving Hazara Afghan applicants in Pakistan. In that case, the visa officer determined that the applicants were not residing in Pakistan and had in fact repatriated to Afghanistan. The visa officer relied on reports indicating that millions of Afghans had repatriated from Pakistan. The officer also relied on the fact that the applicant had no POR card. The following boilerplate text which appears in numerous decisions on Afghan refugees appears in the case notes, followed by a short conclusion:

According to reports from the UNHCR, from 2005 to late 2006, the Government of Pakistan with assistance from the UNHCR began and completed a registration process of all Afghans living in the country, with a reported registration of 2.15 million persons. During the process nearly the entire Afghan community was registered. ... Since 2002, more than 4.7 million Afghans have returned from Pakistan under the biggest facilitated voluntary return programme conducted by the UNHRC. ... Reports from the UNHRC indicate that returnees form a quarter of the current total population of Afghanistan, while as many as 1.6 million registered Afghans remain in exile in Pakistan. I am not satisfied that PA's reside in Pakistan as stated and find it more likely that they have repatriated or otherwise reside in Afghanistan, their country of nationality. ...

Judicial review was granted by Justice Barnes. She found that the visa officer's assessment of the registration process was incomplete, and also unverifiable because it is not cited:

¹³⁶ *Qurban Ali Barat v Canada (MCI)*, 2016 FC 443 at paras 12, 14-15.

Mr. Rahimi told the Officer during his interview that he was not required, and had no need, to register. He also stated, “a lot of Afghans are living without these cards”. ... they were not given an opportunity to produce corroborative evidence about the number of Afghan refugees in Pakistan who were unregistered. This type of information should have been readily available and may well have been reported by the UNHCR. But because the Officer neglected to note the source of the UNHCR data he relied on and failed to include that reference material in the Certified Tribunal Record (CTR), it is impossible to put the cited registration data into its proper context. ...¹³⁷

In IMM-1566-11, a Rwandan man and his family were assessed at the Nairobi visa office. The principal applicant told the visa officer that he was a local organizer for an opposition party in Rwanda, the Democratic Republican Movement (MDR), which had been ordered to dissolve in 2003. He told the visa officer that he was targeted by authorities because of his involvement in the party. He was arrested and imprisoned three times, was beaten, and his wife and daughter were also attacked. The applicants submitted in their application several publicly accessible documents reporting harms suffered by former supporters of the MDR party. The visa officer determined that neither the applicant nor his family would not be at risk in Rwanda:

I have reviewed country of origin information (COI), including reports referenced in submissions from PA’s legal counsel in Canada (attached to file). It is well documented that supporters and members of MDR were detained during the 2003 election. However, I have not found evidence that former members or supporters of MDR of comparable rank to PA (or their family members) have faced persecution following the 2003 elections.

On judicial review, Justice Beaudry noted that, in fact, the reports listed by the visa officer presented evidence that members of opposition parties or former political parties are currently at risk of persecution.

¹³⁷ *Rahimi v Canada (MCI)* (Sept 15, 2021), IMM-6254-14 (FC) at para 4.

The cases reviewed in this section show that visa officers sometimes fail to consider the specific circumstances of a claim. Many of the shortcomings identified in this section, I believe, can be attributed to processing pressures and the fact that visa officers have a limited amount of time for each application. Significant and persistent processing pressures have been reported as hindering visa officers' ability to conduct thorough evaluations in other contexts.¹³⁸ Had the visa officers been able to devote more time to the review notes and personal documents, or had they been able to access an audio recording of the interview, one can hypothesize that these types of errors would be less common. The issue of cherry-picking country documents is a more difficult one, one related only partially to processing pressures. As discussed in section 5.4.1.4, it appears visa officers cite country condition documents without having fully reviewed them. CIC's 2011 evaluation had recommended the development of country information packages similar to those by the IRB.¹³⁹ It is unclear whether such a tool has been developed. There was no reference to such a document package in any of the decisions reviewed or in the training material disclosed.

5.4.4 Assessing local integration as a durable solution

As reviewed in Chapter 2, refugee resettlement is considered one of three "durable solutions" for refugees, the other two being local integration and voluntary repatriation. Chapter 2 also provided an overview of the problematic relationship between durable solutions and norms of international refugee law, as well as an overview of historical shifts in the international refugee regime's conceptualization of durable solutions. The three durable solutions are not defined in international refugee law. Over time, however, a relative international consensus has emerged around definitions proposed by the UNHCR. In Canadian refugee law, the term "durable

¹³⁸ See Vic Satzewich, *Points of Entry: How Canada's Immigration Officers Decide Who Gets In* (Vancouver: UBC Press, 2015) at 105.

¹³⁹ Citizenship and Immigration Canada, "PSR QA Project", *supra* note 11 at para 4.7.

solutions” appears in the *IRPR*, but is not defined. Section 139(1)(d) provides that resettlement is only available to refugees who *do not* have a durable solution *within a reasonable period*:

139 (1) A permanent resident visa shall be issued to a foreign national in need of refugee protection, and their accompanying family members, if following an examination it is established that ...

...

(d) the foreign national is a person in respect of whom there is no reasonable prospect, within a reasonable period, of a durable solution in a country other than Canada, namely

(i) voluntary repatriation or resettlement in their country of nationality or habitual residence, or

(ii) resettlement or an offer of resettlement in another country...

Interestingly, local integration is not mentioned specifically in this provision, and the term “namely” would suggest that the list introduced is exhaustive. Nevertheless, all actors in the refugee resettlement programs operate under the assumption that the term “durable solution” in section 139 includes local integration. It is also worth mentioning that the concept of durable solutions, being unique to the resettlement context, is rather underdeveloped in Canadian law. In this section, I investigate how visa officers and IRCC interpret and apply local integration as a durable solution, and assess to what extent the concept of local integration in Canadian law conforms with principles developed in the international refugee regime.

The most authoritative statement on local integration is found in UNHCR’s *Resettlement Handbook*. Local integration is therein defined as

... a legal, economic and socio-cultural process aiming at providing the refugee with the permanent right to stay in the country of asylum, including, in some situations, as a naturalized citizen. Local integration follows the formal granting of refugee status, whether on an individual or prima facie basis, and assistance to settle in order for the refugee to live independently within the community.¹⁴⁰

...

¹⁴⁰ UNHCR, *Resettlement Handbook*, *supra* note 118 at para 1.3.4.

If local integration is to be a viable solution, it requires (i) agreement by the host country concerned; and (ii) an enabling environment that builds on the resources refugees bring with them, both of which implicitly contribute to the prevention of further displacement. Local integration should be seen as a gradual process that takes place through three interrelated dimensions:

- legal: refugees are granted a progressively wider range of rights (similar to those enjoyed by citizens) leading eventually to permanent residency and, in some situations, to naturalization;
- economic: refugees gradually become less dependent on aid from the country of asylum or on humanitarian assistance and become increasingly self-reliant to support themselves and contribute to the local economy;
- social and cultural: the interaction between refugees and the local community allows refugees to participate in the social life of their new country without fear of discrimination or hostility while not obliged to abandon their own culture.

...

There are serious constraints to local integration. Some asylum countries are not signatories to universal or regional instruments concerning refugees and/or do not apply practices akin to the rights enumerated under the 1951 Convention. General socio-economic conditions, the desire to protect scarce resources, the risk of security problems, concerns about migration, and potential antagonism towards refugees or migrants in general often prevent the local integration of refugees. Obstacles to local integration grow when stagnated local economies increase competition in the labour market, exacerbate the struggle over already limited resources, and trigger xenophobia [emphases mine].¹⁴¹

Local integration, following this definition, is far more than the granting of refugee status and the protection against *refoulement*. In other words, protection alone is not solution, although there is no doubt that there can be no solution without protection. Solution in the country of asylum also requires *integration*. The UNHCR expressly recognizes that socioeconomic conditions, security problems, and xenophobia can be barriers to local integration. UNHCR's *Resettlement Handbook*, a piece of international soft law, is not binding in Canadian law. The Supreme Court has however acknowledged in *Ward* that the handbook has acquired a *de facto* authority in national courts:

¹⁴¹ *Ibid* at 1.3.4.

While not formally binding on signatory states, the Handbook has been endorsed by the states which are members of the Executive Committee of the UNHCR, including Canada, and has been relied upon by the courts of signatory states.¹⁴²

As reviewed in Chapter 2, James Hathaway points out that local integration is, at minimum, the enjoyment of *full refugee rights*, not only the protection against *refoulement*. Full refugee rights include religious rights, property and intellectual property rights, the right of association, access to courts, employment rights, housing rights, education rights, the right to freedom of movement, the right to identity documents, the right to travel documents, the right to fair fiscal treatment, and the right to transfer one's assets.¹⁴³ Hathaway also points out that only naturalization can formally put an end to a person's refugee status and thus truly be considered a 'solution' to the person's refugee status.

Already, the conceptualization of local integration under the *IRPR* is at odds with the concept as defined by the UNHCR, insofar as applicants are disqualified from resettlement not only if they *have* locally integrated, but if it is deemed that they *can* locally integrate *within a reasonable period*, the length of which is unspecified.¹⁴⁴ The prospective nature of the local integration analysis under the *IRPR* does not fit easily with the highly contextualized and personalized analysis proposed by the UNHCR. In addition, the definition of local integration in IRCC guidelines only partly mirrors that of the UNHCR.

¹⁴² *Canada (AG) v Ward*, [1993] 2 SCR 689 at para 27. See also *Elyasi v Canada (MCI)*, 2010 FC 419 at para 28; *Al-Anbagi v Canada (MCI)*, 2016 FC 273 at para 22.

¹⁴³ James Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005) at 979 [*The Rights of Refugees*].

¹⁴⁴ According to IRCC's processing guidelines, what constitutes a "reasonable period of time" is a question of fact to be determined by the visa officer and can vary depending on the circumstances:

If the civil and human rights of the applicant are respected in the country where they are currently living, a reasonable period of time may be longer than that for an individual who is not permitted to work, for example (Citizenship and Immigration Canada, "Overseas Selection and Processing", *supra* note 16 at para 13.2).

Local integration is a long-lasting solution to a refugee's situation. It is more than the granting of safe conditions of asylum, which is a key obligation of signatories of the Convention Relating to the Status of Refugees. Local integration is an enhanced status that signatories are encouraged, though not required, to offer to refugees who have sought asylum within their borders. Local integration allows refugees to participate broadly in the host society. In reality, relatively few major countries of first asylum provide refugees with opportunities for local integration.

Local integration allows the refugee to live permanently in safety and dignity in the country of refuge and partake of its enduring legal, economic and social benefits. While ideally sanctioned by law, CIC recognizes that even where benefits are not legally conferred, in some cases the refugee may be de facto locally integrated as a result of actual enduring conditions. Conversely, where benefits are legally extended to refugees but factors such as widespread discrimination by the host society prevent real access to those benefits, then local integration has not occurred [emphases mine].¹⁴⁵

In fact, the guidelines explicitly recognize that there is no binding definition of local integration and that the departmental definition may diverge from the UNHCR's:

Although the UNHCR uses its own definition, there is no binding legal definition of the concept of "local integration". As a result, Departmental guidelines may not mirror the UNHCR definition in every respect. ...

...

Determining whether or not local integration can or has occurred requires careful analysis by the visa officer of both country conditions, the applicant's individual circumstances and a comparison of these circumstances to the Department's guidelines described here [emphases mine].¹⁴⁶

The notion of *de facto* integration outside national legal frameworks is not one that is contemplated in the UNHCR's conceptualization of local integration. Further, what is lacking from this definition is the notion that general social, economic, and security conditions may pose a barrier to local integration. While it does not necessarily follow that those considerations are irrelevant, cases from the dataset reveal that visa officers are indeed not concerned with "general conditions" in their assessment of local integration. Moreover, the view that general conditions

¹⁴⁵ *Ibid* at para 13.2.

¹⁴⁶ *Ibid.*

are irrelevant to local integration seems to have led to a conceptual slippage where visa officers replace the local integration assessment with the Convention refugee definition. Indeed, in the dataset, visa officers frequently considered that a refugee has locally integrated *if he or she would not be able to claim refugee status against the host state*. Again, local integration and refugee status are distinct concepts with different foundations in international refugee law. In addition, many visa officer decisions in the dataset showed a troubling disregard both for actual legal status, and for incidents of xenophobia and discrimination.

In the following analysis, the case of South Africa figures prominently. The bulk of cases rejected on local integration involved applicants in South Africa, a signatory state to the Refugee Convention. A 2015 survey conducted by the Canadian Council for Refugees shows that sponsors are particularly concerned with such refusals, with one sponsor noting:

South Africa illustrates that visa officers have the freedom to decide one way or the other. About two-thirds of my RSA cases were refused for the durable solution reason; the rest got here. The de facto situation on the ground should be given more weight than the de jure override...¹⁴⁷

i) Local integration and generalized risk: conceptual confusion?

The refusal of visa officers to consider ‘generalized risk’ as an impediment to local integration was frequent in cases decided in South Africa. In these cases, the local integration analysis often overlapped with the heavy reliance on the boilerplate country document analysis reviewed in section 5.4.1.4. In IMM-96-13, for example, a visa officer found that a Somali man who had refugee status in South Africa had locally integrated, despite the fact that the applicant stated that Somalis were routinely victims of xenophobic attacks in South Africa. In the visa officer’s

¹⁴⁷ Canadian Council for Refugees, “Survey of Refusals of Privately Sponsored Refugees - Summary of Results” (2015) [“Survey of Refusals”].

assessment, since crime is widespread in South Africa, it *cannot* be an impediment to local integration:

Applicants have not been subjected to xenophobic violence. They fear crime but South Africa is a violent place with lots of crime. In this they are no different than any other resident or citizen of South Africa.

A similar conclusion was reached in IMM-4927-15. In this case, the applicant reported being the victim of ethnically motivated robberies, and that the police would not provide effective protection. The visa officer concluded:

While the PA and spouse have been victims of robberies, so has almost the entire South African population – citizens, PRs, foreign nationals and diplomats alike. The PA and spouse have the same access to security as does the rest of the population.

Another Somali applicant was found to have a durable solution in South Africa in IMM-3456-15. In that case, the applicant reported having been attacked, shot and left for dead. He told the visa officer that he sought the protection of the police on several occasions but the authorities were unable to protect him. The visa officer reasoned:

The PA has been a victim of crime in RSA. The shop he worked in was robbed and he was injured in the robbery. The police however were contacted and a case opened and the applicant received a case number. Applicant provided no evidence that he was the victim of xenophobic violence rather a victim of the level of crime that exists in RSA.

There was similar reasoning in IMM-3722-15, the case of a female Eritrean national with 6 children in South Africa. She told the visa officer that she was robbed in South Africa, and that officials had demanded bribes to extend her refugee status. The visa officer noted the following:

PA indicates that she has been robbed many times, that she used to call the police but got discouraged as the crimes went unsolved. It is noted that there is a high

incidence of crime in RSA which is something that has an impact on everyone living in RSA. ...

While it is regrettable that the applicant has been a victim of crime in RSA, applicant did not provide any evidence that she has been a victim of xenophobic violence, rather a victim of the level of crime that exists in RSA for everyone.

IMM-3962-15 concerns a family from the Democratic Republic of Congo who told the visa officer that they felt that the local population was hostile to their presence and that their daughter was afraid of walking to school. The principal applicant also told the visa officer that he had been the victim of a robbery during which his friend was stabbed. The following exchange took place:

Unfortunately robberies happen in any country and unfortunately bad things happen. When this happened what did you do? A: Well we called the police. Q: And? A: And they came and investigated Q: So the police responded the same way they would for a South African citizen? A: I'm not sure how they respond to South African citizens.

In IMM-3933-15, a case concerning a Rwandan woman seeking refuge in South Africa, the applicant told the visa officer that she feared xenophobic attacks and that she had been attacked and stabbed on her way home from school. The visa officer considered that the fact that she was able to obtain medical treatment after the attack was an indication that she had locally integrated in South Africa:

Q: Did you go to the hospital? A: Yes. Q: Was it a government hospital? A: Yes. Q: So the RSA government provided you medical care? Yes. Q: How much did you pay? A: Nothing.

Q: So you receive free medical care? A: Yes.

Q: That's better than in some first world countries where they don't have free medical aid. A: I guess. ...

Based on the evidence before me. I am satisfied that the PA has a durable solution in RSA. She has the same rights as a RSA citizen and a clear pathway to citizenship. She has the ability to avail herself of the protection of the police should she be the victim of crime and this is the same situation he [SIC] would himself [SIC] in Europe, Canada or elsewhere. Application refused.

The finding of a durable solution in the context of widespread criminality is not unique to South Africa. In IMM-12748-12, a visa officer found that an Eritrean family had a durable solution in Sudan. The visa officer considered that police extortion could not be an impediment to local integration as it is commonplace in the region:

Only problem in Sudan was police attempt to extort money (pulled over while driving). Very common all over this region.

This approach to generalized crime is certainly inconsistent with the principles established by the UNHCR, and also, perhaps, inconsistent with IRCC's own criteria, which refers to "safety." Nevertheless, the approach has been endorsed by the Federal Court.¹⁴⁸ In my view, the definition of local integration adopted by the Federal Court departs from the UNHCR's definition in many respects. In *Barud*, for example, the Federal Court suggested that the local integration assessment is *less* stringent than the test for state protection:

The standard for a durable solution differs from the test for state protection. In the latter case, the question is whether the claimant will face a well-founded fear of persecution on return to his or her country of origin, given the state's resources and willingness to protect the person. In the case of a "durable solution", the state's plans and intentions, as compared to its existing capacity and desire, is far more relevant.¹⁴⁹

A similar conclusion was reached in *Abdi*:

¹⁴⁸ In *Muled Ismail Shiek Mahamed v Canada (MCI)* (17 December 2015), IMM-2646-15 (FC), Justice Gascon wrote at para 11:

The finding of a durable solution is a forward-looking exercise, where the focus is on the state's plans and intentions. ... A durable solution analysis does not have to feature a consideration of the ability of the state to protect. Neither is the high risk of crime faced by the general population a deterrent to a finding of a durable solution. ... [I]n a durable solution analysis, the state's plans and intentions, as compared to its existing capacity and desire, are far more relevant [sources omitted].

In that case, the Federal Court refused to certify a question to that effect for the purposes of appeal. Similar questions for certifications were refused in *Barud v Canada (MCI)*, 2013 FC 1152, *Ahmed Sheik Hussein v Canada (MCI)* (25 November 2015), IMM-1097-15 (FC) and *Abdi v Canada (MCI)*, 2016 FC 1050.

¹⁴⁹ *Barud*, *ibid* at para 16.

...a durable solution analysis does not require a finding that there is an existing ability of the state to protect. What was relevant and to be considered were the plans and intentions of the state.¹⁵⁰

Granted, these passages are not entirely clear. Insofar as the Federal Court would allow a finding of local integration where a state is unable to protect a person from the harms identified in the Refugee Convention or section 97 of the *IRPA*, this interpretation is extremely problematic and inconsistent with the core principles of the international refugee regime. Still, even the consideration that a person's actual integration is much less relevant than a host state's apparent plans to integrate refugees opens the door to perpetual findings that a durable solution is "forthcoming."

ii) Xenophobia and local integration

UNHCR's Resettlement Handbook refers to "xenophobia" and "antagonism towards refugees or migrants" as potential obstacles to local integration. IRCC's processing guidelines state that "widespread discrimination" can prevent access to local integration. In a few cases decided in South Africa, when claimants asserted that they feared xenophobic attacks, visa officers found that because they had not yet been *personally* targeted, they could therefore locally integrate. For example, in IMM-992-11, a young Rwandan man seeking refuge in South Africa told the visa officer that he feared xenophobic attacks, and that he had stayed home for two months during a documented wave of attacks. The visa officer noted that xenophobic attacks are widespread in South Africa, and wrote the following:

The applicant did not indicate that he has ever suffered any xenophobic attacks in South Africa in the past 5 years he has been here. ... Even if the applicant were

¹⁵⁰ *Abdi v Canada (MCI)*, 2016 FC 1050 at para 25.

to meet either of the criteria I note that the applicant appears to have a satisfactory durable solution in South Africa.

If we accept that the local integration analysis is to be strictly forward-looking, the absence of the materialization of the risk in the past should not so easily lead to a conclusion of local integration. What is more, even when applicants declared having been victims of discrimination or xenophobic violence in South Africa, visa officers in many cases considered that those attacks did not result from discrimination or xenophobia, but from general criminality. In other cases, a claim of xenophobic attacks was simply ignored. In IMM-96-13, IMM-3456-15, and IMM-4927-15, cited in the previous section, the applicants had experienced personal incidents of violence or discrimination which they attributed to xenophobia. A specific claim of xenophobic violence was made and discounted in another eight cases processed in South Africa. For example, in IMM-9101-11, the following exchange took place between a Somali applicant and the visa officer:

Q: Why do you feel that you do not have a durable solution in RSA?

A: It is not safe for foreigners. I have been very robbed and beaten on two occasions.

The visa officer concluded:

Although he has been the victim of two robberies and a violent attack in South Africa, all three were motivated by money. Although the CDT believes that they may also have been racially motivated, on all occasions, the police were called and investigations were opened. The CDT was extended the help of the local authorities as well as offered medical assistance.

In IMM-6393-14, a Somali applicant told the visa officer about two extremely violent attacks he suffered in South Africa, which he attributed to his identity as a foreigner:

WHY CAN'T YOU STAY IN SOUTH AFRICA?

... Many times they are attacking. South African people hate us. I have a knife scar on my left arm. In 2012 ... they attacked us. We were sleeping. They broke down the door and entered the shop. ... They opened fire. ... One was killed. Did you call the police? No because they took our phones. Why did they target your place? Not only us – all foreigners. ...

They stabbed me and tied me and asked me for money. The second time in 2014 – I was with my uncle. They stopped us at a checkpoint – South African people – they covered their faces – they opened fire because we were moving. My uncle was shot and passed away. They opened the car door and pulled him outside. ... They hit me and asked where the money was.

The officer's notes contain no assessment of the problems faced by the applicant in South Africa. The decision letter contains only the following boilerplate conclusion:

You currently reside in a country that is a signatory to the Geneva Convention on Refugees, South Africa. You have been able to benefit from the protection of South Africa and have been able to obtain asylum.
You have been able to benefit from the protection of South Africa and have been able to obtain asylum.

The lack of any meaningful assessment of these claims of xenophobic attacks is all the more troubling given that most visa officer reasons cited above contain a standard text recognizing the existence of xenophobic violence in South Africa.

iii) Access to status, temporariness and backward-looking analysis

UNHCR's conception of local integration includes the notion of permanent resident status: local integration is "a legal, economic and socio-cultural process aiming at providing the refugee with the permanent right to stay in the country of asylum."¹⁵¹ The Refugee Convention itself contains a loose obligation on signatory states to promote the naturalization of refugees:

¹⁵¹ UNHCR, *Resettlement Handbook*, *supra* note 118 at 1.3.4.

The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.¹⁵²

IRCC's processing guidelines also emphasize the importance of a permanent right to stay: "[l]ocal integration allows the refugee to live permanently in safety and dignity in the country of refuge and partake of its enduring legal, economic and social benefits."¹⁵³ The *IRPR*, however, frames local integration in a problematic way insofar as it is concerned with integration occurring "within a reasonable period."¹⁵⁴ In addition, in many cases in the dataset, the visa officer considered that temporary status, or even the *possibility* of obtaining refugee status in a country that is signatory to the Refugee Convention, was sufficient to ground a finding of local integration. However, the mere fact that a country is a signatory to the Refugee Convention does not mean that the state's asylum procedures are fair, accessible, or that the state upholds the rights of refugees as stipulated in the Refugee Convention. Some states have extremely low asylum seeker approval rates. The following statement made by a sponsor surveyed by the Canadian Council for Refugees is consistent with the findings of the cases reviewed:

It is cruel to leave refugees in deplorable conditions, with little or no hope, with Canada hiding behind a "durable solution" facade that is more legal fiction than a practical, human reality.¹⁵⁵

In IMM-5557-15, an Eritrean couple had been in Israel for 18 years and had had two Israeli-born children. They had both fled mistreatment in the national service in Eritrea. In Israel, they

¹⁵² *Convention relating to the Status of Refugees*, 1951, 189 UNTS 150 (entered into force 22 April 1954), art 34.

¹⁵³ Citizenship and Immigration Canada, "Overseas Selection and Processing", *supra* note 16 at para 13.2.

¹⁵⁴ *IRPR*, s 139(1)(d).

¹⁵⁵ Canadian Council for Refugees, "Survey of refusals", *supra* note 147 at 4.

were only able to secure temporary group protection, which needed to be renewed every one to six months. The applicants presented to the visa officer a letter from an employee of the Jerusalem African Community Center showing that only 0.2% of asylum seekers in Israel obtain permanent refugee status. The letter also indicated that the applicants face delays in their visa renewal during which they are unemployed, considered undocumented, and at risk of deportation. Nevertheless, the visa officer found that they had locally integrated, despite their inability to secure permanent status for 18 years:

You currently reside in a country that is signatory to the Geneva Convention on Refugees, Israel, where you have effectively secured a durable solution. You have resided for 18 years in Israel. During this time, you have been permitted to work unrestrictedly by the Israeli authorities. Your authorization to remain and work in Israel has been renewed semi-annually for the past 18 years and there is every indication that this will continue indefinitely. Both your children were born in Israel and were issued regulation government birth certificates, which are only issued to citizens and permanent residents. Both attend a normal Israel school.

At the Federal Court, leave was granted unopposed and the application was settled between the parties.

IMM-6100-14 presents a similar situation, but in this case the applicant was formally *denied* refugee status by the country of refuge. This is the case of an Iranian couple who fled to Japan in 1991 because of problems resulting from the Iran-Iraq war. In Japan, the couple had two children and converted to Christianity. The applicants made an asylum claim in Japan, which was refused. At the time of their interview, they had been in Japan for 23 *years* on a temporary visa that required renewal every one to three years. They were never able to obtain a travel document from Japan, and since their asylum claim was rejected, were permanently at risk of being deported to Iran. The visa officer nevertheless concluded that the applicants had a durable solution in Japan:

You currently reside in a country that is a signatory to the Geneva Convention on Refugees, Japan, where you have a reasonable possibility, within a reasonable period of time, of a durable solution. You are currently lawfully employed, your children have access to education. You have access to government subsidized healthcare. You have a longterm migratory status in Japan. Your children will eventually be eligible to become citizens of Japan and it appears that you may be eligible to apply for permanent residence in Japan. Therefore, you do not meet the provisions of this paragraph.

It is problematic that the visa officer would rely in his analysis on the fact that Japan is a signatory to the Refugee Convention, since the applicants had already been *refused* refugee status and were at risk of deportation. In addition, the fact that the applicant had been in Japan without permanent status or protection for 23 years raises an important question: what is a 'reasonable period of time' a refugee can be expected to wait for a durable solution? Yet, this case was denied leave by Justice McVeigh.

Many of the applicants found to have locally integrated in South Africa also lacked a permanent status. IMM-7812-12 is the case of a Rwandan couple who fled in the mid-1990s at the time of the Rwandan genocide. At the time of the interview, they had been in South Africa for 16 years. The applicants had obtained a renewable temporary refugee permit, but had been formally denied permanent refugee status by the South African Standing Committee. The following exchange took place at the interview:

Q - You have refugee status in South Africa. Why should you be allowed to go to Canada?

A - Have been in South Africa for 16 years; have been refused permanent residence. Because of the xenophobic mindset of the locals, it is not easy to get a job. ...

Despite evidence that the applicants had been refused permanent refugee status, the visa officer found that they had locally integrated:

You have been accepted as a Convention Refugee in the Republic of South Africa. You have been given the right to work and study in South Africa and are able to avail yourself of the protection of government agencies. You have the mobility rights and the same rights as a South African citizen with the exception of voting rights.

Following the refusal, the applicant's sponsor submitted to the visa officer the letter from the South African Standing Committee refusing the applicant's refugee application. In the letter, the Standing Committee indicated that it believed that conditions in Rwanda had changed and that there was no evidence that the applicants would now face persecution in their country of nationality. The Standing Committee also stated that *it intended to cancel the applicant's temporary refugee status in South Africa*. The visa officer reviewed these documents but maintained his decision. At the Federal Court, leave was granted (opposed) and judicial review was granted on the merits. Justice Gagné wrote in the order:

[T]he Court agrees with [the applicant] that the panel committed a reviewable error by failing to analyze all of the evidence filed, particularly Exhibit "C", in which the RSA's Standing Committee for Refugee Affairs strips him of his refugee status in the RSA...¹⁵⁶

The cases IMM-1221-15, IMM-1222-15, and IMM-1223-15 are linked cases of one Iraqi family. In the early 2000s, the principal applicant had worked in Iraq as an engineer for the United States Army. He told the visa officer that, because of his involvement with the American forces, his name was put on an Al-Qaeda assassination list. The family fled to Jordan in 2004 following assassination attempts on the principal applicant and his brothers. Jordan is not a state signatory to the Refugee Convention and is not bound the international norm of *non-refoulement*. In Jordan, the family members obtained temporary residence permits which they

¹⁵⁶ *Robert Senyoni v Canada (MCI)* (16 May 2013), IMM-7812-12 (FC) at 3.

renewed every year. During the interview, the principal applicant explained that their temporary permit was precarious and dependent on his ability to remain employed. The principal applicant also told the visa officer that not all family members were allowed to work in Jordan. In determining that the applicants had a durable solution in Jordan, the visa officer focused heavily on the fact that the applicants were fairly wealthy:

... they are effectively settled and well-established in Jordan. HOF runs a successful medical supplies business with office in Jordan and business ties in Iraq. Reasonable to assume he can go on doing this and supporting his family. He is able to fund costly univ education for all his children, as well as international travel. ... They have successfully obtained legal Jordanian annual residency every year since 2005. ... It is reasonable to assume that they can go on obtaining it.

On judicial review, Justice LeBlanc determined that the visa officer had erred in concluding that the applicants could have a durable solution in a country that is not a signatory to the Refugee Convention and where they have only temporary status:

Jordan is not a signatory to the 1951 Convention on the Status of Refugees (the Convention). It is, as a result, under no legal obligation to offer the Applicants long-term residence. In fact, the Applicants do not have legal status in Jordan as long-term residents. As a result, if and when Jordan decides not to renew the Applicants' temporary 1-year residency permit, the Applicants will not be protected from *refoulement* to Iraq. ... In addition, in determining that the Applicants would have no difficulty in satisfying the residency requirements in Jordan in the future, the Officer failed to consider that the family's ability to retain residency status in Jordan is highly contingent on the Principal Applicant's ability to maintain a successful business.¹⁵⁷

A visa officer made a similar decision in IMM-2249-15, another case that involves Iraqi refugees in Jordan. The principal applicant in this case was an architect who had been targeted in Iraq because of his work with American forces. Like the applicants in the case above, the applicants in IMM-2249-15 had only a temporary residence permit that needed to be renewed

¹⁵⁷ *Al-Anbagi v Canada (MCI)*, 2016 FC 273 at para 26.

every year. The principal applicant in this case, however, stated that he had not been able to find work in the last six months and that the family was at risk of losing their temporary status. Nevertheless, the visa officer concluded that the applicants could locally integrate, stating that it was reasonable to expect that the applicants could continue to renew their status in the future. The visa officer also stated that the applicant was “able to avail [him]self of the protection in Jordan”, despite the fact that Jordan is not a signatory to the Refugee Convention. At the Federal Court, this case was denied leave by Justice Diner.

The last case to be reviewed in this section is IMM-7760-14. Here, the visa officer focused not on a possibility of a future durable solution, but on a *past* (and now unobtainable) possibility. The case involved a single male applicant who was born in Eritrea when the territory was still part of Ethiopia. He then moved to Ethiopia proper and became stranded there with his family when the civil war began. In Ethiopia, he was suspected to be an Eritrean spy and was at risk of deportation to Eritrea, where he would also be in danger. His entire family was arrested by Ethiopian authorities and never heard from again. He fled Ethiopia and sought refuge in Sudan. The visa officer determined that he had a durable solution in Ethiopia because he *could have* obtained Ethiopian citizenship:

I realise that you were born in what is now Eritrea and that you moved to Addis Ababa with your family at a relatively young age. You indicated that ... you were unable to regularise your status. ...

It appears to me that ... it might have been possible for you to acquire Ethiopian nationality and thus to remain legally in Ethiopia. While I appreciate that the level of tension between Ethiopia and Eritrea was high at that time and that you might have felt you would not receive fair treatment at the hands of the Ethiopians, I am not satisfied that you made every reasonable effort to resolve your situation before leaving Ethiopia for Sudan [emphasis mine].

On judicial review, Justice McDonald ruled that the visa officer had erred in conducting a backward-looking durable solutions analysis. Justice McDonald also faulted the visa officer for

relying on a report concerning the acquisition of Ethiopian nationality that was over a decade old.¹⁵⁸

Local integration was the third most frequent ground of refusal in the dataset. The above analysis shows that visa officers assessed local integration in a way that is out-of-step with UNHCR guidelines. Findings of local integration were made in cases where applicants lived in countries that were not signatories to the Refugee Convention, cases where the applicant had been refused refugee status, cases where the applicant only had temporary status, and cases where the applicant could not economically integrate and was facing widespread xenophobia.

5.4.5 Assessing successful establishment

As reviewed in Chapter 3, the *IRPR* provide that establishment potential is to be assessed taking into consideration the applicant's resourcefulness, the presence of relatives or sponsors in Canada, their employment prospects given their education, work experience and skills, and their ability to learn English or French.¹⁵⁹ IRCC's processing guidelines specify that visa officers are to consider a pre-establishment period of 3-5 years.¹⁶⁰ Casasola has criticized successful establishment criteria as leading to inconsistent decision-making between visa posts and preventing Canada from providing protection to vulnerable refugees.¹⁶¹ In the dataset, successful establishment was cited as a refusal ground in only seven cases. Successful establishment was the sole ground of refusal in only one case. The relatively low frequency of refusals based on the successful establishment criteria is consistent with government statements on the reorientation

¹⁵⁸ *Seifu Belay Zgta v Canada (MCI)* (12 January 2016), IMM-7760-14 (FC).

¹⁵⁹ *IRPR*, s 139(1)(g).

¹⁶⁰ Citizenship and Immigration Canada, "Overseas Selection and Processing", *supra* note 16 at para 16.1.

¹⁶¹ Michael Casasola, "Legislative Review, New Directions and Refugee Resettlement" (1999) 18:1 *Refugee* 18 at 19 ["Legislative Review"].

of the resettlement program towards protection with the introduction of the *IRPA* in 2001.¹⁶²

This approach is reflected in visa office training material disclosed by IRCC:

Protection is the overriding goal of Canada's resettlement program; while the ability to settle is important, protection is the priority.¹⁶³

The shift towards protection and away from establishment potential also brings Canada's resettlement program more in line with UNHCR's position that establishment potential should *never* be considered in resettlement decisions:

The notion of integration potential should not negatively influence the selection and promotion of resettlement cases. For example, educational level or other factors considered to be enhancing the prospects for integration are not determining factors when submitting cases for resettlement.¹⁶⁴

The review of the seven cases in the dataset confirms that the assessment of establishment potential is an exceptionally subjective and discretionary exercise. IMM-5046-14 was the only case where successful establishment was the sole refusal ground. This was the case of an Eritrean family who had fled to Sudan. The male principal applicant had fled to Sudan for the first time in 1983 after the Eritrean People's Liberation Front (EPLF) came to his village and rounded up men and women. He had repatriated to Eritrea with his first wife in 2001 with the assistance of the UNHCR. He was later arrested in Eritrea for allegedly hosting people with anti-government views in his shop. He was detained and tortured for four months by Eritrean authorities, and managed to escape to Sudan once again. His first wife and six children stayed behind. In Sudan, he married his second wife. Together they had 5 children. The visa officer

¹⁶² See Citizenship and Immigration Canada, "Evaluation of Government Assisted Refugees (GAR) and Resettlement Assistance Program (RAP)" (March 2011) at vii.

¹⁶³ Access to Information Request # A-2015-09399 (29 June 2015) at 23, on file with author.

¹⁶⁴ UNHCR, *Resettlement Handbook*, *supra* note 118 at para 6.1.

concluded that given the applicant's age, education, work experience, and large family, he would not be able to become financially independent in Canada:

PA is 53 years old which is already a very advanced age to enter the labour market. He has very limited work experience with any application to the Canadian economy. He has worked as a subsistence farmer and daily labourer. He has been able to provide for daily needs of the family through low-skilled work in Eritrea and Sudan. ... PA's experience in Sudan and Eritrea is not easily transferable. PA has 6 years of elementary school and no English or French language ability. No secondary. His wife declares no education at all. Her only work experience is as a maid for a Sudanese family... Unlikely that she would be able to work full-time as a cleaner at this time as she has very young children. PA has 5 accompanying deps and 6 non-accompanying deps. There are very limited possibilities for anyone in this family to earn sufficient income in Canada to support this very large family.

The visa officer also concluded that the applicant's family in Canada had only a limited capacity to contribute financially to his settlement and took the unusual step of conducting an independent Google search to determine their level of income, based on where they lived:

I googled the address PA's sister and her live at ... in London, Ontario. This is non-profit social housing which normally is only available to people with low income. I am not satisfied that the support that could be provided by PA's relatives in Canada would be sufficient to overcome the challenges he has to becoming established Canada...

On judicial review, the applicant noted that it had been established at the interview that his six children in Eritrea would not be coming to Canada. The applicant also noted that the same visa officer had approved for resettlement one adult son, yet had failed to consider his potential financial contribution to the family's establishment.¹⁶⁵ Leave was denied by Justice Mason.

¹⁶⁵ The visa officer also determined that the applicant's second wife could not qualify as a spouse. She made the following Kafkaesque assessment of the relationship, which overlooks the fact that the principal applicant had been separated from his first wife:

PA's wife is not a spouse according to the regs & OP 2. PA was married to his first wife when he married his current wife and as such the marriage is not legally valid even though he subsequently divorced his first wife. Nor can such a relationship (polygamous second marriage) be converted to a monogamous relationship) common law) as per guidance in OP2. To make his marriage to his second wife legally valid, PA must re-marry his second wife. But to re0marry her, he must divorce her and, according to PA, under Islamic law, she must marry another man and be divorced before he can re-marry her.

In another case, IMM-9101-11, the visa officer found that a single male Somali applicant would not successfully integrate in Canada because he had not sought to learn the local language while in South Africa for seven years:

- I AM NOT SATISFIED THAT THE CDT WOULD BE ABLE TO BECOME ECONOMICALLY ESTABLISHED IN CANADA.
- THE CDT HAS ONE COUSIN IN CANADA WITH WHOM HE HASN'T SPOKEN SINCE MARCH.
 - THE CDT HAS BEEN IN RSA FOR 7 YEARS AND HAS NOT LEARNT ANY OF THE 11 OFFICIAL LANGUAGES OF SOUTH AFRICA.
 - THE CDT HAS CHOSEN NOT TO TAKE UP STUDIES IN RSA (HE CAME HERE AS A YOUNG MAN) AND HAS NO FORMAL EDUCATION FROM RSA.
 - THE CDT DID ONE YEAR AT A LANGUAGE SCHOOL IN SOMALIA FROM 97-98 BUT DROPPED OUT OF HIS PROGRAM.
 - THE CDT SPEAKS NO ENGLISH OR FRENCH EVEN THOUGH HE HAS BEEN IN A PREDOMINANTLY ENGLISH SPEAKING COUNTRY FOR 7 YEARS. HE ALSO SPEAKS NO AFRIKANS OR XSOSA OR ANY OTHER OFFICIAL LANGUAGE OF RSA.

The officer here notes only the more negative aspects of the applicant's integration in South Africa. Strangely, the visa officer also rejected the case because the applicant had successfully integrated in South Africa, a conclusion that is, in many respects, incompatible with a finding of a lack of establishment potential in Canada. In coming to the conclusion that the applicant had locally integrated in South Africa, the visa officer noted that that the applicant had been employed since his arrival. The applicant's financial independence in South Africa, however, did not factor in the officer's determination that the applicant would not successfully establish

CIC's family class processing manual clearly states that a married person can form a common law relationship with a second person partner if one has separated from the first spouse:

The notion of conjugality has within it the requirement of monogamy; therefore, it is only possible in law to establish a new common-law relationship after a person is either divorced or separated from the spouse or common-law partner and where they have convincingly formed the intention not to continue with that previous relationship (Citizenship and Immigration Canada, *OP 2 Processing Members of the Family Class* (2006) at para 13.2, online (pdf):

<canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/op/op02-eng.pdf>).

themselves in Canada. Judicial review in this case was granted on consent.

IMM-3863-13 is another case where the visa officer failed to consider the factors enumerated in the *IRPR*. This is the case of a 27-year-old Eritrean man in South Africa who claimed to have fled religious persecution as a Pentecostal believer. The visa officer found that the applicant was not credible and that he was “reticent and did not provide any details even when asked.” As reviewed in section 5.4.3, the applicant’s difficulty in answering the visa officer was likely compounded by the fact that no interpreter was provided and the interview was conducted in English, a language that the applicant did not understand well. The applicant’s difficulty at the interview also led the visa officer to conclude that he would not successfully establish in Canada:

It was very difficult to extract information - failing to satisfy me that he would have sufficient initiative to establish himself in Canada. ... Finally, I believe that his general lack of initiative would render resettlement in Canada difficulty.

The applicant told the visa officer during the interview that he had family members in Canada, that he had a high school education, that he could do construction, cleaning, cooking, and service work. It was also clear that the applicant understood some English. The visa officer never considered these facts or any of the factors listed in section 139 of the *IRPR* in coming to his decision. Rather, he relied on the vague notion of “lack of initiative.” On judicial review, this application was settled between the parties.

The last case to be reviewed in this section is IMM-3752-14. This is the case of a Haitian widow in the Dominican Republic with three children who claimed that she and her daughters were assaulted by men from the Lavallas organization after they demanded they join the organization. The visa officer’s problematic assessment of the gender-based claim was reviewed in section

5.4.2.1. Regarding establishment potential, the applicant demonstrated that she could speak French fluently, and she stated that the family had not worked in the Dominican Republic because they did not have a work permit, and that doing so would be illegal and put them at risk of deportation to Haiti. The visa officer nevertheless determined that the applicant had poor establishment potential because she had not worked or studied while in the Dominican Republic:

Potentiel de ré-établissement très faible. Pas d'études complétées au-delà du secondaire, pas d'expérience de travail. Ils considèrent qu'ils pourront apporter leur contribution au développement socio-économique du Canada mais n'ont pas d'expérience ont démontré jusqu'à présent un manque total d'initiative. Ils auraient pu travailler des petits boulots en attendant, surtout au travers de leur église, ou étudier en ligne. N'ont rien fait, même pas de bénévolat. ... Le fils ... a dit que la différence entre les milliers d'Haïtiens travaillant au noir en RD et eux était que leur but était d'aller au Canada et qu'en conséquence, ça ne valait pas la peine de travailler.

At the Federal Court, the application was granted leave (opposed) and dismissed on the merits by Justice Locke.¹⁶⁶

While successful establishment was the sole ground of refusal in only one case, the cases reviewed above confirm that it remains a highly subjective and discretionary assessment. The four cases reviewed in this section presented no worse settlement potential than a large number of other applicants in the dataset who were much older, more vulnerable, and had more limited work experience, education, and language skills. In addition, in the seven cases where settlement potential was an issue, visa officers seldom took into consideration the full list of factors listed in the *IRPR*. In only one case did the visa officer considered whether extending the

¹⁶⁶ *Janvier v Canada (MCI)*, 2015 FC 278.

sponsorship period to 36 months would mitigate concerns of successful establishment, as prescribed by IRCC guidelines.¹⁶⁷

The existence of the requirement, however infrequently invoked as a refusal ground, remains at odds with UNHCR guidelines and the principle of refugee protection. It also opens the door to inconsistent practices among visa offices and visa officers. Abandoning the requirement altogether would eliminate these potential inconsistencies, and remove a barrier to the resettlement of the most vulnerable.

5.4.6 Inadmissibility

A total of 15 applications were rejected because of ‘true’ inadmissibility concerns. I use the terms ‘true’ inadmissibility because another 15 applications were rejected because the visa officer was *not satisfied* that the applicant was *not inadmissible*. In this group of cases, no positive finding of inadmissibility was made. Such a determination was frequent in cases where the applicant failed to complete procedural steps, such as submitting updated forms, attending the interview, or responding to a procedural fairness letter. However, this also occurred in cases where the visa officer had general credibility concerns, and in one case where the applicant was found to have submitted a fraudulent police report. A finding that an applicant is ‘not not inadmissible’ is a problematic one, as noted by Justice Kane in IMM-3561-12. In that case, the principal applicant told the visa officer that his family originally fled Afghanistan because of the

¹⁶⁷ Section 154(3) of the *IRPR* expressly provides that the sponsorship period can be extended to up 36 months because of successful establishment concerns. Similarly, IRCC’s processing manual states:

Officers may consider an extended private sponsorship when they believe that an applicant will require a longer period of assistance, even if they are not a special-needs refugee. In such cases, the sponsorship may be extended for up to 36 months provided the applicant is otherwise eligible under the Regulations (Citizenship and Immigration Canada, “Overseas Selection and Processing”, *supra* note 16 at para 13.14.).

war and that now they could not return because his daughters would risk being kidnapped or forced into marriage. The applicant told the visa officer that he had never performed military service and had never been recruited by the mujahedeen. The visa officer did not find the applicant credible in relation to his military service, and concluded:

Upon removing from the assessment of your file those elements for which I have credibility concerns, I find that I am not satisfied, given all the available evidence that remains, that you are not inadmissible to Canada.

Justice Kane remarked that the use of inadmissibility language was improper in the circumstances:

I cannot help but comment that immigration decision-makers often use double negatives and, although such findings may be an attempt to follow the wording of the Act, such wording is awkward and difficult to interpret. In this case, the officer did not articulate why the applicant is inadmissible. The mere double negative statement which conveys that the applicant is not admissible is insufficient as it does not explain why the applicant is not admissible. ...

...

In the present case, it cannot be said that the officer's inadmissibility finding and the reasons underlying this finding were "established with the utmost clarity". The officer fails to articulate - let alone explain - the basis on which the applicant was found to be inadmissible.¹⁶⁸

It is worth mentioning that in the above case, there was at least a loose connection to a ground of inadmissibility (the applicant's potential military service in Afghanistan). In 10 of the 15 cases, however, the finding that the applicant was "not not inadmissible" was not even remotely linked to a ground of inadmissibility, but instead resulted from general credibility concerns or the failure of the applicant to attend the interview.

The 15 cases rejected for "true" inadmissibility break down as follows:

¹⁶⁸ *Fairozi, Karimdad v Canada (MCI)* (12 December 2012), IMM-3561-12 at 9-10 (FC).

- 7 case of security inadmissibility through membership under section 34(1)f) of the *IRPA*¹⁶⁹
- 3 cases of inadmissibility for human or international rights violation under section 35¹⁷⁰
- 3 cases of inadmissibility for serious criminality under section 36¹⁷¹
- 1 case of inadmissibility for non-compliance with the *IRPA* under section 41(a)¹⁷²
- 1 case of inadmissibility of a family member under section 42¹⁷³

It is noteworthy that none of the security inadmissibility findings involved direct participation in the prohibited acts listed in section 34. Each security inadmissibility determination relied on the membership clause in section 34(1)(f). This finding is consistent with empirical studies in the inland context that have shown that the vast majority of security inadmissibility determinations made by the IRB rely on the membership clause, and very few on direct involvement.¹⁷⁴ The organizations considered to have committed the prohibited acts were the Kurdish Democratic Party of Iran (KDPI - 2 cases), the Oromo Liberation Front (OLF), the Eritrean People's Liberation Front (EPLF), the Eritrean Liberation Front (ELF), the Ethiopian Democratic Union (EDU), and the Revolutionary Forces of Colombia (FARC). It is noteworthy that these cases had a high success rate on judicial review. Aside from one case that was not perfected, all but three judicial review applications were either granted on their merits or settled (a positive outcome rate of 78.57%). It was also interesting to note that the single case refused under section 41 for non-compliance with the act involved an applicant who had failed to attend his interview. There were many other cases in the dataset where an interview was missed, but this is the only case where a missed interview led to a finding of inadmissibility under section 41.

¹⁶⁹ Files IMM-274-12, IMM-5532-13, IMM-5233-14, IMM-2531-15, IMM-3210-15, IMM-5121-11 & IMM-12434-12.

¹⁷⁰ Files IMM-309-15, IMM-2158-15 & IMM-4297-15.

¹⁷¹ Files IMM-226-15, IMM-3043-15 & IMM-5810-15.

¹⁷² File IMM-6290-12.

¹⁷³ File IMM-909-15. The underlying inadmissibility was security inadmissibility.

¹⁷⁴ See Angus Grant, *Confronting (In)Security: Forging Legitimate Approaches to Security and Exclusion in Migration Law* (PhD thesis, York University Osgoode Hall Law School, 2016).

5.4.7 Assessing credibility and plausibility

The assessment of credibility is at the core of the refugee status determination.¹⁷⁵ A finding that an applicant is not credible can defeat their entire claim.¹⁷⁶ Studies in Canada's inland refugee system have reported that the majority of rejected cases are rejected on the basis of credibility.¹⁷⁷ In this study's dataset, 198 cases (50.38% of decided cases) were decided on credibility grounds. In 69 cases (17.56%), credibility was the sole ground of refusal.

In CIC's PSR QA Evaluation, some of the most concerning findings related to credibility assessments. The report found that in 25% of the cases rejected on credibility grounds, the applicant was not or was only partially confronted with the officer's concerns over credibility.¹⁷⁸ Moreover, in 63% of cases, the record did not clearly indicate how the credibility issue related to material aspects of the claim.¹⁷⁹ In the previous sections, I have reviewed over 20 cases where inadequate interpretation, translator error, mental health problems, misconstruction of testimony, and misconstruction of personal documents appear to have led to problematic credibility determinations. In those cases, the credibility concerns may have been put to the applicant, and may have related to central elements of the claim, but the credibility determinations were nevertheless deemed problematic for other reasons. In the paragraphs that follow, I address more substantive issues that were not covered in CIC's evaluation.

¹⁷⁵ See Smith-Khan, *supra* note 14 at 391; Michael Kagan, "Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination" (2002) 17 *Geo Immigr LJ* 367 at 367.

¹⁷⁶ See *Salim v Canada (MCI)*, 2005 FC 1592 at para 31; *Cienfuegos v Canada (MCI)*, 2009 FC 1262 at para 25; *Ventura v Canada (MCI)*, 2012 FC 10 at para 60; *Nanton v Canada (MCI)*, 2011 FC 266 at para 13. A negative credibility finding is however not *necessarily* determinative "if the subjective and objective components of the test for refugee status have been met" (*Yener v Canada (MCI)*, 2008 FC 372 at para 31).

¹⁷⁷ See for example Audrey Macklin, "Truth and Consequences: Credibility Determination in the Refugee Context" in *The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary* (Haarlem: International Association of Refugee Law Judges, 1999) 134 at 158.

¹⁷⁸ Citizenship and Immigration Canada, "PSR QA Project", *supra* note 16 at para 1.3.

¹⁷⁹ *Ibid.*

It is worth beginning this analysis by reviewing some general principles of credibility assessments in refugee claims as formulated by Canadian courts. The case law highlights the need for visa officers to avoid engaging in a “microscopic examination” of an applicant’s testimony, especially if the applicant is testifying through an interpreter.¹⁸⁰ “Minute” or “trivial” contradictions should not lead to a negative credibility finding, nor should a decision-maker turn the claim into a “memory test.”¹⁸¹ Decision-makers are not to conduct a “line-by-line treasure hunt for errors”¹⁸² or a “too granular or overzealous analysis.”¹⁸³ Nor should they be “reaching for inconsistencies” to support a negative credibility finding.¹⁸⁴ Moreover, credibility findings should not be based on matters “irrelevant to the case or peripheral to the claim.”¹⁸⁵ Courts have also stated that findings of implausibility should only be made in the “clearest of cases” where the facts are “inherently implausible.”¹⁸⁶ The Federal Court has ruled that decision-makers should be particularly cautious in making determinations of implausibility because “refugee claimants come from diverse cultures, and actions which appear implausible from Canadian

¹⁸⁰ *Attakora v Canada (MEI)*, [1989] FCJ No 444, 99 NR 168 (CA) at 198. See also *Hashi v Canada (MCI)*, 2020 FC 309 at para 24; *Haramichael v Canada (MCI)*, 2016 FC 1197 at para 15; *Lubana v Canada (MCI)*, 2003 FCT 116 at paras 10-11; *Tang v Canada (MCI)*, 2019 FC 1478 at para 27; *Abou Loh v Canada (MCI)*, 2019 FC 1084 at para 36; *Pooya v Canada (MCI)*, 2018 FC 1019 at para 21; *Hos v Canada (MCI)*, 2015 FC 791 at para 29; *Arslan v Canada (MCI)*, 2013 FC 252 at para 36.

¹⁸¹ *Yahaya v Canada (MCI)*, 2019 FC 1570 at para 12.

¹⁸² *Yan v Canada (MCI)*, 2017 FC 146 at para 19.

¹⁸³ *Lawani v Canada (MCI)*, 2018 FC 924 at para 23. See also *Zirou v Canada (MCI)*, 2003 FCT 617 at para 66; *Hohol v Canada (MCI)*, 2017 FC 870 at para 20; *RKL v Canada (MCI)*, 2003 FCT 116 at para 25; *Balyokwabwe v Canada (MCI)*, 2020 FC 623 at para 44.

¹⁸⁴ *Owusu-Ansah v Canada (MEI)*, [1989] FCJ No 442, 98 NR 312 (CA). See also *Acikgoz v Canada (MCI)*, 2018 FC 149 at para 37; *Yener v Canada (MCI)*, 2008 FC 372 at para 31; *Tanase v Canada (MCI)*, [2000] FCJ No 32, 181 FTR 111 at para 20.

¹⁸⁵ *Lawani v Canada (MCI)*, 2018 FC 924 at para 23. See also *Bueno v Canada (MCI)*, 2020 FC 228, [2020] ACF no 230 at 22; *Farah v Canada (MCI)*, 2019 FC 27 at para 24; *Warnakulasuriya v Canada (MCI)*, 2008 FC 885 at para 7; *Towolawi v Canada (MCI)*, 2020 FC 245 at para 29.

¹⁸⁶ *Sherlock Albertson Hardware v Canada (MCI)*, 2009 FC 338 at para 29. See also *Fok v Canada (MCI)*, [1993] FCJ No 800 (FCA) at para 1; *Valtchev v Canada (MCI)*, 2001 FCT 776 at para 7; *Callender v Canada (MCI)*, 2020 FC 515 at para 48; *AB v Canada (MCI)*, 2020 FC 498 at para 111.

standards may be plausible when considered from the claimant’s milieu.”¹⁸⁷ Directions contained in IRCC’s processing manual reflects these principles, and warn against microscopic and overly vigilant evaluations:

Given the nature of the refugee experience, it is hardly possible for a refugee to “prove” every part of their story. Therefore, it is frequently necessary to give the applicant the benefit of the doubt.

...

Officers should not be over-vigilant by microscopically examining the applicant. This is especially so where an interpreter is being used. Officers must not search through the evidence looking for inconsistencies or for evidence that lacks credibility thereby “building a case” against the applicant’s credibility.¹⁸⁸

There were many cases in the dataset where the visa officer’s credibility assessment appeared to be out of step with these principles. I recognize that my analysis of credibility assessments, perhaps more than other analyses in this dissertation, draws from my subjective assessment of the claim. Though I cite Federal Court cases to define the parameters of credibility assessments, I want to stress that my claim in this chapter is not that the problems I have identified are ones that would necessarily warrant granting judicial review. Rather, I am identifying problematic trends and opportunities for improvement.

i) Credibility of Eritrean Pentecostal believers

I reviewed in chapter 3 problems associated with visa officer Ann Marie MacNeil at the Cairo office who in 2009 rejected a large number of Eritrean applicants claiming to be followers of the Pentecostal faith, a religion outlawed in Eritrea. The Canadian Council for Refugees published

¹⁸⁷ *Low v Canada (MCI)*, 2007 FC 256 at para 18. See also *Ortiz v Canada (MCI)*, 2004 FC 690 at para 6; *Chikadze v Canada (MCI)*, 2020 FC 306 at para 24; *Manan v Canada (MCI)*, 2020 FC 150 at para 46; *Jamil v Canada (MCI)*, 2006 FC 792 at para 25.

¹⁸⁸ Citizenship and Immigration Canada, “Overseas Selection and Processing”, *supra* note 16 at para 13.1.

in January 2010 a 36-page review of 17 applications rejected by the visa officer.¹⁸⁹ The findings of the report are troubling. The report shows that that the visa officer lacked basic knowledge of realities in Eritrea, and that she made arbitrary assumptions about the knowledge of Pentecostal followers. According to the report, the visa officer frequently asked applicants to name the “seven Gifts of the Holy Spirit” or answer specific questions of religious doctrine. If applicants could not answer correctly, they were considered not to be believers:

She tested membership in a faith community (Pentecostal Christianity) through questions focused on religious doctrine, an approach that is flawed because adherents are not necessarily knowledgeable about their faith. The approach was particularly problematic in these cases, as the visa officer lacked knowledge of Eritrean Pentecostalism and relied instead on speculation about what Pentecostals should know.¹⁹⁰

There were also concerns that the visa officer may be biased against Pentecostal believers, as she frequently mentioned that she was Catholic and challenged the applicants on why they decided to convert. The report states that the visa officer frequently assumed, without justification, that it was “unreasonable” for an applicant to voluntarily decide to follow a banned religion. Applications for judicial review were launched in over 40 cases. Judicial review was granted in four lead cases by Justice Snider.¹⁹¹ The remainder were settled, with a commitment from the government that the particular visa officer would no longer decide refugee cases. These judicial review applications were all submitted before 2011 and therefore were not included in my dataset. It is nonetheless useful to review the cases decided on their merits because of evident similarities with certain cases included in the dataset. In *Ghirmatsion*, the visa officer

¹⁸⁹ Canadian Council for Refugees, “Concerns with Refugee Decision-making at Cairo” (January 2010), online (pdf): <https://ccrweb.ca/sites/ccrweb.ca/files/cairoconcerns_1.pdf> [“Decision-making at Cairo”]. See also Canadian Council for Refugees, “Disturbing upsurge in rejections of Eritrean refugees in Cairo by Canada” (30 November 2009), online: <<https://ccrweb.ca/en/bulletin/09/11/30>>.

¹⁹⁰ Canadian Council for Refugees, “Decision-making at Cairo”, *ibid* at 2.

¹⁹¹ *Ghirmatsion v Canada (MCI)*, 2011 FC 519; *Kidane v Canada (MCI)*, 2011 FC 520; *Weldesilassie v Canada (MCI)*, 2011 FC 521; *Woldesellassie v Canada (MCI)*, 2011 FC 522.

had determined that the applicant was not a Pentecostal follower because he could not provide “sufficient information about the religion”:

I am not satisfied that you are indeed a true convert to Pentecostal faith. Your knowledge of the faith [was] not up to the level one would expect from a person who has been practicing and reading the bible for 12 years. You were not able to provide sufficient information about the religion to satisfy me that you are in fact a follower of the Pentecostal faith.¹⁹²

The case notes showed that the visa officer had asked only three questions, which the applicant answered:

Describe to me how do you pray?
LEADER TELLS US WHAT TO DO, AND WE DO IT.
What are the days that Pente followers celebrate?
EASTER, CHRISTMAS, AND PENTECOST
Why did you convert?
NO MENTORS, AND BELIEVE IN JESUS CHRIST.¹⁹³

Justice Snider determined that it was unreasonable for the visa officer to conclude that the applicant was not a Pentecostal believer based on three simple questions to which the applicant gave three simple answers.

In both *Kidane* and *Weldesilassie*, the visa officer asked the applicant to name the “seven gifts of the Holy Spirit.” On judicial review, an expert witness testified that the expression “seven gifts of the Spirit” is “absolutely foreign to a Pentecostal.” The visa officer, on cross-examination of her affidavit, stated that she was not familiar with Pentecostalism as practiced in Eritrea, but only generally. As to the issue of the “seven” gifts of the Holy Spirit, she stated that she was aware that there was no specific number mentioned in the Bible: “I just chose a number. I could have asked for three or four. I chose seven.” Justice Snider determined that the visa officer had engaged in an arbitrary assessment of the applicant’s belief:

¹⁹² *Ghirmatsion*, *ibid* at para 35.

¹⁹³ *Ibid* at para 39.

In my opinion, the faith-based questions posed by the Officer were without factual foundation. It is an important function for a visa officer to decipher the sincerity of an applicant's religious belief. In order to do this, the visa officer must be informed regarding the relevant religious beliefs and practices. This cannot be done by arbitrarily applying a test that would confuse an applicant. This was the case with the line of questioning posed by the Officer. The Officer did not assess the sincerity of the Applicant's Pentecostal religious beliefs. Instead, the Officer asked questions designed to test the Applicant's knowledge of "the seven gifts of the Holy Spirit". Moreover, the Officer's admission that she knew little of the Pentecostal faith in Eritrea taints all of the questions that she asked and the inferences that she drew from the Applicant's responses.¹⁹⁴

In the dataset, sixteen cases were identified as presenting problematic credibility assessments of Eritrean nationals who claimed to be followers of the Pentecostal faith. Fourteen were decided at the Cairo office, *at least three of which were decided by visa officer Ann Marie MacNeil*. All of these refusals showed a striking resemblance to the cases assessed by the Canadian Council for Refugees and the four lead cases reviewed by the Federal Court. It is disappointing to see that the visa officer was not removed from refugee decision-making immediately after the Canadian Council for Refugees report was published or after the launch of over 40 judicial review applications. It is also curious that all three were denied leave.

In IMM-5097-12, visa officer Ann Marie MacNeil asked numerous and detailed questions to the applicant, and concluded:

I am not satisfied that you were indeed a follower of the Pentecostal faith. You were unable to provide specific details concerning the Pentecostal religion.

It is not entirely clear what "specific details" the visa officer was expecting. In the interview, the applicant explained in some detail the conversion process that led to his baptism:

What did you do in order to become baptized? Attended salvation classes.
How long? One month. ...

¹⁹⁴ *Kidane, supra* note 191 at para 46.

What is the meaning of baptized? It means you are creating your union with [unreadable] that means you are dying with J.C.

How long are salvation classes normally?

In Sudan it takes some long months, but in Eritrea it is done in a hidden day... In Sudan it depends on the church and on the person. It depends how long you attend, how many weeks, how many hours

Are you tested on your knowledge? The follow up on how you are doing classes. They give you exam.

... explain about the salvation classes. ... When you finish your salvation courses, they give you an exam, to understand how much your knowledge.

Only give you one exam at the end of the course? Yes, they ask you daily if your life has changed. If your life is not changed, they may extend the class.

The visa officer's conclusion that the applicant lacked knowledge about his religion seems to have been based on the applicant's inability to cite the specific book of the Corinthians where the "Gifts of the Holy Spirit" are mentioned and his inability to cite an unknown number of such gifts (the applicant was "Only able to list 6"). Leave was denied by Justice Barnes.

IMM-4948-13 is another case decided by the same visa officer. In this case, visa officer MacNeil asked several doctrinal questions about Pentecostalism such as "Where is the word Pentecostal in the Bible?", "Significance of the Lord's last supper?", and "What is the meaning of baptism?" In most instances, she failed to record the applicant's answer, simply writing "incorrect" after the question. The visa officer seemed to be prepared to accept only one answer:

WHERE IS THE GIFTS OF THE HOLY SPIRIT LOCATED IN THE BIBLE?
IN ACT OF THE APOSTLES. MORE SPECIFIC PLEASE? IN CHAPTER
TWO. (INCORRECT)

In IMM-6201-12, visa officer MacNeil asked the applicant what led to his conversion. The applicant explained that his cousin had told him about Jesus Christ being the true saviour, and that he had been baptized. The visa officer concluded: "...I find it unreasonable that you would convert to a banned religion only after reading the Bible for one month."

Another nine cases in the dataset, despite not being decided by Ann Marie MacNeil, presented striking similarities. In addition, six of these were decided after Justice Snider's decision in *Ghirmatsion*. IMM-1788-13, for example, was decided at the Cairo office in October 2012.

Officer "FA" asked the following questions to the PA:

Q. What is the meaning of the Pentecost? A. T is the feast of the 50 days after JC had risen when the Holy Spirit (HS) came down to the Apostles and filled them. They started to speak in tongues.

Q. Do you know any specific gifts given to Peter and Paul? A. They are speaking in tongues. When they pray in tongues the others accepted the Lord and converted.

Q. How many are the gifts of the HS? A. They are five, I cannot remember them now but it is like a gift to heal people.

Q. Do you know where they are found in the Bible? A. Corinthians.

Q. Chapter? Verse? A. It is hard for me to memorise since I am not educated, I only studied only for 5 years. ...

Q. What are the days of observance to the Pente? A. Christmas and Easter.

The visa officer concluded the following:

PA has provided minimal or incorrect information about the Pentecostal faith that, a religion she claims to be a member of for 23 years. A follower of this faith would be expected to have more knowledge and commitment of the faith than PA has demonstrated.

It is unclear which of the information provided by the applicant during the interview was found to be incorrect. At the Federal Court, leave was denied by Justice Gagné.

IMM-404-13 was decided by visa officer "KG", also from the Cairo office, and also after the Federal Court decided *Ghirmatsion*. The visa officer asked seventeen doctrinal questions at the interview. The applicant provided an answer to each:

Q. Tell me passages in Bible that are significant. A. Psalm 23.

Q. Tell me those sig to Pente religion. A. 1 John 3 about baptism, there was a man who asked Christ about baptism, that's it. Told to be re-born again.

Q. Old/New? A. New.

Q. Sig of Pentecost? A. That he is the only way.

Q. Tell me what Pente/Pentecost means? (starts fidgeting) A. A feast where the holy spirit comes down.

Q. Sig of 50 days? A. Apostles were gathered holy spirit comes upon them.

Q. When does this take place or celebrated? A. When he raised from dead... 50 days after.

Q. After what? A. 50 days after he rose up from the dead, they were gathered and he came upon them. ...

The visa officer never indicates what responses he or she was expecting from the applicant. Nevertheless, the visa officer concluded: "I do not find the PA sufficiently knowledgeable about the religion that could be expected of a committed member of the faith." This case was denied leave. Officer 'KG' came to a similar conclusion following a similar line of questions in IMM-349-12 and IMM-8602-11, both decided after *Ghirmatsion* and denied leave at the Federal Court.

The problems identified in the Canadian Council for Refugees report therefore appear not to be limited to a single visa officer. It is also evident that the Federal Court's 2011 decision in *Ghirmatsion* was not immediately brought to the attention of visa officers. These cases highlight the need for increased internal review of refusals and the importance of communicating to visa officers developments in Federal Court case law.

ii) Other problematic plausibility findings

In this section, I review five cases from other visa offices where the visa officer made problematic plausibility findings. IMM-5801-12 is a case of an Afghan family who fled to Pakistan. The principal applicant claimed that he feared returning to Afghanistan because warlords would demand his daughters in marriage. The visa officer rejected the application because of concerns over the "credibility of the information you gave me regarding warlords imposing forced marriage proposals on you for your daughters." The visa officer made a

bewildering plausibility finding with regard to the applicant's daughter's schooling and her ability to do "calculations":

HOW OLD WERE YOU WHEN YOU CAME TO PAK? I was 15.
HOW OLD ARE YOU NOW? 21. I was born in 1991.
HAVE YOU BEEN TO SCHOOL? Yes in Afghanistan.
HOW FAR IN SCHOOL? I studied for 3 years - primary.
YOU CAN DO MATH PRETTY WELL FOR SOMEONE WHO ONLY STUDIED 3 YEARS. What do you mean?
I MEAN YOU DID ALL THE CALCULATIONS TO FIGURE OUT HOW OLD YOU WERE WHEN YOU CAME HERE - SOMEONE WHO HAS STUDIED 3 YEARS WOULD NOT BE ABLE TO DO THAT. I studied at home [emphasis mine].

The visa officer's assumption that people who studied only three years would not be able to "calculate" how old they were when they moved to another country was not based on any evidence. Neither does it relate to a central element of the claim. At the Federal Court, this case was denied leave.

A problematic finding of implausibility was also made in IMM-1439-12, which involved a female Eritrean applicant who claimed that she had escaped national service and had been detained thereafter. She told the visa officer that she became sick while in detention, was transferred to a hospital, and managed to escape while the person guarding her was sleeping.

The visa officer found it implausible that the applicant would manage to escape at 5pm:

WHILE I WAS IN THE HOSPITAL, I WAS THINKING HOW I WOULD LEAVE, WHEN I FOUND A SUITABLE SITUATION AND TIME I ESCAPED FROM HOSPITAL. ... THE GUARD WAS CARELESS BECAUSE HE WAS SLEEPING, AND I WAS ABLE TO ESCAPE FROM THE HOSPITAL. ...
PEOPLE WOULD HAVE SEEN YOU LEAVE THE HOSPITAL AND KNOWN? AT THE TIME I LEFT THERE WAS NO ONE. I CHOSE A SUITABLE TIME. ...
WHAT WAS THE TIME OF DAY? AROUND 5 OR 6 PM, THE HOSPITAL WAS QUIET, NO PEOPLE AROUND. ...
PA CLAIMS TO HAVE WALKED OUT OF THE HOSPITAL WHILE THE GUARD WAS SLEEPING (AROUND 5 OR 6 PM AT NIGHT). WOULD

THINK THT THERE WOULD BE LOTS OF ACTIVITY DURING THE SUPPER HOURS.

The visa officer never questioned the applicant about where the applicant's room was located in the hospital, or how many other patients and staff there were in her section of the hospital. Leave in this case was also denied.

IMM-2211-11 is a case where the Federal Court did intervene. That case involved a Tamil Sri Lankan family who fled to India because the principal applicant was targeted by Sri Lankan authorities. The principal applicant told the visa officer that he had been forced to work for the LTTE for three days and had later been imprisoned by the Sri Lankan army on suspicion of supporting the LTTE. He was able to escape detention after his father paid a bribe. After his release, Sri Lankan authorities continued to look for him and, in a case of mistaken identity, killed his brother. The visa officer's decision includes the following determinations of implausibility (which are misidentified as "credibility concerns"):

It is not credible that the army would detain you for eight months and then release you upon payment of a bribe if you were considered a member of the LTTE. Nor is it credible that the army or related groups would then return to your home to kill you one month after your release from detention, or that these assailants would leave after killing your brother without further pursuing you.

The visa officer did not refer to any objective evidence in support of his findings regarding how the Sri Lankan army operated in the context of the civil war. On judicial review, Justice Barnes faulted the visa officer for assuming that Sri Lankan authorities would behave in a rational way:

The essential problem with this finding is that this part of Mr. Jeevaratnam's story was entirely plausible, at least insofar as he had recounted it. ... At the time of these events, when unlawful detentions and extra-judicial killings were frequent, there is nothing implausible about a prisoner gaining release on payment of a bribe and then being targeted for execution. Indeed, an expectation

of rational behaviour on the part of state agents allegedly involved in bribery and murder should not form the basis of a plausibility finding of this sort.¹⁹⁵

The Federal Court also intervened in IMM-5094-12. This was the case of a young married Ethiopian couple. They told the visa officer that Ethiopian authorities had arrested the male applicant and detained him for two months because he had refused to support the governing party in the election. The male applicant escaped prison after the payment of a bribe, and both applicants fled to Djibouti, where they were married one year later. The visa officer found it implausible that the applicants would reside together before getting married, as that is inconsistent with cultural norms. Justice O’Keefe granted judicial review and determined that the applicants “could have decided to live together before marriage (as they stated) despite the customs of their country.”¹⁹⁶ Indeed the notes indicate that the applicants provided at least a plausible explanation for diverging from cultural norms:

I ALSO DON'T UNDERSTAND WHY IF SHE CAME TO YOU IN DJIBOUTI SINCE 2006, WHY YOU WERE LIVING TOGETHER FOR MORE THAN A YEAR WITHOUT MARRYING. We married in that year, and we have lived together since 2006, and we married each other in 2007. But I entered 2006. THAT IS WHY I AM ASKING - IS IT NOT INAPPROPRIATE IN YOUR CULTURE FOR A WOMAN AND MAN TO LIVE TOGETHER IN ONE ROOM WITHOUT BEING MARRIED? If we lived alone, there was some people who would abuse her. SO WHY DIDN'T YOU JUST MARRY AS SOON AS YOU WERE TOGETHER? At that time, we had no income. We had no money at that point. It is impossible to pay for rent.

The last case reviewed in this section, IMM-4855-12, is a case of a young Ethiopian woman who claimed that she was imprisoned and raped because of her involvement with the All Amhara People’s Organization (AAPO). Her father was also a member of AAPO and had been

¹⁹⁵ *Jeevaratnam v Canada (MCI)*, 2011 FC 1371 at para 13.

¹⁹⁶ *Abdulahi v Canada (MCI)*, 2013 FC 868 at para 43.

detained before the applicant herself became a member. She told the visa officer that she was aware of the risks of joining the AAPO, and had done so because she was “struggling for the rights of (her) ppl”, and because she was “trying to look for (her) father” who was arrested because of his activities with the AAPO. The visa officer rejected the case because he found it “unreasonable” that the applicant would have joined the AAPO and remained a member:

I find it unreasonable that you joined AAPO after your father has been detained for his involvement with same party. It is also unreasonable that you would resume your activities with the army after you have been arrested and detained for 45 days.

Judicial Review was granted in this case, but on other grounds. The Refugee Convention exists precisely to protect persons who “decide” put themselves at risk because of their political opinion or religious views. It is baffling that the visa officer would consider that choosing belief over safety is implausible. This was certainly not a plausibility finding made in the “clearest of cases.”

5.5 Improving decision-making

Throughout this chapter, I have identified various data-informed measures that would lead to improved decision-making within IRCC. In this section, I reiterate these recommendations and provide additional guidance on how I believe the problems identified can be addressed. The recommendations I make are rather minor and easily achievable. More systemic change has been suggested elsewhere. Notably, the Legislative Review Advisory Group recommended in 1998 that both inland and overseas systems be administered by a single independent agency.¹⁹⁷ There is no doubt that such a structural change would help address many of the issues I have

¹⁹⁷ Canada, Legislative Review Advisory Group, *Not Just Numbers: A Canadian Framework for Future Immigration – Executive Summary*, (Ottawa: Minister of Public Works and Government Services Canada, 1997) at 25. See Casasola, “Legislative Review”, *supra* note 161.

identified in the case review and reduce the gap in decision-making between the inland and overseas refugee systems. That being said, the recommendations I offer are all achievable within existing administrative structures.

5.5.1 Administrative changes

5.5.1.1 More robust training

This issue of inadequate training has been mentioned by various scholars, advocacy organizations, and government evaluators. IRCC's 2016 Evaluation of the Resettlement Programs (GAR, PSR, BVOR, RAP) reports the views of visa officers themselves on existing training programs:

Several issues with the training opportunities, both internationally and domestically, were reported.

- On-the-job training for officers varied between CVOA, depending on the provider, available material, and region-specific information and needs. Variances in on-the-job training by CVOA resulted in inconsistencies in applied practices.

- Refugee-specific training for CVOA staff was reportedly oversubscribed; thus, not all officers had access to training. Furthermore, the formal training did not always match how processing was completed in the offices due to a lack of time and operational demands.

- During the international case studies, CVOA officers noted that training on GCMS, particularly its advanced reporting and management functions, was not provided [emphasis mine].¹⁹⁸

The data reviewed in this chapter is strong evidence that training should be strengthened. That some visa officers make refugee decisions without having complete core training in refugee processing is concerning. Improving training is a cross-cutting measure that would lead to improvements in almost every procedural and substantive area reviewed in this chapter.

¹⁹⁸ Immigration, Refugees and Citizenship Canada, "Evaluation of the Resettlement Programs – Extended Report" (Spring 2016) at 5.2.3.

Training programs on refugee decision-making should be consistent across all regions. Visa officers should not be assigned to refugee cases before completing the core training program. Training should also be ongoing and training material should be frequently updated. There should also be region-specific training modules that address region-specific issues, such as local integration. The design and delivery of the training program could benefit from a partnership with the Immigration and Refugee Board. The data reviewed in this study indicates that increased training is especially needed in the areas of case documentation, gender-based claims, vulnerable applicants, language barriers, inadmissibility findings, and making use of country documentation.

i) Documenting cases (notes and decision letters)

The notes entered by visa officers should be clear, substantive, and complete. The case notes should be complete. They should reflect the questions posed and the answers provided, and also reflect why the case was decided in that particular way. Decision letters should also provide a substantive statement of why the visa officer arrived at that particular decision. Boilerplate decisions should be avoided. Clear benchmarks should be developed and applied by supervisors.

ii) Gender-based claims

Visa officer training with respect to gender-based claims should be strengthened. This training should put serious emphasis on principles elaborated by the Federal Court, the IRB, and the UNHCR on gender as a “particular social group”, and should emphasize the need to demonstrate sensitivity in interviewing victims of gender-based violence.

iii) Vulnerable and applicants and language matters

Visa officers should receive training on how to identify applicants who have mental disabilities and procedures should be developed on how to adapt interviews with such applicants. Training should for example address the issue of adapting visa officers' expectations, and the increased need to review objective country condition documents. Visa officers should also receive training on how to better identify language barriers between interpreters and applicants and how to adapt the interview in light of those barriers.

iv) Properly indicating inadmissibility findings

As stated by the Federal Court,¹⁹⁹ it is inappropriate for visa officers to conclude that they are not satisfied that an application is not inadmissible. The language of inadmissibility should be employed only in cases where a positive finding of inadmissibility is made.

v) Making proper use of objective country documentation

Visa officers relied on objective country documents only in a small minority of cases. Often, the title of the document was omitted. There were also many cases where the analysis of documentation was problematic. In some cases, visa officers misquoted documentation. Visa officers would benefit from more developed country documentation tools, in conjunction with training on how to use these tools.

5.5.1.2 Lighter workload

The pervasiveness of factual mistakes, lack of country conditions research, and inadequate documenting of decisions, suggest that visa officers are unable to allocate sufficient time to each

¹⁹⁹ See section 5.4.6.

case. IRCC's 2016 Evaluation, quoted earlier in this section, reports that visa officers are unable to apply the best practices discussed during training because of a lack of time. IRCC should consider measures to ensure that visa officers can devote the time required to process refugee applications. This should be guided by the principle that refugee applications are more complex than other immigration matters and require a different approach in terms of human resources allocation. This could include increasing the overall number of visa officers or allocating cases differently within a visa office based on the nature of the application.

5.5.1.3 Recording interviews

Creating a system for recording interviews would relieve visa officers from the time-consuming task of transcribing the questions posed and responses provided during the interview. A greater proportion of the interview could be devoted to substantive inquiry. Visa officers would also benefit from such a recording of the interview when they review and assess the case. Such a system for recording interviews would require only minor additional resources. Applicants would also benefit from audio recordings, especially those who proceed to judicial review. Because the visa officer notes - often incomplete - are the only reliable record of the interview, it can be arduous for the Federal Court to reconstruct what transpired at the interview. For instance, it is difficult for an applicant to establish that the translation was inadequate, that they made a particular statement, or that they were impeded by a cognitive impairment. Similarly, allegations of improper interview conduct are difficult to verify. This is the rationale that led the CCR to recommend instituting audio recording of interviews.²⁰⁰ Conversely, some decisions are quashed by the Federal Court for the reason that the court cannot identify on the written record the basis of the visa officer's credibility concerns. Visa officer decisions would be less

²⁰⁰ Canadian Council for Refugees, "Decision-Making at Cairo", *supra* note 189 at 28, 34.

vulnerable to judicial review if the reviewing court could access a recording of the interview. I note that in the inland system, all refugee hearings at the RPD are recorded, and the recording is disclosed when judicial review is initiated. When leave is granted, a transcript of the hearing is produced.

5.5.1.4 Automatic review of refusals

Returning to the former practice of having a senior official review every rejected refugee would create an important safeguard against poor-quality decision-making and also provide ongoing learning opportunities for visa officers. Such a change was recommended in CIC's PSR QA Assessment, where it was noted that automatic internal review would be consistent with other jurisdictions, including the United States.²⁰¹

5.5.1.5 Reconsider position on local integration

It should be of concern to policy-makers that Canada's definition and application of local integration as a durable solution is out-of-step with criteria developed by the UNHCR. In the dataset, local integration was found to have occurred in cases where applicants lived in countries that were not signatories to the Refugee Convention, cases where the applicant had been refused refugee status, cases where the applicant only had temporary status, and cases where the applicant could not economically integrate and was facing widespread xenophobia.

²⁰¹ See Citizenship and Immigration Canada, "PSR QA Project", *supra* note 11 at 8.

5.5.2 Regulatory changes

5.5.2.1 Eliminate the successful establishment criteria

In the reviewed dataset, very few applicants were rejected on the basis of the successful establishment criteria. The existence of the requirement remains however at odds with UNHCR guidelines and the very principle of refugee protection. The criteria also enables inconsistent uses of discretion. Processing directives state that protection concerns should be at the centre of the assessment, yet the successful establishment criteria remains a tool that visa officers can invoke to reject applications. The applicants in the dataset that were rejected on the basis of establishment potential had no worse establishment potential than other applicants. The criteria should be eliminated from the regulations.

5.5.2.2 Eliminate the UNHCR/state refugee documentation requirement

As reviewed in Chapter 3, refugees have differential access to refugee status determination based on their nationality and country of asylum. Canada's refugee resettlement system should be equally accessible to all refugees regardless of nationality. IRCC should consider other measures to ensure that the application backlog does not increase and processing timelines remain reasonable.

5.6 Conclusion

Already in 1984, only six years after the formalization of refugee policy in Canada, Gerald Dirks wrote that the newly adopted act was a "significant breakthrough" which put an end to earlier ad hoc refugee policies that relied on unclear criteria.²⁰² Dirks noted, however, that

²⁰² Gerald E Dirks, "A Policy within a Policy: The Identification and Admission of Refugees to Canada" (1984) 17 Can J Pol Sci 279 at 299.

Canada's overseas refugee system suffered from shortcoming as a result of administrative practices:

... legislation which appears to be liberal and humane may be modified by administrative convenience, or the perceptions of elected and career policy-makers.²⁰³

In Dirk's assessment, the faulty administrative practices include, for instance, shortfalls in staff numbers, failures in assessing the link between refugee emergencies and living conditions in the country of first asylum, budgetary considerations, and policy priorities dictated by cabinet. Dirks also noted that, because refugee policy is implemented within the broader context of immigration policy, refugee admissions are determined, formally or informally, on the basis of evaluation criteria developed for regular migrants.²⁰⁴

My analysis of the 403 cases reviewed in this chapter indicates that, 35 years later, there is still room improvement in terms of institutional design. This chapter has identified and documented important procedural and substantive shortcomings in decision-making. These findings confirm many of the concerns expressed over the years by refugee organizations. Major improvements could be achieved with relatively minor changes in the way the overseas refugee program operates. In closing this chapter, I would like to reiterate that this study does not suggest that improving decision-making is the only or the best avenue to optimize Canada's contribution to refugee protection. Short of a wholesale reform of the international refugee regime, refugee law researchers must face the fact that resettlement admissions to Canada are limited. If one refugee applicant with a real protection need is wrongly denied entry to Canada, another one will replace her. In other words, top-quality decision-making will not increase the total sum of protection

²⁰³ *Ibid* at 299-300.

²⁰⁴ *Ibid* at 309.

Canada offers. Some may add that the number of resettlement places offered by Canada is a drop in the bucket considering global resettlement needs. Yet, it is clear that deficiencies in decision-making and processing cause immense hardship to individual refugee applicants in need of a durable solution who often wait for years in limbo before receiving a decision from IRCC. As I have discussed in Chapter 2, deficiencies in decision-making also impact sponsors, and lead to increases in cost.

CHAPTER 6 THE ROLE OF JUDICIAL REVIEW

6.1 Introduction

The impact of judicial review for refugees is salient in the context of inland asylum seekers, for whom a negative judicial review can lead directly to removal:

Refugee determinations are among the most important decisions Canadian administrative tribunals and courts are called upon to make. If errors in first-instance refugee determinations at the Immigration and Refugee Board (IRB) are not caught and corrected through judicial review, refugees may be deported to countries where they face persecution, torture or death.¹

Effective and fair judicial review also forms part of a state's implementation of its obligations under international refugee law:

The way that the rule of law operates at the national level in relation to refugees and asylum seekers determines the extent to which their rights in international law (especially... the right to seek asylum and the right against *refoulement*) are respected.²

For failed resettlement applicants, too, judicial review is a high-stakes affair. It is their only recourse to challenge a visa officer's negative decision. It can mean the difference between protection and a durable solution in Canada, on the one hand, and life in limbo and potential *refoulement* on the other. A judicial review framework that is fair and accessible will have a major impact in correcting individual failings and shaping decision-making practices. Conversely, a judicial review framework that is inaccessible will fail to correct objectionable decision-making practices and to have a meaningful impact.

¹ Sean Rehaag, Rehaag, Sean, "Judicial Review of Refugee Determinations: The Luck of the Draw?" (2012) 38 Queen's LJ 1 at 2 [Luck of the Draw].

² Susan Kneebone, "Introduction: Refugees and Asylum Seekers in the International Context – Rights and Realities", in Susan Kneebone, ed, *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (Cambridge: Cambridge University Press, 2009) 1 at 30.

The goal of this chapter is to assess, using quantitative and qualitative methodologies, how judicial review operates in the context of refugee resettlement, and to discuss the overall impact of judicial review on the resettlement program.³ The first section of this chapter will discuss how my analysis is situated within the literature on judicial review. The second section will present a quantitative overview of the outcomes of the 403 cases in the dataset. This will be followed by more detailed quantitative analyses, beginning with various applicant-focused factors that are correlated to variations in judicial review outcomes, including sponsor, city of filing, country of origin and country of asylum, and quality of counsel. In the following section, I address three extralegal, ‘judge-focused’ factors, that have been found to have an impact on grant rates in other contexts, including individual variation, gender variation, and variation based on the political party of appointment. Federal judges’ reason-giving practices will also be analyzed and discussed. The following section will shift the analysis from the quantitative to the qualitative, as I review the Federal Court’s approach to procedural fairness and deference, practices in case settlement, as well as strong cases that were denied leave. In the following sections, I discuss the role of judicial review as individual redress and as a structural component of the resettlement system. In the concluding section, I present recommendations in light of my findings aimed at improving access to review.

6.2 Researching judicial review

Refugee law scholars are particularly interested in judicial review as it is often the ultimate recourse for individuals undergoing refugee status determination. Doctrinal approaches have

³ Many of the quantitative results and recommendations in this chapter were previously reported in Pierre-André Thériault, “Judicial Review in Canada’s Refugee Resettlement Program”, in Shauna Labman & Geoffrey Cameron, eds, *Strangers to Neighbors: Refugee Sponsorship in Context* (Montreal & Kingston: McGill-Queen’s University Press, 2020) 227.

traditionally dominated in legal research around judicial review in the refugee context. There is however a growing body of literature in legal scholarship that approaches decision-making in judicial review proceedings in refugee matters through empirical methodologies. The overall finding of many of these studies is concerning: judicial review of refugee matters often depends extralegal factors, such as the identity, gender and the ideology of the judge, with devastating impact for refugee claimants who are entitled to a ruling on the merit of their case.⁴ No study has yet inquired into how judicial review operates in the overseas refugee context and how it may differ from the inland refugee context.

I also want to address here a related emerging body of literature in the social sciences termed ‘judicial impact studies’, an approach concerned with the broader impacts of judicial review on government bureaucracies. The judicial impact approach seeks to go beyond the traditional doctrinal concerns of legal scholarship and addresses some of the more informal aspects of the interaction between courts and bureaucracies:

[t]he most profound and enduring influences of judicial review are not to be found by examining the statute book, or by seeking formalized and public shifts in policy in response to litigation. Rather they are to be found in the effects of litigation on the less accessible aspects of government: the internal and informal working practices of departments, their management systems and decision-making culture.⁵

The judicial impact approach is an empirically grounded one that privileges interviews and observation with decision-makers. Judicial impact scholars have looked, for example, into

⁴ See for example Jon B Gould, Colleen Sheppard & Johannes Wheeldon, “A Refugee from Justice? Disparate Treatment in the Federal Court of Canada” (2010) 32:4 JL & Pol’y 454.

⁵ Maurice Sunkin, “Conceptual Issues in Researching the Impact of Judicial Review on Government Bureaucracies”, in Marc Hertogh & Simon Halliday, eds, *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2004) 43 at 63.

decision-makers' perceptions and reactions to doctrinal changes,⁶ mechanisms of dissemination of judicial decision,⁷ the use of soft-law by agencies to implement judicial decisions, and practices around case settlement.⁸ In this chapter, the discussion around case settlement, changes in decision-making practices following judicial pronouncements, and the structural impact of judicial review on the resettlement program are indeed topics of concern of the judicial impact approach. That being said, as my methodology is grounded in the legal approach and case analysis, I engage only peripherally with the judicial impact literature.

6.3 Overview of judicial review outcomes and rate of seeking judicial review

My review of the cases shows that 320 JR applications were 'perfected' (i.e. all required court documents were filed), while seven applications were granted on consent before having been perfected. Twenty-two cases were discontinued by the applicant before being perfected – two of which contained evidence of a settlement. Fifty-four cases were not perfected and were denied leave for that reason. It should be noted that the relatively high number of 'not perfected' cases is likely driven by the rules of disclosure in immigration matters. Reasons are not disclosed to applicants as a matter of course, and can only be obtained through a formal access to information request. However, delays in obtaining a reply to an access to information request can bring applicants outside the judicial review time limit, which is 60 days in the case of refugee resettlement applicants. As a result, a common practice is for lawyers to file a judicial review application as soon as judicial review is contemplated and review disclosure provided



⁶ Bradley C Canon, "Studying Bureaucratic Implementation of Judicial Policies in The United States: Conceptual and Methodological Approaches" in Marc Hertogh & Simon Halliday, eds, *Judicial Review and Bureaucratic Impact: International an Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2004) 76.

⁷ Robin Creyke & John McMillan, "Executive Perceptions of Administrative Law - An Empirical Study" (2002) 9 *Austl J Admin L* 163.

⁸ Sunkin, *supra* note 5.

through the judicial review process. Only at that point do applicants and their lawyer assess whether continuing with the judicial review is warranted.

TABLE 6.1 - SUMMARY OF JUDICIAL REVIEW OUTCOMES

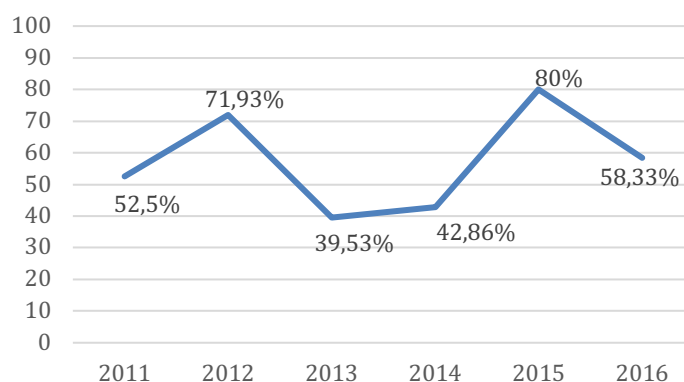
<p>Pre-leave stage (403 cases)</p> <ul style="list-style-type: none"> • 76 cases not perfected or discontinued before being perfected <ul style="list-style-type: none"> ○ 54 not perfected and denied leave ○ 22 discontinued before being perfected • 7 cases granted on consent or settled before being perfected • 320 perfected cases, including: <ul style="list-style-type: none"> ○ 7 cases granted on consent or before leave decision ○ 45 cases discontinued after being perfected (13 with evidence of settlement, 11 where leave was not opposed) ○ 268 cases proceeded to leave determination

<p>Leave stage (268 cases)</p> <ul style="list-style-type: none"> • 268 leave determinations, including: <ul style="list-style-type: none"> ○ 172 leave granted cases (22 leave not opposed; 150 leave opposed) ○ 96 leave denied cases (1 leave not opposed; 95 leave opposed)

<p>Post-leave stage (172 cases where leave was granted)</p> <ul style="list-style-type: none"> • 38 cases discontinued after leave granted (14 with evidence of settlement) • 134 cases proceeded to a hearing, including <ul style="list-style-type: none"> ○ 78 cases granted (56 on their merits, 22 on consent) ○ 56 cases dismissed

Out of the 320 perfected cases, 7 were granted on consent before leave was decided, 45 were discontinued before leave was decided (13 containing evidence of a settlement, and another 11 cases where leave was not opposed), and 268 proceeded to a leave determination.

Leave was opposed by the government in 245 of the 270 perfected cases that proceeded to a leave determination. Leave was granted in 150 of those 245 cases, for a leave grant rate of

61.22% for “opposed and perfected” cases. Leave was also granted in all but one of the 23 unopposed leave applications. Overall, leave was granted in 172 of all perfected cases (63.70%).⁹ The leave grant rate varied between a low of 42.86% in 2013 to 80.00% in 2015. No clear trend emerges from fluctuations in grant rates over the study period.¹⁰

TABLE 6.2 - LEAVE GRANT RATES (2011-2015)



Rehaag observed that the Federal Court’s average leave grant rate in applications for judicial review of negative inland refugee determination is lower than what the leave’s permissive legal test should permit. As reviewed in chapter 3, the jurisprudence of the Federal Court directs judges to grant leave if “a fairly arguable case is disclosed”¹¹ or “if there appears to be any possibility of applicant succeeding at the hearing.”¹² Rehaag writes,

given the low leave grant rate (14.44%), the success rate at the merits stage in cases where leave is granted (43.98%) is surprisingly high. ... If only applications that clearly cannot succeed on the merits fail at the leave stage, and if the vast majority of applications do not pass that stage, one might expect success rates on the merits to be lower in cases where leave is granted. The combination of low leave-granting rates and high success rates once leave is

⁹ In 6 cases, a motion to reconsider leave was filed by the applicant after leave was denied. Leave was granted in 4 of the 6 motion to reconsider. For the purpose of case statistics, only the outcome of the reconsideration was included.

¹⁰ In contrast, leave grant rates have steadily increased for refugee cases stemming from the inland system. See Sean Rehaag, “Judicial Review of Refugee Determinations (II): Revisiting the Luck of the Draw” (2019) 45:1 Queen’s LJ 1 at 17 [Revisiting The Luck of the Draw].

¹¹ *Bains v Canada (MEI)* (1990), 47 Admin LR 317 at paras 1, 3 (FCA).

¹² *Virk v Canada (MEI)* (1991), 13 Imm LR (2d) 119 (FCTD).

granted may lead one to wonder whether leave is too often being withheld in cases where there is some modest prospect of success.¹³

It seems that, in the case of resettlement applications, the imbalance observed by Rehaag is largely rectified, with a leave grant rate (61.22%) that is over 4 times what it was in the inland asylum system.

Of the 172 cases that were granted leave, 38 were discontinued after receiving a positive leave determination, 14 with evidence of a settlement. It is likely, however, that many more (if not all 38) were in fact settled, considering that not all lawyers follow the practice of placing settlement letters in the court record. Of the 134 remaining cases, 56 were granted on their merits, 22 were granted with the consent of the government, and 56 were dismissed on their merits, for a success rate at the hearing stage of 58.21% (78/134).

A “serious question of general importance”, which opens the door for an appeal to the Federal Court of Appeal, was submitted for certification in 36 cases by the applicant, and in one case by the government. All but one of the questions for certification submitted by the applicant were refused, while the sole question submitted by the government was accepted for certification. Neither case actually proceeded to an appeal.

Overall, as many as 154 cases (38.21% of all cases) had a positive outcome, taking into account explicitly settled cases, cases granted on consent, perfected cases discontinued following a notice that leave was not opposed, cases discontinued following a positive leave determination, and cases granted on their merits. It is also likely that the other 21 cases discontinued after being

¹³ Sean Rehaag, “Luck of the Draw”, *supra* note 1 at 23-24.

perfected were in fact settled, with no evidence of settlement entered into the record.

It is also noteworthy that a large proportion of cases were settled by the government: 63 cases were granted on consent or explicitly settled at various stages of the process, another 24 cases were discontinued after a positive leave determination, and 11 cases were discontinued after leave was not opposed by the government. In total, 98 cases (24.32%) were settled, in addition to the 21 perfected and discontinued cases mentioned in the above paragraph.

The dataset's 403 judicial review applications reviewed account for 494 separate 'principal applicants' (480 principal applicants in the PSR stream and 14 principal applicants in the GAR stream). Taking into account individual principal applicants is relevant to calculating the rate of seeking judicial review in the overall rejected resettlement applicant population. It is also important to pay attention to the fact that *mandamus* applications concern refugee applications that have not been determined yet. Taking into consideration these variables, 8.47% of rejected principal applicants in the PSR stream sought judicial review during the study period, while rejected refugee applicants in the GAR stream sought judicial review in 0.25% of rejected cases.¹⁴

¹⁴ This method of calculating the rate of seeking judicial review has one limitation. Under the *IRPA*, judicial review applications can be filed up to 60 days after they receive their decision (*IRPA*, s 72(2)b)). Therefore, it was expected that some judicial review applications in the dataset would concern a decision made in the last 60 days of 2010, or even earlier if the decision was not received immediately when it was issued. In total, 23 cases, all filed in 2011, concerned a decision issued in 2010. Similarly, the methodology may not have captured all visa officer decisions made in the last 60 days of 2015 in respect of which a judicial review was sought. To ensure a more accurate analysis, I considered looking at judicial review applications filed in the first 60 days of 2016, and eliminating all 2011 judicial review applications that involved a visa officer decision from before 2011. I decided against this method because, as it turns out, a large number of judicial review applications are filed outside the 60 days window. In the end, I believe the number of judicial review applications that concern pre-2011 visa officer decision roughly cancels out the number of 2015 visa officer decisions that were judicially reviewed in 2016 or later.

TABLE 6.3 - RATE OF SEEKING JUDICIAL REVIEW (2011-2015)

PSR				GAR			
JR	Principal applicants	<i>Mandamus</i> applications [†]	JR applications as a % of all rejected cases*	JR	Principal applicants	<i>Mandamus</i> applications [†]	JR applications as a % of all rejected cases*
393	475	1	8.47% (474/5597)	10	17	9	0.25% (8/3203)

[†]Principal applicants equivalent

*Principal applicants excluding *mandamus* applications

6.4 A quantitative assessment of the judicial review process

6.4.1 Type of sponsor and sponsor impact

As reviewed in the methodology section, the 393 privately sponsored cases in the dataset included 224 cases sponsored by a SAH (57.00%); 138 cases sponsored by a Group of Five (34.11%); and only one case sponsored by a Community Sponsor (0.25%). In 30 cases, it was impossible to determine the type of sponsor. I initially hypothesized that, as “repeat players”,¹⁵ SAHs would have more favourable outcomes than other types of sponsors in judicial review. The data does not entirely support this hypothesis. While SAH cases had a significantly higher leave grant rate in perfected and opposed cases, as compared to Groups of Five and Community Sponsors (67.61% compared to 51.76%), SAHs actually had a slightly lower rate of positive outcome (44.32% compared to 48.65%).¹⁶ I also hypothesized that SAH-sponsored cases would be overrepresented in the dataset because SAHs are more experienced with review procedures and thus more likely to initiate a judicial review to challenge a visa officer decision. CIC’s 2016 Evaluation of the PSR program reports that, between 2010 and 2014, SAHs submitted 66% of all sponsorship applications, while Groups of Five submitted 31%, and Community Sponsors submitted 3%.¹⁷ Relying on those numbers, SAH-sponsored cases actually appear to be slightly

¹⁵ See Marc Galanter, “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change” (1974) 9 L & Soc Rev 95.

¹⁶ Ultimate positive outcome here includes cases settled, granted on consent, discontinued after a declaration that leave was not opposed, and cases discontinued after being granted leave.

¹⁷ Immigration, Refugees and Citizenship Canada, “Evaluation of the Resettlement Programs (GAR, BVOR, PSR and RAP)” (July 2016) at para 5.4.1.

underrepresented in the dataset and Groups of Five slightly overrepresented. A potential explanation is that SAHs are not true repeat players because a large proportion of their cases are submitted with one-time co-sponsors. That being said, it is worth noting that such a calculation relies on the assumption that approval rates are consistent across sponsor categories, which may not be the case.¹⁸ Unfortunately, there is no available data on approval rates broken down by sponsor category. What remains clear is that extremely few cases sponsored by a Community Sponsor were judicially reviewed (0.25% of reviewed cases), as compared to the overall number of submitted Community Sponsor cases (3% of all sponsored applications).

6.4.2 City of filing

In 82.52% of cases where the city of destination was apparent on the record, the city of destination matched the province where the judicial review was filed.¹⁹ Table 6.4 shows in which Federal Court office processed each of the 403 cases.

TABLE 6.4 – CITY OF FILING

Federal Court office	Number of cases	% of cases
Toronto	203	50.37%
Winnipeg	99	24.57%
Montreal	40	9.93%
Vancouver	24	5.96%
Ottawa	19	4.71%
Calgary	10	2.48%
Edmonton	6	1.49%
Saskatoon	1	0.25%
Saint John	1	0.25%
<i>All cities</i>	<i>403</i>	<i>100.00%</i>

That Toronto would be the top city of filing is to be expected considering that Toronto is the city

¹⁸ For example, SAHs, being more experienced in preparing refugee applications, may have higher approval rates than other sponsors.

¹⁹ The city of destination was apparent in 286 cases.

which received the largest number of resettled refugees during the study period.²⁰ It is surprising that the volume of cases filed in Winnipeg is equivalent to that of Montreal, Vancouver, Ottawa, Calgary, and Edmonton combined. To those familiar with Winnipeg's strong history of refugee resettlement, however, this should not come as a surprise. Tom Denton explains:

Winnipeg per-capita brought in more privately sponsored refugees [in 2001] than any other Canadian city, and in absolute numbers was exceeded only by Toronto. More refugees arrived in Winnipeg than in all other Prairie cities combined. The city's closest rival was Montreal, with fewer than half Winnipeg's numbers.²¹

That being said, the proportion of judicial review applications being filed in Winnipeg (24.57%) remains much higher than the proportion of refugees resettled in the province in recent years of Manitoba (14.57% of all PSRs in 2011-2015).²² This suggests that long-standing community organization around refugee sponsorship in Manitoba has led to an increased capacity for sponsors to conduct judicial review.

In Rehaag's 2012 dataset, there was some variation in success rates between cities where the application is filed. Notably, Rehaag found that applications filed in Montreal were less likely to be granted leave and less likely to be granted on the merits than applications filed in other cities. Conversely, applications filed in Toronto were found to have higher than average success

²⁰ Ontario is the top province of destination for resettled refugees and Toronto is the top city of destination in Canada: Immigration, Refugees and Citizenship Canada, "Canada - Admissions of Resettled Refugees by Province/Territory and Census Metropolitan Area (CMA) of Intended Destination and Immigration Category", online: <<https://open.canada.ca/data/en/dataset/4a1b260a-7ac4-4985-80a0-603bfe4aec11>>.

²¹ Thomas R Denton, "Understanding Private Refugee Sponsorship in Manitoba" (2003) 4:2 J Int Migration & Integration 257 at 262. Labman writes that the private sponsorship of refugees is encouraged as a "population-building strategy" in Winnipeg, with a city-funded "assurance fund" available to sponsors who cannot meet the financial needs of the newcomers. See Shauna Labman, *Crossing Law's Border: Canada's Refugee Resettlement Program* (Vancouver: UBC Press, 2019) at 100-01.

²² See Immigration, Refugees and Citizenship Canada, "Canada - Admissions of Permanent Residents by Intended Province/Territory of Destination and Immigration Category, 2000-March 2016", online: <<https://open.canada.ca/data/en/dataset/ad975a26-df23-456a-8ada-756191a23695>>; Immigration, Refugees and Citizenship Canada, "Canada - Permanent residents by category, 2007 - 2016", online: <<https://open.canada.ca/data/en/dataset/1d3963d6-eea9-4a4b-8e4a-5c7f2deb7f29>>.

rates.²³ Rehaag’s study did not identify a reason for the disparity. One potential explanation could be that the payment structure of the Commission des services juridiques (CSJ) – which provides comparatively low-paying legal aid certificates – has led to the development of a refugee law business model where lawyers do not devote as much time to a case as they would otherwise.²⁴ In this study’s dataset, similar trends were observed. Applications filed in Montreal had lower than average grant rates. Applications filed in Toronto were 1.7 times as likely to have a positive outcome than applications filed in Montreal. The fact that legal aid is not available in resettlement cases casts serious doubt on the above hypothesis. The disparity in success rates is more likely a product of a variety of factors that go beyond the scope of this study. I suggest that counsel experience may be a contributing factor. As will be discussed further in section 6.4.5, counsel with more experience (i.e. counsel with more cases in the dataset) generally obtained better outcomes for their clients, and it just so happens that none of the five most experienced lawyers in the dataset (who together have litigated more cases than the other 91 lawyers in the dataset) work in Quebec.

TABLE 6.5 - OUTCOME BY CITY OF FILING

City	Leave grant rate²⁵	Hearing outcome	Overall success²⁶
Toronto (203)	58.02% 76/131	64.59% 31/48	55.56% 90/162
Winnipeg (99)	77.63% 59/76	27.50% 11/40	41.77% 33/79
Montreal (40)	60.00% 15/25	41.67% 5/12	32.00% 8/25
<i>All cities</i>	<i>64.18%</i> <i>172/268</i>	<i>50.00%</i> <i>56/56</i>	<i>50.33%</i> <i>154/306</i>

²³ Rehaag, “Luck of the Draw”, *supra* note 1 at 29, 56.

²⁴ See Justice Canada, “Legal aid in Canada 2016-17”, online: <<https://www.justice.gc.ca/eng/rp-pr/jr/aid-aide/p1.html#table17>>.

²⁵ “Successful” cases account for all positive outcomes: cases ultimately granted on the merits, cases granted on consent or explicitly settled. It is assumed here that cases discontinued after a positive leave, and all cases discontinued after a declaration by the government that leave was not opposed, were in fact settled. Therefore, the number of cases with a determined positive outcome exceeds the number of cases in respect of which leave was decided.

²⁶ *Ibid.*

6.4.3 Country of origin and country of asylum

As expected, there were important variations in judicial review outcomes depending on applicants' country of origin and the country of asylum. The table below shows the judicial review outcomes for each country of origin and country of asylum with more than 20 cases.

TABLE 6.6 - OUTCOMES BY COUNTRY OF ORIGIN

Country	Leave	Hearing outcome	Overall success ²⁷
Afghanistan (137)	65.22% 60/92	66.67% 28/42	54.29% 57/105
Somalia (74)	89.36% 42/47	16.13% 5/31	39.29% 22/56
Eritrea (57)	46.15% 18/39	75.00% 3/4	50.00% 22/44
Sri Lanka (47)	50.00% 17/34	53.85% 7/13	37.84% 14/37
Ethiopia (23)	68.75% 11/16	71.43% 5/7	61.11% 11/18
<i>All countries</i>	<i>64.18%</i> <i>172/268</i>	<i>50.00%</i> <i>56/112</i>	<i>154/306%</i> <i>154/306</i>

TABLE 6.7 - OUTCOMES BY COUNTRY OF ASYLUM

Country	Leave	Hearing outcome	Overall success ²⁸
Pakistan (106)	65.28% 45/69	64.71% 22/34	53.85% 42/78
South Africa (39)	64.29% 18/28	10% 1/10	32.14% 9/28
India (37)	50.00% 13/26	66.67% 6/9	42.86% 12/28
Kenya (24)	86.87% 13/15	50.00% 5/10	57.14% 12/21
Egypt (22)	47.06% 8/17	50.00% 2/4	35.29% 6/17
Tajikistan (21)	66.67% 10/15	66.67% 4/6	56.25% 9/16
<i>All countries</i>	<i>64.18%</i> <i>172/268</i>	<i>50.00%</i> <i>56/112</i>	<i>50.33%</i> <i>154/306</i>

Applicants from Somalia were vastly more likely to be granted leave (89.36% compared to an average of 64.18%). Eritrean refugee applicants (46.15%) and, to a lesser extent, Sri Lankan refugees (50.00%) were less likely to be granted leave. There were outliers as well in terms of

²⁷ *Ibid.*

²⁸ *Ibid.*

countries of asylum: applicants seeking refuge in Kenya were granted leave in 86.87% of perfected cases, while refugee applicants in Egypt were granted leave in 47.06% of perfected cases. Higher leave grant rates generally correlated with higher overall success, with the notable exception of Somalia, which had the highest leave grant rate but a relatively low overall success rate. As shown in chapter 5, some countries of origin and some countries of asylum are heavily associated with particular types of refusals. The fact that South Africa had the lowest overall success rate among all countries of asylum with over 20 cases and that Sri Lanka had the second lowest overall success rate among countries of origin with over 20 cases suggests that refusals based on the availability of an alternative durable solution are difficult to challenge on judicial review.

6.4.4 Variation among judges: individual, gender, and party of appointment

In legal theory, legal realism holds that judicial decision-making is an inherently subjective exercise.²⁹ Under a strong legal realist view of decision-making, judicial decision-making is primarily influenced by extralegal factors, and there is no expectation of consistency among decision-makers. The legal realist view does not sit well with the principle of the rule of law, which relies on predictability and impartiality. The opposing view, legal formalism, describes legal decision-making as a purely objective, rational exercise, and allows for divergent judgements only when the law itself can lead to two plausible outcomes.³⁰ Just as the legal realist position is objectionable on normative grounds, the formalist position is objectionable on empirical grounds: the data shows that judicial decision-making is relatively inconsistent, and that subjectivity cannot be completely eliminated in any human activity. The better view of

²⁹ See Brian Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton: Princeton University Press, 2010).

³⁰ Julius Stone, *Precedent and Law: Dynamics of Common Law Growth* (Butterworths, 1985) at 221.

decision-making is that, in reality, decision-making combines elements of both realism and formalism: it is neither fully objective, nor fully subjective. Tamanaha terms this conception decision-making “balanced realism.”³¹

Greene and Shaffer write that, in the refugee context, “(a) uniform and just application of the law is particularly important ... because of the severe human consequences which may result if the law is misapplied.”³² Several studies have focused on leave grant rates and judicial review grant rates among Federal Court judges in refugee and other immigration matters. These studies have consistently found that judicial review outcomes at the Federal Court in refugee cases are correlated to extralegal factors, including the identity of the judge, the judge’s party of appointment and the judge’s gender. In the following pages, I will discuss these studies and explore whether similar trends can be found in my dataset.

Soon after the leave requirement was adopted for inland refugee cases in 1989, Greene and Schaffer conducted an analysis of outcomes in a random sample of 611 judicial review applications of inland refugee decisions.³³ The authors found a statistically significant association between individual judges and the rate of success of leave applicants, even when taking into variations in country origin. Greene, Baar, McCormick, Szablowski, and Thomas later conducted a more comprehensive study of all 2,081 leave applications filed in 1990, which

³¹ Brian Z Tamanaha, “Balanced Realism on Judging” (2010) 44:4 Val U L Rev 1243.

³² Ian Greene & Paul Shaffer, “Leave to Appeal and Leave to Commence Judicial Review in Canada’s Refugee-Determination System: Is the Process Fair?” (1992) 4:1 Intl J Refugee L 71 at 75, cited in Rehaag, “Luck of the Draw”, *supra* note 1 at 15.

³³ Greene & Shaffer, *ibid.* Under the 1976 *Immigration Act* (in force at the time of that study), leave determinations and hearings on the merits were conducted by the Federal Court of Appeal.

confirmed the previous study's findings.³⁴ In addition, they found that cases decided by judges with low leave grant rates were not more likely to succeed on the merits than cases granted leave by judges with high grant rates.³⁵

A 2010 study by Gould, Sheppard and Wheeldon looked at a random sample of refugee and non-refugee leave applications decided by the Federal Court.³⁶ The authors found that a number of factors were significantly correlated to leave outcomes, including the gender of the judge, the judge's ideology, the language of the judge, and whether or not the applicant was represented by experienced counsel. More recent and comprehensive research has been conducted by Sean Rehaag. Rehaag's 2012 study analyzed the entirety of Federal Court leave determinations in inland refugee cases between 2005 and 2010.³⁷ Rehaag found wide discrepancies in leave grants rates, ranging from 77.97% (Justice Campbell) to 1.36% (Justice Crampton). Rehaag also found wide discrepancies in terms of judicial review grant rates, ranging from 92.31% (Justice Campbell) to 7.89% (Justice Boivin). Rehaag's analysis also identified variations in terms of city of filing, party of appointment, gender, and experience of counsel. In an updated study, Rehaag looked at leave determinations made between 2008 and 2016.³⁸ He found that, while discrepancies between judges had decreased, there remained important variations in both leave grant rates and judicial review grant rates. Between 2013 and 2016, leave grant rates ranged from 49.2% (Justice Heneghan) to 5.3% (Justice Snider). Judicial review grant rates ranged from 66.2% (Justice MacTavish) to 17.9% (Justice Boivin).

³⁴ Ian Greene et al, *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Toronto: James Lorimer & Company, 1998) at 20-21. For example, Justice Pratt granted leave in 14% of cases, while Justice Desjardins was 3.43 times more likely to grant leave with a grant rate of 48% of cases.

³⁵ *Ibid.*

³⁶ Gould, Sheppard & Wheeldon, *supra* note 4.

³⁷ Sean Rehaag, "Luck of the Draw", *supra* note 1.

³⁸ Sean Rehaag, "Revisiting The Luck of the Draw", *supra* note 10.

In this study’s dataset, a total of 45 judges made leave determinations in perfected and opposed cases. The number of cases decided ranged from 19 (Shore) to one (Southcott, Louis, Pinard, and Mandamin). Because of the low number of leave cases decided by individual judges, it is difficult to draw reliable conclusions in terms of consistency across the bench. I will focus here only on the eight judges who decided at least ten leave applications. As the table below shows, there appears to be some significant disparities in leave grant rates between judges. Justices Gagné and Mosley granted leave in 100% of cases, while Justice Snider granted leave in 10% of cases. While the caseload is excessively small, it is interesting to note that the leave grant rates in this group of cases follows, to a certain extent, the trends identified in Rehaag (2012) and Rehaag (2019). This suggests that in this group of cases as well, outcomes may depend on judge assignment.

TABLE 6.8 - LEAVE DETERMINATIONS FOR JUDGES WITH 10+ CASES³⁹

Name of judge	# of leave determinations	Leave granted	Leave denied	Leave grant rate	Deviation (perc. points)	Deviation (Rehaag 2012)⁴⁰	Deviation (Rehaag 2019)⁴¹
Mosley	10	10	0	100.00%	+38.78	-1	N/A
Gagné	10	8	2	80.00%	+18.78	N/A	N/A
Shore	19	14	5	73.68%	+12.56	+18.33	-3.5
Russell	10	7	3	70.00%	+8.78	+7.84	+19.8
Mactavish	13	9	4	69.23%	+5.01	+8.84	-4.1
Kelen	14	9	5	64.29%	+3.07	-4.32	N/A
Bédard	11	5	6	45.45%	-15.77	-0.23	-7.9
Snider	10	1	9	10.00%	-51.22	-7.47	-16.9
<i>All judges</i>	<i>245</i>	<i>150</i>	<i>95</i>	<i>61.22%</i>	<i>0</i>	<i>0</i>	<i>0</i>

A total of 40 judges decided applications on their merits. The number of applications decided by individual judges ranged from 15 (Justice O’Reilly) to one (Justices Locke, Roy, Near, McVeigh, Manson, De Montigny, Martineau, Strickland, Strickland, Gagné, Camp, Simpson, Southcott, and Gleeson). The table below shows the grant rates for the four most prolific judges.

³⁹ Perfected and opposed cases only.

⁴⁰ The leave grant rates in this column are for the years 2005-2010.

⁴¹ The leave grant rates in this column are for the years 2013-2016.

Here the number of cases per judge is certainly too low to reliably ascertain consistency between judges. It is interesting to note, however, that the low grant rates of Justice Boivin seem consistent across this study and both Rehaag’s 2012 and 2019 studies.

TABLE 6.9 - HEARING OUTCOME BY JUDGE (TOP 4 JUDGES)

Name of judge	# of JR applications	JR granted	JR dismissed	JR grant rate	Deviation (perc. points)	Deviation (Rehaag 2012) ⁴²	Deviation (Rehaag 2019) ⁴³
LeBlanc	7	4	3	57.14%	+7.14	N/A	-6.2
Heneghan	7	3	4	42.86%	-7.14	+5.46	-10.6
O’Reilly	15	3	12	20%	-30%	+8.77	+8.5
Boivin	6	1	5	16.67%	-33.33	-31.65	-26.8
<i>All judges</i>	<i>112</i>	<i>56</i>	<i>56</i>	<i>50%</i>	<i>0</i>	<i>0</i>	<i>0</i>

The nature of the dataset was better suited for analyses based on the gender of the judge and the party of appointment. An important study in the US context found that female judges had much higher grant rates than male judges in refugee proceedings, a finding that led researchers to hypothesize that female adjudicators were more sympathetic than male adjudicators to refugee applicants.⁴⁴ Studies in the Canadian context have not supported this hypothesis. In Gould’s study, male judges were found to be more likely to grant leave than female judges to a significant degree.⁴⁵ Rehaag’s study of gender impact at the IRB has shown that the difference between male and female grant rates is much narrower than in the US context, and that male adjudicators were 6% more likely to grant refugee status than female adjudicators.⁴⁶ Rehaag’s 2012 study of judicial review proceedings at the Federal Court also found that male judges were more likely to grant leave than female judges, but were less likely to grant judicial review on the

⁴² The leave grant rates in this column are for the years 2005-2010.

⁴³ The leave grant rates in this column are for the years 2013-2016.

⁴⁴ Gould, Sheppard & Wheeldon, *supra* note 4 at 465. See Jaya Ramji-Nogales, Andrew I Schoenholtz & Phillip G Schrag, “Refugee Roulette: Disparities in Asylum Adjudication” (2007) 60:2 Stan L Rev at 295 at 339-49.

⁴⁵ In that study, male judges granted leave in 58% of cases, and female judges in 46% of cases (Gould, Sheppard & Wheeldon, *supra* note 4 at 469).

⁴⁶ Sean Rehaag, “Do Women Refugee Judges Really Make a Difference? An Empirical Analysis of Gender and Outcomes in Canadian Refugee Determinations” (2011) 23 CJWL 627 at 648 [“Gender and Outcomes”].

merits, and the differences were rather small.⁴⁷

In this study’s dataset, male judges were more likely to grant leave than female judges (64.74% for male judges; 55.06% for female judges). However, male judges were slightly less likely to grant judicial review on the merits than female judges (48.85% for male judges; 53.85% for female judges). From this data alone, it is very difficult to explain how, if at all, the gender of the judge influences judicial review outcomes. This study does confirm Rehaag’s finding that variations based on gender are much less pronounced in Canada than in the US context, and supports his call for caution in generalizing differences in how men and women decide cases based on studies from specific adjudicative settings.⁴⁸

TABLE 6.10 LEAVE OUTCOMES BY JUDGE GENDER (PERFECTED AND OPPOSED CASES)

Gender	Leave decided	Leave granted	Leave denied	Leave grant rate
Female	89	49	40	55.06%
Male	156	101	55	64.74%
<i>All judges</i>	<i>245</i>	<i>150</i>	<i>95</i>	<i>61.22%</i>

TABLE 6.11 - JR OUTCOMES BY JUDGE GENDER (CASES DECIDED ON THE MERITS)

Gender	JR decided	JR granted	JR dismissed	JR grant rate
Female	26	14	12	53.85%
Male	86	42	44	48.84%
<i>All judges</i>	<i>112</i>	<i>56</i>	<i>56</i>	<i>50.00%</i>

Political party of appointment is another factor that has been posited as influencing judicial outcomes generally and in the refugee context in particular.⁴⁹ The variation in refugee grant rates based on political party of appointment is especially large in the US context.⁵⁰ In the dataset analyzed in Rehaag’s 2012 study, Federal Court judges appointed by a Liberal Prime

⁴⁷ At the leave stage, Rehaag found that the grant rate was 16.52% for male judges and 15.85% for female judges. At the JR stage, the grant rate was 38.78% for male judges and 42.88% for female judges. See Rehaag, “Luck of the Draw”, *supra* note 1 at 28, 56.

⁴⁸ Rehaag, “Gender and Outcomes”, *supra* note 46 at 648; Rehaag, “Luck of the Draw”, *supra* note 1 at 32.

⁴⁹ See Rehaag, “Luck of the draw”, *supra* note 1 at 13.

⁵⁰ See Ramji-Nogales, Schoenholtz & Schrag, *supra* note 44.

Minister were much more likely to grant leave and grant judicial review than judges appointed by a Conservative (or Progressive Conservative) Prime Minister: Liberal appointees granted leave in 17.64% of cases, and granted judicial review in 42.69% of cases; Conservative appointees granted leave in 11.00% of cases, and granted the judicial review in 29.14% of cases.⁵¹ According to Rehaag, the finding is unsurprising given that the Conservative government of Stephen Harper indicated a desire for greater deference to IRB members in judicial review and would seek to appoint judges who share their judicial policy.⁵²

The results in this study’s dataset are not entirely straightforward. The judges’ political party of appointment was correlated to a slight variation in leave grant rates. Judges appointed by the Liberal Party granted leave in 63.95% of cases, compared to 57.14% for judges appointed by the Conservative Party and the Progressive Conservative Party, which amounts to a variation of 11.92%. This is a much smaller variation than that reported in Rehaag’s study. More importantly, at the hearing stage, there was practically no difference, with (Progressive) Conservative appointees being 3.64% *more likely* to grant judicial review. It may be that ideological differences between judges are less salient in the case of overseas refugee applicants, who have been addressed much differently in political discourse.

**TABLE 6.12 - LEAVE OUTCOMES BY POLITICAL PARTY OF APPOINTMENT
(PERFECTED AND OPPOSED CASES)**

Party	Leave decided	Leave granted	Leave denied	Leave grant rate
Liberal	147	94	53	63.95%
(Progressive) Conservative	98	56	42	57.14%
<i>All judges</i>	<i>245</i>	<i>150</i>	<i>95</i>	<i>61.22%</i>

⁵¹ Rehaag, “Luck of the Draw”, *supra* note 1 at 56.

⁵² *Ibid* at 32.

**TABLE 6.13 - JR OUTCOMES BY POLITICAL PARTY OF APPOINTMENT
(CASES DECIDED ON THE MERITS)**

Party	JR decided	JR granted	JR dismissed	JR grant rate
Liberal	57	28	29	49.12%
(Progressive) Conservative	55	28	27	50.91%
<i>All judges</i>	<i>112</i>	<i>56</i>	<i>56</i>	<i>50.00%</i>

6.4.5 Impact of counsel

There is a growing literature on the impact of counsel and representation more generally in both administrative and judicial proceedings. These studies tend to show two things. First, individuals with counsel tend to attain more favourable outcomes than self-represented individuals or individuals represented by someone other than a lawyer. Second, lawyers obtain better results for their clients than other types of representatives, and certain categories of lawyers, including lawyers with more experience, tend to obtain more favourable results than other lawyers. For instance, in the American context, Anderson and Heaton have demonstrated that public defenders reduce their client’s murder conviction by 19%, and their likelihood of obtaining a life sentence by 62% compared to appointed counsel.⁵³ Thornton and Gwin show that providing parents with quality representation in child welfare cases leads to faster and more successful family reunification.⁵⁴ Carpentar, Mark and Shanahan’s study demonstrates that represented parties in employment proceedings fare better than unrepresented parties, and that lawyers are better equipped than non-lawyers to deal with contested procedural and substantive issues and advance novel legal argument.⁵⁵ Poppe and Rachlinski reviewed the existing empirical literature on the impact of legal representation in a variety of administrative and

⁵³ James M Anderson & Paul Heaton, “How Much Difference Does the Lawyer Make: The Effect of Defense Counsel on Murder Case Outcomes” (2012) 122:1 Yale LJ 154.

⁵⁴ Elizabeth Thornton & Betsy Gwin, “High-Quality Legal Representation for Parents in Child Welfare Cases Results in Improved Outcomes for Families and Potential Cost Savings” (2012) 46:1 Fam LQ 139.

⁵⁵ Anna E Carpenter, Alyx Mark, and Colleen F Shanahan, “Trial and Error: Lawyers and Nonlawyer Advocates” (2017) 42:4 L & Soc Inquiry 1023; Colleen F Shanahan, Anna E Carpenter & Alyx Mark, “Lawyers, Power, and Strategic Expertise” (2016) 93:2 Denver L Rev 469.

judicial proceedings, including juvenile cases, housing, administrative hearings on government benefits, employment proceedings, family proceedings, small claims proceedings, tax proceedings, bankruptcy proceedings and torts claims. They found that legal representation was associated with better outcomes across all areas with the exception of juvenile court, where the evidence is unclear.⁵⁶

Empirical studies in the American context have shown that legal representation matters in immigration and refugee proceedings. Ramji-Nogales, Schoenholtz and Schrag conducted a large-scale study of more than 400,000 refugee proceedings before various administrative tribunals and courts. They found that representation was *the most important factor* affecting outcomes. Refugee claimants that went unrepresented had a success rate of 16.3%, compared to 45.6% for represented claimants.⁵⁷ In addition, certain categories of lawyers - lawyer from large law firms working *pro bono* and lawyers from university legal clinics - had a much higher success rate of 96% and 89% respectively.⁵⁸ Miller, Keith and Holmes looked at all American asylum decisions between 1990 and 2010, finding that quality of counsel did impact outcomes, and that “low quality representation actually makes an applicant worse off than if they precede *pro se*.”⁵⁹ A 2006 study by Kagan has shown that legal assistance is also a strong predictor of claim success in UNHCR refugee status determination procedures, both at first instance and at the appeal level.⁶⁰

⁵⁶ Emily S Taylor Poppe & Jeffrey J Rachlinski, “Do Lawyers Matter? The Effect of Legal Representation in Civil Disputes” (2016) 43 Pepp L Rev 881.

⁵⁷ Ramji-Nogales, Schoenholtz & Schrag, *supra* note 44 at 340.

⁵⁸ *Ibid* at 340-41.

⁵⁹ Banks Miller, Linda Camp Keith & Jennifer S Holmes, “Leveling the Odds: The Effect of Quality Legal Representation in Cases of Asymmetrical Capability” (2015) 49:1 L Soc’y Rev 209 at 232.

⁶⁰ Michael Kagan, “Frontier Justice: Legal Aid and UNHCR Refugee Status Determination in Egypt” (2006) 19:1 J Refugee Stud 45.

Now turning to the Canadian context, Gould, Sheppard and Wheeldon, cited in the previous section, found that applicants (both refugee and immigrant) represented by a lawyer were 32 times more likely to be granted leave by the Federal Court than applicants representing themselves or represented by a consultant.⁶¹ In addition, lawyers from experienced law firms had more success at the leave stage.⁶² The presence and experience of counsel have also been shown to strongly influence outcomes in first instance refugee cases at the IRB. Rehaag's study of IRB refugee cases decided between 2005 and 2009 showed that those represented by a consultant or without representation were ten times more likely to have their claim denied.⁶³ In addition, there was a strong correlation between a lawyer's experience and their success rate.⁶⁴ Ethnographic studies have also shown that lawyers at the IRB have a major impact on outcomes.⁶⁵

In this study's dataset, 395 applicants were represented by a lawyer on judicial review (98.01%), while 8 applicants (1.99%) were either self-represented or represented by a non-lawyer. Not a single applicant proceeding without a lawyer was granted leave. A total of 96 lawyers were represented in the dataset. Forty-four were counsel in one case each, 41 were counsel in 2-5 cases, 8 were counsel in 6-18 cases, and three lawyers were counsel in over 18 cases (31, 54, and 85 cases respectively). It is clear from the dataset that a handful of lawyers specialize in overseas refugee judicial reviews. The top three lawyers litigated together 170 cases (42.18% of

⁶¹ Gould, Sheppard & Wheeldon, *supra* note 4 at 475-76.

⁶² *Ibid* at 468.

⁶³ Sean Rehaag, "The Role of Counsel in Canada's Refugee Determination System: An Empirical Assessment" (2011) 49 Osgoode Hall LJ 71 at 90.

⁶⁴ *Ibid* at 89.

⁶⁵ Sule Tomkinson, "The impact of procedural capital and quality counsel in the Canadian refugee determination process" (2014) 1:3 Int J Migr & Border Stud 276; Sule Tomkinson, "Who are you Afraid of and why? Inside the Black Box of Refugee Tribunals" (2018) 61:2 Can Pub Admin 18; Sule Tomkinson, "Trois nuances de l'expertise stratégique : le rôle des avocats dans la procédure d'asile" (2019) 38 :1 Pol & soc 99.

the total caseload). The top 5 lawyers litigated more cases than the bottom 91 lawyers. The table below shows a breakdown of leave grant rates and overall success rates by each lawyer category.

TABLE 6.14 - JR OUTCOMES BY LAWYER EXPERIENCE

Lawyer	Number of cases	% of caseload	Leave grant rate (all perfected cases)	Overall success rate (all perfected cases)⁶⁶
Lawyers w/ 19-85 cases (n=3)	170	42.18%	73.95% (88/119)	52.14% (73/140)
Lawyers w/ 6-18 cases (n=8)	73	18.11%	48.78% (20/41)	53.06% (26/49)
Lawyers w/ 2-5 cases (n=41)	108	26.80%	63.38% (45/71)	52.56% (42/78)
Lawyers w/1 one case (n=44)	44	10.92%	59.37% (19/32)	41.18% (14/34)
No lawyer (n=8)	8	1.99%	0% (0/5)	0% (0/5)
<i>All cases</i>	<i>403</i>	<i>100%</i>	<i>64.18% 172/268</i>	<i>50.33% (154/306)</i>

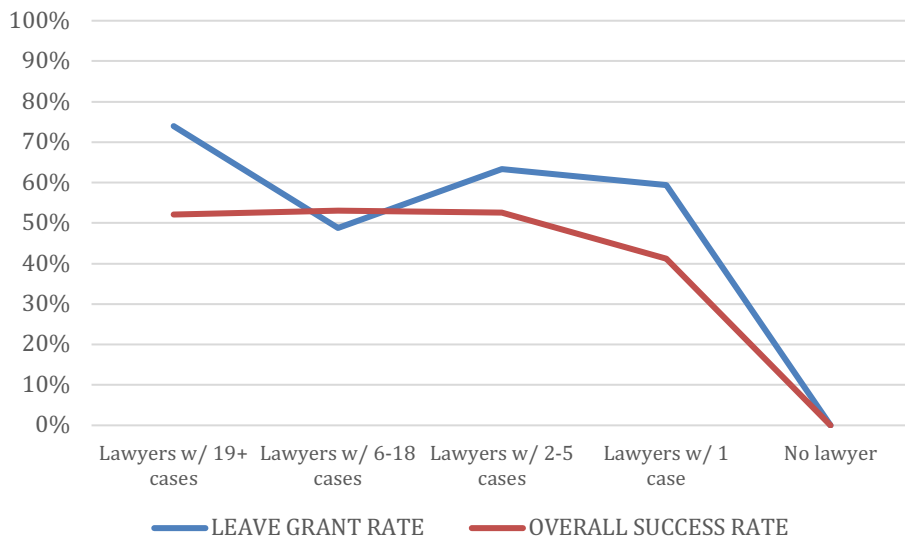
Judicial review is a complicated, technical process, one that is difficult to navigate without counsel even for the most sophisticated of individuals. Judicial processes are not designed with self-represented litigants in mind.⁶⁷ The disastrous showing of self-represented litigants in the dataset confirms that legal representation matters in judicial review. The data also confirms, but only to a certain extent, that more experienced counsel obtain better results for their client. Lawyers who had litigated only one case in the study period obtained lower than average outcomes both in terms of leave outcome and ultimate success. It was surprising to find that, in terms of ultimate outcome, the overall success rate was relatively constant across all lawyer categories with at least 2 cases. That being said, because of the small number of lawyers litigating 20+ cases (3 lawyers), it is difficult to reliably determine the impact of experience at the higher end.⁶⁸

⁶⁶ See note 25, *supra*.

⁶⁷ See Trevor CW Farrow et al, “Addressing the Needs of Self-Represented Litigants in the Canadian Justice System”, Commissioned Reports, Studies and Public Policy Documents Paper 38 (Toronto and Edmonton: 2012), online: <<https://digitalcommons.osgoode.yorku.ca/reports/38/>>; Michelle Flaherty, “Self-Represented Litigants, Active Adjudication and the Perception of Bias: Issues in Administrative Law” (2015) 38:1 Dal LJ 119.

⁶⁸ Idiosyncratic factors also may play a role in the success rate of the three lawyers with a high volume of cases, such as a focus with particular refugee populations, and a relationship with particular SAHs that see particular types of refusals.

TABLE 6.15 – JR OUTCOMES BY LAWYER EXPERIENCE (GRAPH)



6.4.6 Reason-giving

The common law has not traditionally imposed on courts a duty to give reasons, but that traditional position has evolved in many jurisdictions, including Canada. In 2002, the Supreme Court in *Sheppard* adopted a functional test to assess whether a trial judge in the criminal context had provided adequate reasons. While refusing to recognize an absolute stand-alone duty to give reasons, the court ruled that reasons will be considered adequate if, considering the entirety of the court record, they fulfil their purpose, defined as being “reasonably intelligible to the parties and provid[ing] the basis for meaningful appellate review of the correctness of the trial judge’s decision.”⁶⁹

Judicial reason-giving is a defining characteristic of legal regimes. A variety of rationales are considered to support a strong commitment to judicial reason-giving. Reasons promote the principle that individuals should be treated not as mere objects of the law, but as agents entitled

⁶⁹ *R v Sheppard*, 2002 SCC 26 at para 55. See also *R v Y (CL)*, 2008 SCC 2; *R c Dinardo*, 2008 SCC 24; *R v Walker*, 2008 SCC 34; *R v M (RE)*, 2008 SCC 51; *R v B (HS)*, 2008 SCC 52; Hamish Stewart, “The Trial Judge’s Duty to Give Reasons for Judgment in Criminal Cases” (2009) 14:1 Crim L Rev 19.

to participate in the making of law. Reasons encourage the acceptance of decisions and reinforce confidence in the judicial system. The act of writing reasons helps to ensure that decisions are arrived at rationally and imposes on judges a form of self-discipline. Reasons allow parties to understand why a case was decided a certain way. Reasons allow appeal judges to assess the merits of decisions under review. Reasons are also necessary for the proper development of the common law through the principle of stare decisis, and serve an educational purpose by informing both the legal community and those outside it of the content and evolution of legal rules.⁷⁰

In the case of the Federal Court, regulations seem to indicate that the decision to issue reasons or not is left to the discretion of the judge. Rule 392 of the *Federal Courts Rules* provides that “The Court *may* dispose of any matter that is the subject-matter of a hearing signing an order.”⁷¹ Rule 393 provides directions for how a judge *may* deliver reasons for judgement. In practice, Federal Court judges do issue reasons in the vast majority (if not the entirety) of final judicial review cases decided on the merits. However, in order for judicial reasons to serve their full purpose, they must not only be given to the parties, they also must be published and made available to the public.⁷² Those familiar with the Federal Court practices in refugee and immigration cases know that it is not uncommon for the court to issue unpublished orders. Research conducted by Rehaag and Thériault has mapped trends in issuing unpublished

⁷⁰ See Mathilde Cohen, “When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach” (2015) 72:2 Wash & Lee L Rev 483 at 514-513; Jason Bosland & Jonathan Gill, “The Principle of Open Justice and the Judicial Duty to Give Public Reasons” (2014) 38:2 Melbourne U L Rev 482 at 488-90.

⁷¹ *Federal Courts Rules*, SOR/98-106.

⁷² See JJ Spigelman, “The Principle of Open Justice: A Comparative Perspective” (2006) 29:2 UNSWLJ 147; Bosland & Gill, *supra* note 70.

decisions in inland refugee cases between 2006 and 2018.⁷³ They report that the Federal Court's practice has varied greatly over time. The rate of issuing unpublished decisions peaked in 2014-15, where the rate of issuing an unpublished decision ranged between 36.9% (2014) and 48.6% (2015). Rehaag and Thériault show that the rise in unpublished decisions increased in the years preceding a 2015 notice to the profession in which the Chief Justice of the Federal Court announced that only decisions deemed by the deciding judge to have "precedential value" would be accompanied by reasons and be published, while decisions "considered by the presiding judicial officer to not have precedential value" would be issued in the form of a "Judgment" without detailed reasons.⁷⁴ Following the 2015 notice, the court faced significant pressure from the immigration and refugee bar through its Bench & Bar Liaison Committee, and formally ended the practice of issuing unpublished decisions on the merits in 2018.

In this study's dataset, the overall proportion of unpublished final decisions was 27.68%, with positive decisions being slightly more likely to be published compared to negative decisions (30.36% vs 25.00%). This rate of unpublished decisions is close to the 33.37% rate reported with respect of inland refugee judicial reviews by Rehaag and Thériault for 2011-2015. The data also shows that the rate of unpublished decisions peaked in 2015, before falling drastically in 2016. It appears that Federal Court judges followed the same practice in overseas refugee cases as they did in inland refugee cases.

⁷³ Sean Rehaag & Pierre-André Thériault, "*Judgments v Reasons* in Federal Court Refugee Claim Judicial Reviews: A Bad Precedent?" (Paper delivered at the Canadian Law & Society Association Conference, UBC, 3 June 2019).

⁷⁴ Federal Court, "Notice to the Parties and the Profession – Publication of Decisions of Precedential Value" (19 June 2015).

TABLE 6.16 - UNPUBLISHED FINAL DECISIONS (2011-2015)⁷⁵

Year	Final decisions	% of unpublished positive decisions	% of unpublished negative decisions	% of unpublished decisions (all decisions)
2011	4	0% (0/2)	50% (1/2)	25% (1/4)
2012	35	26.67% (4/15)	5% (1/20)	14.29% (5/35)
2013	11	25% (2/8)	33.33% (1/3)	27.27% (3/11)
2014	13	50% (2/4)	22.22% (2/9)	30.77% (4/13)
2015	29	61.64% (8/13)	50% 8/16	55.17% (16/29)
2016	20	7.14% (1/14)	16.67% (1/6)	10% (2/20)
<i>All years</i>	<i>112</i>	<i>30.36% (17/56)</i>	<i>25% (14/56)</i>	<i>27.68% (31/112)</i>

6.5 A qualitative look at Federal Court decisions

6.5.1 Deference and procedural fairness

As I reviewed in Chapter 3, the Federal Court in *Jallow* reasoned that visa officer decisions are “purely administrative”,⁷⁶ and that visa officers are entitled to “extensive discretion.”⁷⁷ The *Jallow* case should be contrasted with the Federal Court of Appeal’s decision in *Ha*. In *Ha*, the court, in discussing the application of the *Baker* principles, determined that “[t]he fact that the appellants are applying for permanent resident status as Convention refugees suggests that this decision is potentially of great importance in their lives.”⁷⁸ The court in *Ha* determined that the visa officer had breached procedural fairness by denying the applicant the right to have a lawyer present at the interview. In the overwhelming majority of cases in the present dataset, the Federal Court, at least explicitly, approached matters of procedural fairness and deference in general terms. There were relatively few cases where the court described visa officer refugee decisions as a distinct type of administrative decision requiring a distinct level of procedural

⁷⁵ The classification of cases as published and unpublished proved problematic in four cases. In three cases (IMM-5962-11/2012 FC 800; IMM-3396-15/2016 FC 298; IMM-3721-15/2016 FC 399), the judge issued reasons, a neutral citation is associated with the decision, but the decision does not appear on the Federal Court website or any other online platform. Those cases were considered “published” in order to reflect the judge’s intention. Conversely, the court’s decision in IMM-3566-11 was issued as a judgment, without a neutral citation, yet the decision is reported in online platforms. This may be due to the fact that a question for appeal was certified in that case. This case was considered unpublished in order to reflect the judge’s intention as well.

⁷⁶ *Jallow v Canada (MCI)*, [1996] FCJ No 1452 at para 18.

⁷⁷ *Ibid.*

⁷⁸ *Ha v Canada (MCI)*, 2004 FCA 49 at para 61.

fairness and deference.

A higher degree of deference was articulated in two cases. In IMM-7718-14, Justice St-Louis determined that the visa officer had not breached procedural fairness by failing to specifically state in a procedural fairness letter that the applicant could submit a further police report. In coming to that decision, Justice St-Louis stated that refugee applicants - like other visa applicants - are owed minimal procedural fairness:

Moreover, the content of the duty of fairness owed to visa applicants is at the low end of the fairness spectrum. In fact, minimal fairness is owed to persons outside of Canada, seeking admission to Canada, given that there is no individual right at stake for an unqualified applicant to enter Canada and given the highly discretionary context of visa applications.⁷⁹

A similar conclusion was reached in IMM-3505-12. In that case, the applicant on judicial review argued that the visa officer had breached procedural fairness by not directly putting to him their concerns regarding omissions in the written application. In determining that the visa officer had not breached procedural fairness, Justice Manson adopted the reasoning in *Oraha*:

The duty of fairness owed to refugee claimants applying from within Canada is different than the duty owed to applicants outside of Canada. The Supreme Court in *Singh* did not comment adversely on the process used for the determination of refugee claims by persons outside of Canada (*Oraha*, above, at paras 8-11).⁸⁰

In other decisions, however, the judge, while recognizing that overseas refugee applicants are not entitled to the same level of procedural fairness as inland refugee claim, stressed that overseas refugee decisions are nonetheless extremely important to the applicant and warrant a

⁷⁹ *Khuda Bakhsh et al v Canada (MCI)* (25 June 2015), IMM-7718-14 (FC) at paras 6-7.

⁸⁰ *Ismailzada v Canada (MCI)*, 2013 FC 67 at para 21 (IMM-3505-12). The judicial review in this case was granted on other grounds.

level of procedural fairness that is not at the lowest end of the spectrum. In IMM-634-13, the applicant filed a motion for the appointment of a special advocate to appear at an *in camera* hearing, on a motion by the respondent for non-disclosure of confidential information. Justice MacTavish recognized that the importance of the decision militates in favour of a higher level of procedural fairness, but concluded nonetheless that the duty of fairness did not require the appointment of a special advocate:

I accept that this matter is undoubtedly of great importance to both the applicant and his family. However, unlike the situation in Security Certificate proceedings, there are no section 7 Charter rights at stake in this case. ...

As the Supreme Court of Canada observed in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the content of the duty of fairness is variable, and how much fairness is owed in a given case depends on the context of the specific case at issue.

As was noted earlier, I recognize that the decision in issue in this case was of considerable importance to Mr. Kandiah and his family, a factor that militates in favour of a somewhat higher level of procedural fairness being owed to him. So too does the fact that no appeal is provided for by IRPA with respect to the decision under review. Insofar as this latter consideration is concerned, Mr. Kandiah is limited to his application for judicial review, and then only with leave of the Court.

That said, there are other factors that limit the content of the duty of fairness owed to visa applicants such as Mr. Kandiah [cases omitted]. In particular, the visa officer's decision in this case did not deprive Mr. Kandiah or any legal rights. As a foreign national, he had no right to enter Canada [cases omitted]. This reduces the level of procedural fairness required [cases omitted].⁸¹

In another case, IMM-4297-15, Justice Zinn distinguished overseas refugee application from other types of visa officer decisions, before concluding that the visa officer had breached procedural fairness by not disclosing that he had relied on American “joker cards” to determine Iraqi army rank:

⁸¹ *Premachandran Kandiah v Canada (MCI)*, 2014 FC 302 at paras 10, 14-16. The underlying application was dismissed in *Premachandran Kandiah v Canada (MCI)*, 2014 FC 509.

The parties disagree on the level of procedural protection owed. While the respondent refers to jurisprudence finding that visa officers should only be required to provide a low level of procedural protection, the applicant points out that this is not a typical visa case. Rather, the applicant is applying to come to Canada as a refugee and claims to fear persecution, and even death, if he is forced to return to Iraq.

I accept that the officer's decision in this case was more important to the applicant than an officer's decision would normally be in a non-refugee case and I therefore accept that, according to the contextual analysis set out by the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] SCJ No. 39, a somewhat higher level of procedural fairness was owed.⁸²

There is clearly a disagreement on the Federal Court in how to approach overseas refugee decisions. The fact that the Federal Court of Appeal rarely reviews such decisions certainly serves to perpetuate doctrinal divergences. At the same time, important doctrinal divergences also exist regarding inland refugee decisions, which both the Federal Court and the Federal Court of Appeal hear much more regularly.⁸³ I want to state that, at minimum, the lumping together of overseas refugee applicants with other visa applicants certainly is problematic in that it fails to recognize the important interests at stake - literally life or death. Persons seeking to come study, work or visit Canada are not in the same position as refugees escaping persecution and seeking a durable solution. Analyses that fail to take this into consideration are out of step with the dicta in *Baker*.

6.5.2 Case settlement and residence

As previously stated, the rate of case settlement was surprisingly high in this dataset (24.32%).

⁸² *Krikor v Canada (MCI)*, 2016 FC 458 at paras 12-13.

⁸³ For example, Evans Cameron describes in her book opposing and consequential approaches at the Federal Court in terms of “error preference” in the inland refugee context (Hilary Evans Cameron, *Refugee Law’s Fact-Finding Crisis: Truth, Risk, and the Wrong Mistake* (Cambridge, Cambridge University Press, 2018).

A case settlement is generally a favourable outcome for an applicant, but that is not always the case. The dataset revealed at least three cases where a redetermination was settled following a first judicial review settlement, suggesting that some applicants find themselves going back and forth from refusal to settlement without having the court weigh in on their case. This datapoint proved difficult to code, however, as the existence of a previous judicial review is not always apparent on the record. It is likely that more cases in the dataset were being judicially reviewed for a second time following a settlement.

Sunkin describes the practice of settling public law cases as being driven not only by resource concerns, but also a concern to maintain policy status quo:

The ability to settle is, for example, an ability to keep controversial public interest issues or sensitive issues of policy out of court. This may be extremely valuable for public authorities and especially for those that are regularly challenged by judicial review proceedings. ... Apart from saving resources, one of the most common reasons for settling a public law case is assumed to be the ability to resolve a specific problem without risking the integrity of the system or the policy that gave rise to that problem.⁸⁴

Case settlement is indeed a convenient mechanism at the disposal of the government to avoid restrictive precedents and, moreover, to avoid the disclosure of material that may reveal objectionable practices. In my dataset, the issue of ‘residence’ illustrates this practice well. Both the Convention Refugee class and the Country of Asylum class require that the refugee be outside their country of nationality or habitual residence. This would seem a rather uncontroversial requirement, as all refugee resettlement applicants are effectively outside their country of nationality or habitual residence when they attend their interview with a visa officer.

⁸⁴ Maurice Sunkin, “Conceptual Issues in Researching the Impact of Judicial Review on Government Bureaucracies”, in Marc Hertogh & Simon Halliday, eds, *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2004) 43 at 50-51.

However, as reviewed in Chapter 5, in a large number of cases, visa officers read into the refugee definition a residence requirement.⁸⁵ In refugee law, a finding that an applicant has travelled back and forth between their country of origin and their country of asylum can lead to the conclusion the applicant lacks subjective fear or that the fear is not well-founded. However, visa officers err when they reject applicants for not having established their residence through utility bills, school records, employment records, etc.

A total of 46 cases were refused because, *inter alia*, the visa officer believed the applicant was not “residing” in the country of asylum where the interview took place. In 19 of these cases, residence was the *only* ground for refusal. All of these cases involved Afghan applicants in Pakistan, save one.⁸⁶ Finally, in February 2016, the Federal Court in *Ameni* clarified, in no uncertain terms, that there is in fact no residence requirement:

In my view, in terms of establishing the quality of connection to a country other than that of their nationality, persons claiming Convention refugee or country of asylum class protection outside Canada need only establish what the statute requires, namely that one “is outside” their country of nationality, i.e., that they be outside such other country. Officers lack the legal authority to require applicants to meet any higher requirement. In my view they also act unreasonably and without statutory authority to the extent they impose, as I find they did in this case, a requirement that such claimants reside or live outside the country of their nationality; being outside such their country of nationality is enough.⁸⁷

There is reason to believe that the Department of Justice was aware that IRCC was routinely issuing questionable refusals on the basis of residence. Prior to the *Ameni* decision, the residence

⁸⁵ In refugee law, a finding that an applicant has travelled back and forth between their country of origin and their country of asylum can lead to the conclusion the applicant lacks subjective fear, or that the fear is not well-founded. However, visa officers err when they reject applicants for not having established their residence through utility bills, school records, etc.

⁸⁶ The other case concerned a Syrian applicant in Lebanon.

⁸⁷ *Ameni v Canada (MCI)*, 2016 FC 164 at para 28. See also *Amani et al v Canada (MCI)*, 2016 FC 1215.

rationale was directly challenged as an error of law in two cases.⁸⁸ Both cases were granted leave by the Federal Court and both were settled. One wonders how many such settlements occurred before 2011.

6.5.3 Strong cases denied leave and similar cases treated differently

As discussed earlier in this chapter, a statistical study of leave grant rates in the inland refugee cases, conducted by Rehaag, suggested that fewer cases are being granted leave than the leave test should allow, given the very permissive nature of the leave test.⁸⁹ A qualitative analysis of inland refugee leave application conducted by Liew et al has shown that a large proportion of apparently meritorious leave applications are being denied leave by Federal Court judges.⁹⁰ In this study's dataset, the leave grant rate is much higher than it is in inland refugee claim judicial reviews. Nonetheless, my review revealed numerous cases where leave was denied despite a significant error apparent on the record. My claim is not that these cases should necessarily have succeeded on the merits, but that the record disclosed, in my opinion, at least a "fairly arguable case", which should have been heard on the merits. A few illustrations are provided below.

Many strong cases denied leave involved questionable assessments of the evidence. One such case involved a Tamil Sri Lankan applicant who fled to Malaysia after being kidnapped by the Tamil Tigers (LTTE).⁹¹ The visa officer rejected the application because the applicant had failed to establish his identity. This visa officer rejected the entirety of the applicant's identity documents because some contained minor discrepancies in terms of the exact date of birth of the

⁸⁸ Files IMM-5500-14 & IMM-4782-15.

⁸⁹ Rehaag, "The Luck of the Draw", *supra* note 1.

⁹⁰ Jamie Chai Yun Liew et al, "Not just the luck of the draw: Explaining Leave Grant Rates at the Federal Court" (2021) 37:1 *Refuge* 61.

⁹¹ File IMM-3322-11, leave denied by Justice Harrington.

applicant's parents.

Leave was also denied in the case of a man from Iran who fled to Turkey after a video of him engaging in sexual intercourse with another man was disclosed to the Iranian authorities, triggering an investigation.⁹² The visa officer rejected the case on the basis that she did not believe that the Iranian authorities were aware of the video, despite the fact that the applicant had disclosed to the officer an Iranian court summons which indicated that the applicant is charged with sodomy, a crime punishable by death in Iran. The visa officer also determined that the applicant was not credible because he identified as heterosexual, despite having had sex with a man. The denial of leave in this case is all the more troubling given that the respondent provided no substantive response to the applicant's argument.

In IMM-6788-13,⁹³ an Eritrean man was detained and tortured by Eritrean authorities for practicing his Pentecostal faith. He fled to South Africa, where he obtained refugee status. The visa officer determined that the applicant was a refugee, but rejected the application because he now had a durable solution in South Africa. The visa officer concluded that he had in South Africa a status "analogous to permanent residence in Canada", despite the fact that the very documents cited by the visa officer indicated that the majority of permanent residence applications by refugees in South Africa are rejected. The visa officer also cited a document from "CORSMA" to establish that the applicant's status was legally equivalent to permanent status, while the document said no such thing.

⁹² File IMM-1957-12, leave denied by Justice Near.

⁹³ Leave denied by Justice Simpson.

In IMM-3315-11,⁹⁴ a young woman from Sierra Leone had been detained by a local group. This group was intent on forcing her to undergo female genital mutilation (FGM) and join their pro-FGM organization. She fled, along with her family, to Guinea. The visa officer determined that she was not a Convention refugee, because there was objective country information to the effect that FGM originates from within families, not from outside groups, and that forced membership in the group in question usually resulted if a woman criticized the group in particular, not FGM in general. However, the cited report indicated that there were numerous circumstances where FGM originates outside any family context. It had also been the applicant's testimony that she had openly criticized the group, not only FGM generally.

There were also cases with near-identical fact-patterns that received different leave decisions. Take for example IMM-1221-15 and IMM-2249-15, discussed in Chapter 5. Both involved Iraqi applicants in Jordan, a country that is not a signatory to the Refugee Convention. Both applicants had the same temporary status in Jordan, which required periodic renewal and was dependent on employment. In both cases, the visa officer determined that the applicant had locally integrated in Jordan. IMM-2249-15 was denied leave by Justice Diner. In IMM-1221-15, not only was leave granted, but the judicial review was granted on the merits.

6.6 Judicial review as individual redress

The data presented in the previous section is strong evidence that judicial review is not an effective legal recourse for failed resettlement applicants. It is true that leave grant rates are higher for rejected refugee resettlement applicants relative to inland rejected refugee claimants. Yet, it remains a fact that the leave requirement bars access to the courts for a significant

⁹⁴ File IMM-3315-11, leave denied by Chief Justice Crampton.

number of applicants. Over a third of perfected cases in the present dataset were denied leave (98 cases), and in many of them a significant error was apparent on the record. The negative impact of the leave requirement on judicial review applications originating from the refugee resettlement system should not be minimized. However, the most significant obstacle to redress through judicial review for rejected resettlement applicants appears to be a more practical one: conducting litigation in Canadian courts is simply unachievable for the vast majority of displaced persons abroad. Overall, 5.38% of rejected PSR and GAR applicants sought a judicial review between 2011 and 2015. In comparison, the proportion of failed inland refugee claimants seeking judicial review before the RAD was implemented was over five times greater.⁹⁵

The primary factor at play is no doubt the financial cost of judicial review. As it was noted in Chapter 3, contrary to inland rejected refugee claimants, rejected resettlement applicants do not have access to financial support from state-funded legal aid agencies. I do not want to endorse the myth that all refugees abroad are destitute. Without a doubt, the refugee condition is not reserved for the poor, and people with means are not insulated from the conditions that create refugee flows. It remains the case, however, that the vast majority of refugee resettlement applicants, especially those in the GAR stream, are in a precarious financial situation and are not sufficiently economically integrated into their country of asylum to earn a substantial income. The overwhelming majority of them cannot afford the \$3,000-\$5,000 fee associated with hiring a lawyer to conduct judicial review.⁹⁶ Recently, under an initiative of the Refugee Sponsorship

⁹⁵ The proportion of failed inland refugee claimants who sought judicial review in 2010-2011 and 2011-2012 was 30.01%. This data was compiled relying on online Federal Court Statistics and IRB Departmental Performance Reports. See also Justice Canada, “Immigration and Refugee Legal Aid Cost Drivers”, (2002) at para 6.2, online (pdf): <https://www.justice.gc.ca/eng/rp-pr/other-autre/ir/rr03_la17-rr03_aj17/rr03_la17.pdf>.

⁹⁶ See Canadian Council for Refugees, “Concerns with Refugee Decision-making at Cairo” (January 2010) at 4, online (pdf): <https://ccrweb.ca/sites/ccrweb.ca/files/cairoconcerns_1.pdf>.

Support Program, some lawyers have been offering ‘low bono’ services to refugee resettlement applicants.⁹⁷ However, even a low bono fee can be prohibitive for destitute refugees. In the Federal Court’s 2011 decision in *Ghirmatsion*, Justice Snider took the exceptional step of awarding costs to the applicants on the following rationale:

The four representative Applicants and all of the remaining applicants are refugees in a dangerous foreign country without the resources to finance the judicial review of their claims in Canada.⁹⁸

Only 8 applicants in the dataset (1.99%) were able to proceed to judicial review without a lawyer. None of the cases without counsel were granted leave: one was discontinued before being perfected, two were not perfected and denied leave for that reason, and 5 were perfected and denied leave. It is clear that the challenge facing self-represented refugee resettlement applicants in judicial review is especially insurmountable for those who have no contact in Canada whatsoever. In one case of a self-represented litigant - a GAR applicant - an application for extension of time was sought on the grounds of “Difficulty of getting who to represent me in Canada due to lack of financial support [sic]” and “late reception of how and where to follow up information [sic].”⁹⁹ One wonders who would have appeared in court on behalf of the applicant had leave been granted.

For refugee applicants in Canada, access to the Federal Court may be difficult, but they can at least speak directly to a lawyer who can advise them and they may be eligible for legal aid, or be able to earn Canadian wages to cover the legal costs. Refugee applicants overseas are unlikely to be able to apply to the Federal Court unless they have family in Canada or a private sponsor who can afford to hire a lawyer on their behalf. The UN High Commissioner for Refugees (UNHCR), which refers many of the refugees assessed by the visa officers, does not assist those rejected to apply to the Federal Court.

⁹⁷ See Kelsey Lange, “Mobilization of the Legal Community to Support PSR Applications through the Refugee Sponsorship Support Program”, in Shauna Labman & Geoffrey Cameron, eds, *Strangers to Neighbours: Private Refugee Sponsorship in Context* (Montreal and Kingston: McGill-Queen’s University Press, 2020) 212.

⁹⁸ *Ghirmatsion v Canada (MCI)*, 2011 FC 773 at para 6. See Labman, *Crossing Law’s Border*, *supra* note 21 at 74-75.

⁹⁹ File IMM-1513-13.

It is clear that private sponsors play a major role in funding and coordinating judicial review proceedings. Privately sponsored applicants also often have family or other personal contacts in Canada who can assist in the judicial review process. Even for sponsors and family members in Canada, however, the legal steps involved in challenging a refusal are costly and difficult to navigate.¹⁰⁰ It is also clear that for GAR applicants, hiring a lawyer and initiating litigation in Canada is virtually impossible. The rate of seeking judicial review is relatively low (8.47%) for PSR applicants, but that rate is almost 34 times higher than the rate for GAR applicants (0.25%). Generally speaking, GARs have fewer support networks in Canada and tend to be in more vulnerable situations than PSRs.¹⁰¹ The fact that even a handful of GAR applicants sought judicial review may be surprising to some. That the majority of those GAR applicants who sought judicial review were not typical GAR cases. The background of the applicant was discussed in nine of the ten GAR cases in the dataset. These include four cases with immediate family in Canada, one case of a former UNHCR lawyer, one case of an applicant who had previously lived in Canada, and one case of a fairly well-off businessman. In only two cases did the applicant appear to have no connections to Canada, have minimal knowledge of the Canadian legal system, and be of modest means.

We can hypothesize with some confidence that resettlement applicants - especially GAR applicants - also lack informational resources necessary to pursue a judicial review application.

¹⁰⁰ See Canadian Council for Refugees, “Survey of refusals of Privately Sponsored Refugees conducted Spring 2015 - Summary of results” (2015). In this survey, one SAH participant declared that “our sponsors simply do not have the resources to retain a lawyer.” Another sponsor stated that “[t]he cost is very difficult for families when they are deciding to appeal. Also, it was challenging to get the case notes from the visa office. it was challenging to get the case notes from the visa office.”

¹⁰¹ See Immigration, Refugees and Citizenship Canada, Evaluation Division, “Rapid Impact Evaluation of the Syrian Refugee Initiative” (December 2016) at para 1.3. See also Sabine Lehr & Brian Dyck, “‘Naming’ Refugees in the Canadian Private Sponsorship of Refugees Program: Diverse Intentions and Consequences”, in Shauna Labman & Geoffrey Cameron, eds, *Strangers to Neighbours: Refugee Sponsorship in Context* (Montreal & Kingston: McGill-Queen's University Press, 2020) 42 at 53-54.

Many are probably not aware of the workings of Canadian administrative law. Judicial review is not mentioned during the interview and is not mentioned in refusal letters.

6.7 The structural role of judicial review

Before addressing the structural role of judicial review in the resettlement system, it is informative to note that Canadian courts have had a major influence on the evolution of the inland refugee system, both at the procedural and substantive levels. The IRB was created in the aftermath of the Supreme Court's decision in *Singh*, where it was recognized that inland refugee claimants are protected by the *Charter* and have the right to an oral hearing if credibility is at stake.¹⁰² There is a vast body of Federal Court case law dealing with both procedural and substantive issues in the inland refugee system. In fact, in the years preceding the implementation of the Refugee Appeal Division at the IRB in 2012, judicial review of inland refugee matters made up around half of the Federal Court's caseload.¹⁰³ The IRB maintains an online legal resource with extensive references to Federal Court cases.¹⁰⁴ This is not the case with the overseas refugee system. While the case law pertaining to the interpretation of the Convention Refugee definition developed in the inland context applies in the overseas context, the usefulness of inland refugee case law ends there. Even the annotated *IRPA* and *IRPR* published by major Canadian legal publishers contain scant references to refugee resettlement

¹⁰² *Singh v Canada (MEI)*, [1985] 1 SCR 177.

¹⁰³ Federal Court, *Statistics*, online: <http://www.fct-cf.gc.ca/fc_cf_en/Statistics.html>. See also Audrey Macklin, "Asylum and the Rule of Law in Canada: Hearing the Other (Side)" in Susan Kneebone, ed, *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (Cambridge: Cambridge University Press, 2009) 78 at 104.

¹⁰⁴ Immigration and Refugee Board, *Legal Resources*, online: <<https://irb-cisr.gc.ca/en/legal-policy/legal-concepts/Pages/index.aspx#LC-RC>>.

cases.¹⁰⁵ That is because little case law exists on key substantive legal issues specific to the overseas refugee system, such as the Country of Asylum class, durable solutions, and the successful establishment criteria. The same can be said about the procedural aspects of refugee resettlement decision-making. The case law is thin and has had little impact on the development of decision-making procedures.

The limited role of courts in refugee resettlement can be explained by process-oriented and doctrinal factors. At the process level, three issues are worth noting. First, a remarkably low number of rejected cases are judicially reviewed. Only about 22 rejected PSR cases are reviewed each year on their merits by the Federal Court. Over the five-year period of study, only 2 GAR cases were reviewed on their merits. It is somewhat troubling from a structural perspective that a surprisingly high proportion of cases where leave is granted are ultimately settled out of court or granted on consent (as much as 29.57% of perfected cases). As discussed earlier in this chapter, this practice raises concerns around IRCC's potential use of case settlement as a method to insulate objectionable practices from judicial and public scrutiny. Further qualitative research should be pursued to identify trends in case settlement, and determine if this practice leads to the repetition of particular failures in decision-making. Second is the fact that a significant portion of Federal Court decisions go unreported. These orders are compiled by the Department of Justice, which thus builds a significant body of law unavailable to refugee applicants. Thirdly, limitations on appeal, much like the leave requirement, hinder the development of a comprehensive body of case law. A "question of general importance for the legal system as a whole" was certified on only two occasions, despite such questions having

¹⁰⁵ See Henry M Goslett & Barbara Jo Caruso, *The 2020 Annotated Immigration and Refugee Protection Act of Canada* (Toronto: Carswell, 2019); Lorne Waldman, *Canadian Immigration and Refugee Law Practice*, 2020 ed (Markham: LexisNexis, 2019).

being submitted in 36 cases. It appears that the last resettlement case decided by the Federal Court of Appeal dates back to 2004.¹⁰⁶ No refugee resettlement case has ever been heard by the Supreme Court of Canada.

The exceptionally deferential position adopted by the Federal Court, and the court's sharp distinction between inland refugee decisions and overseas refugee decisions, also contribute to limiting the procedural and substantive impact of judicial review on the resettlement system as a whole.¹⁰⁷ That said, there is reason to question whether formal statements of deference in the Federal Court jurisprudence translate to actual deference in how judges decide cases. The leave grant rate and overall success on the merits is much higher in resettlement cases as compared to inland cases, where deference is in theory much lower. However, those numbers alone do not tell the entire story. The quality of cases being reviewed by the Federal Court is certainly quite low as compared to inland cases. This alone could account for the relatively higher grant rates. Visa officers are not well-trained in refugee law and there exist systemic concerns about the quality of decision-making in the resettlement system. Chapter 5 has revealed persistent shortcomings in visa officer decisions in this dataset. It can also be hypothesized with some confidence that the possibility of success at the Federal Court is a decisive factor for resettlement applicants contemplating judicial review, much more than for inland refugee

¹⁰⁶ *Ha v Canada (MCI)*, 2004 FCA 49, 236 DLR (4th) 485.

¹⁰⁷ Beyond the distinction between inland and overseas refugee decisions, scholars have noted that judicial review in the immigration context in general is exceptionally deferential as compared to other areas of law:

Immigration law, like the law surrounding parole and prison discipline, has had a reputation among people interested in administrative law as a sort of wasteland in which judges have been loath to apply the legal principles we normally associate with a sense of justice in Canadian public administration (Philip L Bryden, "Fundamental Justice and Family Class Immigration: The Example of Pangli v. Minister of Employment and Immigration" (1991) 41:4 UTLJ 484 at 484).

See also Anna Pratt, *Securing Canada's Borders: Detention and Deportation in Canada* (Vancouver: UBC Press: 2005) at 60-61.

claimants who may have access to legal aid.

Getting a fuller picture of the role of courts in overseas refugee matters would require an analysis of how legal developments percolate to decision-makers on the ground. What is clear however is that the factors reviewed above contribute to minimizing judicial impact on refugee decision-making. It is noteworthy that, out of the hundreds of visa officer decisions reviewed, merely two cited case law.

6.8 Conclusion

In this chapter, I have presented a wide-ranging quantitative and qualitative analysis of the judicial review process in the refugee resettlement context. I have sought to draw some comparisons with existing studies on the operation of the judicial review process in the inland refugee system, as well as studies in other jurisdictions. My overall analysis suggests that judicial review in the context of refugee resettlement is largely inaccessible for legal and practical reasons, and that judicial review plays a minimal role at the individual and structural levels. My analysis has also shown that extralegal factors, such as the identity of the judge and the party of appointment of the judge, influence judicial decision-making, although the results are not always straightforward.

Effective judicial review is essential to uphold the rights of refugees and, more generally, to uphold the rule of law. Legal barriers to judicial review, such as the leave requirement in immigration and refugee matters, are difficult to reconcile with the rule of law. Audrey Macklin, writing on the inland refugee system, offers the following:

One of the foundational tenets of the rule of law is the guarantee of access to an independent and impartial court ... to challenge the legality of a decision affecting fundamental rights ... The use of a leave requirement to constrict that access, however compelling the administrative exigencies animating it, directly and incontrovertibly breaches that fundamental principle. ...

The leave requirement has never been justified on a principled basis. More specifically, it would be untenable to contend that the rule of law does not apply to asylum seekers, or that anything about the current system provides a satisfactory alternative to, or substitute for, judicial review for those who do not obtain leave.¹⁰⁸

Macklin's statements certainly apply in the case of overseas refugees, especially considering existing concerns over the quality of visa officer decision-making, training, and caseloads. With that in mind, I would like to present rather modest recommendations that would facilitate access to judicial review for overseas refugee resettlement applicants. There is little doubt that abolishing the leave requirement would lead to better access to justice for both overseas and inland refugee claimants. The call to abolish the leave requirement for all refugee applicants has been voiced by others.¹⁰⁹ Abolishing the leave requirement would require a significant increase in judicial appointments, but little else. As noted earlier in this chapter, before the coming into force of the 2001 *IRPA*, all visa officer decisions were exempted from the leave requirement. An exemption to the leave requirement specifically for overseas refugee claimants would have minimal administrative impact. When the federal government moved to implement the leave requirement for visa officer decisions, the Canadian Bar Association commented:

...the Section strongly opposes the imposition of a leave requirement on judicial reviews of refugee cases refused by visa officers. The proportion of successful judicial reviews of visa officer decisions does not justify a leave requirement. If refugees are to be encouraged to apply from abroad, their relatively fewer due process rights cannot be eroded. Decisions on refugee cases are decisions on protection: ensuring they are made correctly and that, if not, they are corrected is

¹⁰⁸ Macklin, *supra* note 103 at 104-05.

¹⁰⁹ See Rehaag, "Luck of the Draw" *supra* note 1 at 34-39.

the absolute minimum required by fairness. If a leave requirement is imposed, refugee decisions should be exempted from it.¹¹⁰

Short of abolishing the leave requirement, or exempting overseas refugees from its application, it could be reformed and relaxed, or at least be better defined by the Federal Court of Appeal.¹¹¹ More importantly, in the case of resettlement applicants, it is clear that measures must be adopted to ensure that, at a minimum, rejected applicants understand that judicial review is an option open to them. It is clear that many rejected applicants are unaware that they can seek judicial review at all. In a survey conducted by the Canadian Council for Refugees among Group of Five and Community Sponsors, 46.67% of the respondents indicated that they lacked either information or support in terms of what steps to take in the event of a case rejection.¹¹² Judicial review is not mentioned during interviews and is never mentioned in refusal letters. Clearly, in the case of GARs, such support is critically needed.

¹¹⁰ Canadian Bar Association, National Citizenship and Immigration Law Section, *Response to Building on a Strong Foundation for the 21st Century: White Paper for Immigration and Refugee Policy and Legislation* at 23 (March 1999), online: <<https://www.cba.org/CMSPages/GetFile.aspx?guid=97021bf5-c0d2-477d-ad41-e40dadd0b396>>.

¹¹¹ See Rehaag, “Luck of the Draw” *supra* note 1 at 40-42.

¹¹² Canadian Council for Refugees, “Survey about Group of Five Sponsors and Community Sponsors: Detailed Results” (2020), online (pdf): <<https://ccrweb.ca/sites/ccrweb.ca/files/g5-survey-report-detailed.pdf>>. This was the respondents’ most frequently cited concern.

CHAPTER 7 CONCLUSION

The relationship between refugee resettlement and the other durable solutions in the international refugee regime is a complicated and evolving one. My historical review has shown that refugee resettlement has played an important role in the international response to refugees since the Second World War. However, as a discretionary act, resettlement is deeply intertwined with international geopolitics and shifting state perspectives towards international solidarity. During the decades of the Cold War, the resettlement of refugees fleeing communist regimes was deployed as a political tool by Western states. Until the 1980s, resettlement was the most favoured durable solution and was offered to a relatively large proportion of the global refugee population. Today, refugee resettlement is offered to an increasingly small proportion of the refugee population. Following a clear turn towards repatriation in the 1990s, initiatives are now being deployed to reinvigorate resettlement. States and the UNHCR have stressed the importance of refugee resettlement, both in terms of refugee protection and burden-sharing. However, in the much-anticipated Global Compact on Refugees, which seeks to push forward the pursuit of equitable global burden-sharing, the emphasis is not on third-country resettlement, but on support for asylum in regions of origin.

The potential pitfalls of an increased focus on refugee resettlement have been an important theme of this dissertation. States have at times resorted to resettlement to justify measures that limit their obligations to refugees. Some states have also decreased their financial contribution to the UNHCR as a result of increased resettlement admissions.¹ In Canada, financial

¹ Megan Bradley & Cate Duin, “A Port in the Storm: Resettlement and Private Sponsorship in the Broader Context of the Refugee Regime”, in Shauna Labman & Geoffrey Cameron, eds, *Strangers to Neighbors: Refugee Sponsorship in Context* (Montreal & Kingston: McGill-Queen’s University Press, 2020) 74 at 81-8.

contributions have not been linked to admission numbers. However, successive governments have leveraged increases in resettlement to justify restrictions to the asylum system. Throughout these initiatives, refugees awaiting resettlement were repeatedly portrayed as “legitimate”, while asylum seekers were portrayed as “bogus” or “dangerous.”

I have sought in this dissertation to understand how refugee resettlement operates within Canada’s legal system, and to explore what can be law’s role in strengthening refugee resettlement. I have also sought to analyze how refugee resettlement - including the private sponsorship of refugees - is situated within Canadian refugee policy. My inquiry has led to empirically-grounded findings that should be of interest to Canadian policy-makers, as well as policy-makers in those jurisdictions considering the implementation of a sponsorship of refugees program.

Looking at refugee resettlement through a legal lens has been at the core of this project. This is a relatively new approach in Canadian legal scholarship. As explained in the introduction of this dissertation, the bulk of scholarship on refugee resettlement has focused on policy and integration. Few researchers, until recent years, have considered refugee resettlement applicants as bearers of legal rights in Canadian law. Shauna Labman’s recent work² has been foundational in revealing law’s complex role in the discretionary act of resettlement and has provided an important theoretical and historical basis on which I have developed this research. My hope is

² Shauna Labman & Geoffrey Cameron, eds, *Strangers to Neighbors: Refugee Sponsorship in Context* (Montreal & Kingston: McGill-Queen’s University Press, 2020); Shauna Labman, *Crossing Law’s Border: Canada’s Refugee Resettlement Program* (Vancouver: UBC Press, 2019); Shauna Labman & Madison Perlman, “Blending, Bargaining, and Burden-Sharing: Canada’s Resettlement Programs” *J Int Migr & Integration* 339; Shauna Labman, “Private Sponsorship: Complementary or Conflicting Interests?” (2016) 32:2 *Refuge* 67; Shauna Labman, “Queue the Rhetoric: Refugees, Resettlement and Reform” (2011) 62 *UNBLJ* 55 at 57.

that by applying an empirical methodology to the study of resettlement decisions in Canada, and by analyzing the role of administrative law in the resettlement framework, I have provided a convincing account of how law operates not at the periphery of refugee resettlement, but at its core.

My empirical assessment of the legal framework of refugee resettlement has focused on first instance decision-making in visa offices abroad, and on judicial review at the Federal Court. My conclusions are concerning. They lend evidence to various claims made by advocacy groups over the decades: procedural rights are few, appeal mechanisms are inexistent or inaccessible, and decision-makers are both poorly trained in refugee law and often make poor quality decisions. The data on visa officer decision-making shows persistent shortcomings in various areas of decision-making, including documenting decisions, credibility assessments, assessment of objective evidence, and assessment of gender-based claims. The data also shows that language barriers and mental health issues can significantly hinder communication between applicants and visa officers, with potentially devastating consequences for applicants. Another important trend addressed relates to the problematic interpretations and applications of various regulatory and legislative criteria, including local integration, successful establishment, and inadmissibility. The readers of this dissertation who are familiar with refugee determination practices and procedures at the Immigration and Refugee Board may be surprised by the chasm that separates the inland and the overseas refugee determination systems. I want to reiterate here that I recognize that refugee determination is an extremely difficult task even in the best of circumstances, and that visa officers are under enormous organizational pressure to process cases quickly. In my view, the better way of understanding the findings of this research is in

terms of systemic problems that can be addressed through systemic changes, as opposed to individual visa officer failures.

My analysis of judicial review of resettlement decisions was anchored in the literature and methodology of administrative law and law & society. First, I conducted quantitative analyses examining various non-legal factors that potentially impact outcomes. Many of the analyses were inconclusive. However, the data does suggest that lawyer experience and city of filing are correlated to important variations in outcomes. The wide variation in grant rates among individual judges observed in the inland refugee context was also partly reflected in this dataset. The second component of my analysis consisted of a general assessment of the role of judicial review in refugee resettlement. While Federal Court leave and hearing grant rates were found to be much higher in the resettlement context than in the inland context, my analysis has shown that judicial review in the refugee resettlement context plays a limited role. This, I argued, can be explained by several doctrinal and practical factors. First, few failed refugee resettlement applicants (and practically no applicants in the GAR program) have the financial or informational resources to pursue judicial review. In the dataset, only 8.47% of all rejected PSR applicants, and only 0.25% of rejected GAR applicants, sought judicial review. It is clear that judicial review is an inaccessible avenue of redress for the vast majority of refugee applicants abroad. Second, the leave requirement contributes to limiting access to review. Despite the relatively high leave grant rate, it remains the fact that a significant portion of judicial review applicants do not get their day in court. The restriction on appeals to the Federal Court of Appeal further contributes to limiting access to review and the development of case law. Third, I have found that a large proportion of the few judicial review applications launched by overseas refugee applicants - including the most problematic ones - are ultimately settled out of court by

the Department of Justice. I have argued that this practice impedes the development of a comprehensive body of case law and potentially allows the immigration bureaucracy to avoid the proliferation of restrictive precedents. The issue of residence is a good example of this dynamic. The residence criteria was wrongly applied by visa officers for years, leading to flawed refusals. The issue was raised in a number of judicial review applications between 2011 and 2015, which were routinely settled out of court by Justice Canada, thereby permitting the repetition of the mistake, until finally one case was heard by the Federal Court in 2016. Fourth, I have found that the Federal Court has adopted an exceptionally deferential approach in its review of visa officer decisions, deemed “discretionary” and “purely administrative.” The actual impact of this doctrinal environment is unclear, however, as leave and hearing grant rates are much higher in the overseas context compared to the inland context.

Evidently, refugee resettlement operates in a zone where the rule of law is thin. Legal scholars such as Catherine Dauvergne have maintained that a weak rule of law is a common feature of immigration systems.³ I have not waded into the immigration/rule of law debate in this dissertation, but I would like to caution against the view that an *exceptionally* weak rule of law is an *inherent* and *necessary* feature of immigration systems. Significant improvements to the Canadian inland refugee system have been achieved in the past thirty years through legal advocacy. The overseas refugee system is lagging behind, in my assessment, largely because it is allowed to unfold away from public and judicial scrutiny. In the final analysis, my dissertation calls for a strengthening of the rule of law in refugee resettlement decision-making, both to

³ See, for example, Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge: Cambridge University Press 2008).

ensure fairness and accuracy for refugee applicants and to ensure the long-term support of the sponsorship community.

This dissertation has offered several recommendations aimed at improving decision-making and access to review in the resettlement system. Since the Canadian legal system itself is not easily accessible by displaced persons abroad, the bulk of my recommendations have been aimed not at judicial review, but at first instance decision-making. I have suggested that visa officer training should be strengthened in many areas, including drafting reasons, dealing with vulnerable applicants, dealing with gender-based claims, and making credibility and inadmissibility determinations. I have also recommended that resources be increased to allow visa officers to devote more time to each refugee case, that reasons be disclosed as a matter of course, that all refusals be reviewed by a senior officer, and that audio recording of interviews be instituted. I have recommended three minor regulatory and regulatory interpretation changes. First, I have recommended abandoning the requirement of a UNHCR/state refugee recognition requirement for those refugees sponsored by Groups of Five and Community Sponsors. As I have explained, access to a UNHCR or state refugee status determination varies depending on a refugee's country of origin and country of asylum. Many Palestinian refugees, for instance, are excluded from the mandate of the UNHCR. Insofar as limiting the backlog of Group of Five and Community Sponsors cases is a concern of the government, it would be preferable to limit intake through front end mechanisms that do not disproportionately impact particular refugee populations. Second, I have argued that the successful establishment criteria should be abandoned. As a humanitarian program, refugee resettlement should focus *exclusively* on protection needs. Steps have been undertaken to reduce the focus on establishment potential with the adoption of the *IRPA*, but the new orientation shows signs of ambivalence. The data in

this study indicates that successful establishment is now rarely invoked as a ground for refusal, but its application is exceptionally unpredictable. Third, I have recommended that IRCC reconsider its interpretation of local integration as a durable solution. Findings of local integration were common in the dataset in cases where refugees faced xenophobic attacks, were denied refugee status, and were denied basic rights. This interpretation is inconsistent with international norms, which require at minimum protection from *refoulement*, the possibility of economic integration, and the provision of basic rights.

With regard to the judicial review process, I have suggested that abandoning the leave requirement for overseas refugee cases - as was the case prior to the 2001 *IRPA* - would lead to better access to justice for rejected resettlement applicants. Abandoning the leave requirement would not lead to “unnecessary litigation.” It would provide those rare applicants who manage to reach the Federal Court the right to be heard on the merits. In turn, this would lead to the development of a larger body of case law on insufficiently scrutinized legal issues specific to the resettlement context, such as durable solutions, successful establishment and the country of asylum class. I have also suggested that more needs to be done through the resettlement application process to inform applicants about the steps they can take to seek judicial review.

In conducting this research and developing recommendations, I was mindful of the potential unintended consequences legal changes could engender in the resettlement program. The PSR program operates largely through the work of SAH employees and volunteers, as well as Group of Five and Community Sponsor members, often with the assistance of the Refugee Sponsorship Training Program (RSTP). While the Refugee Sponsorship Support Program (RSSP) is now providing legal support to some sponsors, the vast majority of the actors in the PSR sector are

not legally trained and have limited resources. There is a legitimate concern that further “juridification” of the resettlement system could lead to unmanageable increases in cost and complexity for the largely volunteer-based sponsorship community.⁴ Similarly, adding complexity to the GAR process could increase the burden put on the UNHCR, which is already under-funded. I acknowledge that it would not be helpful to mirror the complexity of the inland refugee system in the overseas resettlement system. I am also mindful of the fact that increases in administration costs could, in the long run, diminish political and public support for the program. That being said, I do not believe that the changes I propose in this dissertation would lead to such challenges. My recommendations are primarily aimed at improving first instance decision-making through relatively modest administrative and policy changes. None of these, I believe, would significantly increase the burden already placed on the volunteer ecosystem of private sponsorship. Adopting interview recording, and mandating the disclosure of reasons to applicants without requiring them to submit an access to information request, would, to the contrary, decrease the challenges applicants and sponsors face in navigating the resettlement system. As I have noted throughout this dissertation, the sponsorship community itself has repeatedly called for such changes. The automatic disclosure of reasons would also decrease the number of placeholder applications for judicial review at the Federal Court and free up court resources.

⁴ Colin Scott defines juridification as the “process by which relations hitherto governed by other values and expectations come to be subjected to legal values and rules” (Colin Scott, “The Juridification of Regulatory Relations in the UK Utilities Sector”, in Julia Black, Peter Muchlinski & Peter Walker, eds, *Commercial Regulation and Judicial Review* (Oxford: Hart Publishing, 1998) 19 at 19). See also Genevra Richardson, Impact studies in the United Kingdom in Marc Hertogh & Simon Halliday, eds, *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2004) 103 at 122.

This dissertation has addressed a variety of themes, but has left many important questions unanswered. I have relied exclusively on documentary analysis to study the work of visa officers. It would be instructive to conduct interviews or observations in visa offices. Such a methodology could shed light on informal information-sharing practices, for example. Have practices organically developed where visa officers discuss and learn about legal developments in the area of refugee resettlement? Are informal decision-making tools utilized in particular visa offices? How are caseloads managed? What measures are in place to inform visa officers of changes in country conditions? Questions surrounding GARs remain in a blind spot, as almost no GARs seek judicial review. An interesting avenue of research would be to study the UNHCR resettlement referral framework and assess how the Canadian resettlement criteria interact with UNHCR criteria. How does the UNHCR for example incorporate the Canadian approach to durable solutions or the successful establishment criteria within its referral infrastructure? How does the Canadian GAR assessment process compare with that of other countries? In terms of the judicial review process, my research has shown interesting patterns around case settlement. Further research could be undertaken to understand Department of Justice strategies around case settlement and specifically the question of “settlement loops.” Such an inquiry would benefit from collaborations with lawyers.

As I have alluded to earlier in this dissertation, another important avenue of research still unexplored relates to the experience of refugees who go through the overseas refugee system. The experiences and agency of refugees are too often overlooked in refugee legal scholarship. How do resettlement applicants learn about the Canadian resettlement requirements? How do they understand the criteria? How do they experience the application and interview process? Has their “local integration” materialized? Further research could seek partnerships with

sponsor organizations to identify and interview refugee applicants who have been denied admission and remain abroad.

Perhaps the most important question left unanswered by this dissertation is *what can be domestic law's role in resolving the international refugee crisis?* The limits of law in the current refugee regime are glaring. As observed in Chapter 2, the legal structures for assessing refugee status in countries of the Global North are extremely costly and do little to provide either protection or a durable solution to the vast majority of refugees, who remain in countries of the Global South. Lawyers and legal advocates are often blamed for this state of affairs. James Hathaway, the world's most recognized expert in refugee law, has suggested that, just as national governments consistently mischaracterize their obligations under refugee law, refugee legal advocacy has been characterized as "absolutist" and as contributing to making the debate around reinvigorating refugee law "sterile."⁵ Without endorsing such a view, I acknowledge that the preeminent question concerning the future of refugee protection is ultimately a political one, not a legal one.

Finally, this dissertation has left largely open the question of what should be the role of resettlement in the future of the international refugee regime. Increasingly, international actors insist that resettlement should remain the smallest piece of the puzzle, and that asylum in regional countries and eventual repatriation is preferable. Reform proposals that endorse this approach have been favourably received. Scholars critical of this "new" inclination contend that such a strategy is merely one of containment that allows countries of the Global North to offload its responsibilities onto countries of the Global South. This dissertation has not proposed an

⁵ James Hathaway, "Why Refugee Law Still Matters" (2007) 8:1 Melb J Intl L 89 at 90-97.

alternative system of refugee protection, I do not claim to have such a solution. In closing, however, I would like to point out that, in light of the critiques of the status quo and of the containment inclination of the Global Compact, the potential for refugee resettlement to play an important role in the international refugee regime is clear: it is a mechanism that guarantees both refugee protection and a durable solution to refugees, and one that incorporates an ethical conception of burden-sharing. It is also perhaps the only obtainable solution for the growing refugee population living in a protracted refugee situation.

APPENDIX A - Index of Cases

DOCKET	COUNTRY OF ORIGIN	COUNTRY OF ASYLUM	DATE OF JR APPLICATION
1. IMM-71-11	ERITREA	SUDAN	2011-01-05
2. IMM-329-11	SOMALIA	YEMEN	2011-01-18
3. IMM-330-11	SOMALIA	YEMEN	2011-01-18
4. IMM-528-11	ETHIOPIA	EGYPT	2011-01-27
5. IMM-529-11	ETHIOPIA	EGYPT	2011-01-27
6. IMM-597-11	LIBERIA	GHANA	2011-01-28
7. IMM-694-11	ETHIOPIA	SOUTH AFRICA	2011-02-03
8. IMM-916-11	SIERRA LEONE	LIBERIA	2011-02-11
9. IMM-966-11	SOMALIA	ETHIOPIA	2011-02-14
10. IMM-992-11	RWANDA	SOUTH AFRICA	2011-02-15
11. IMM-1316-11	ERITREA	EGYPT	2011-02-28
12. IMM-1319-11	ERITREA	EGYPT	2011-02-28
13. IMM-1343-11	SRI LANKA	INDIA	2011-03-01
14. IMM-1485-11	SRI LANKA	INDIA	2011-03-07
15. IMM-1566-11	RWANDA	KENYA	2011-03-09
16. IMM-1593-11	SRI LANKA	INDIA	2011-03-10
17. IMM-1594-11	SRI LANKA	INDIA	2011-03-10
18. IMM-1590-11	ERITREA	EGYPT	2011-03-10
19. IMM-1767-11	SRI LANKA	INDIA	2011-03-17
20. IMM-2010-11	SRI LANKA	INDIA	2011-03-25
21. IMM-2029-11	SRI LANKA	INDIA	2011-03-28
22. IMM-2776-11	SRI LANKA	INDIA	2011-04-02
23. IMM-2211-11	SRI LANKA	INDIA	2011-04-04
24. IMM-2239-11	SRI LANKA	INDIA	2011-04-04
25. IMM-2241-11	IRAQ	SYRIA	2011-04-04
26. IMM-2274-11	SOMALIA	KENYA	2011-04-05
27. IMM-2589-11	SRI LANKA	INDIA	2011-04-18
28. IMM-2590-11	IRAQ	SYRIA	2011-04-18
29. IMM-2805-11	SRI LANKA	INDIA	2011-04-27
30. IMM-2854-11	SRI LANKA	INDIA	2011-04-29
31. IMM-3043-11	ERITREA	SUDAN	2011-05-09
32. IMM-3314-11	SIERRA LEONE	GUINEA	2011-05-19
33. IMM-3315-11	SIERRA LEONE	GUINEA	2011-05-19
34. IMM-3317-11	SIERRA LEONE	GUINEA	2011-05-19
35. IMM-3322-11	SRI LANKA	MALAYSIA	2011-05-19
36. IMM-3333-11	AFGHANISTAN	PAKISTAN	2011-05-20
37. IMM-3447-11	AFGHANISTAN	PAKISTAN	2011-05-25
38. IMM-3448-11	AFGHANISTAN	PAKISTAN	2011-05-25
39. IMM-3544-11	AFGHANISTAN	PAKISTAN	2011-05-27
40. IMM-3566-11	AFGHANISTAN	PAKISTAN	2011-05-30
41. IMM-3630-11	ETHIOPIA	KENYA	2011-05-31
42. IMM-3922-11	SOMALIA	KENYA	2011-06-13
43. IMM-3931-11	AFGHANISTAN	PAKISTAN	2011-06-13
44. IMM-3959-11	SOMALIA	DJIBOUTI	2011-06-14
45. IMM-4276-11	AFGHANISTAN	PAKISTAN	2011-06-29
46. IMM-4303-11	AFGHANISTAN	TADJIKISTAN	2011-06-30
47. IMM-4343-11	AFGHANISTAN	PAKISTAN	2011-07-07
48. IMM-4378-11	AFGHANISTAN	PAKISTAN	2011-07-11
49. IMM-4467-11	SOMALIA	YEMEN	2011-07-15
50. IMM-4531-11	AFGHANISTAN	TADJIKISTAN	2011-07-19
51. IMM-4702-11	ERITREA	EGYPT	2011-07-22
52. IMM-4744-11	SRI LANKA	INDIA	2011-07-25
53. IMM-4740-11	AFGHANISTAN	PAKISTAN	2011-07-25
54. IMM-4753-11	AFGHANISTAN	PAKISTAN	2011-07-25
55. IMM-4754-11	AFGHANISTAN	PAKISTAN	2011-07-25
56. IMM-4927-11	AFGHANISTAN	TADJIKISTAN	2011-07-29
57. IMM-5121-11	ETHIOPIA	SUDAN	2011-08-04
58. IMM-5158-11	SRI LANKA	INDIA	2011-08-05
59. IMM-5159-11	SRI LANKA	INDIA	2011-08-05
60. IMM-5160-11	SRI LANKA	INDIA	2011-08-05
61. IMM-5365-11	AFGHANISTAN	PAKISTAN	2011-08-11
62. IMM-5650-11	SOMALIA	KENYA	2011-08-22
63. IMM-5652-11	SOMALIA	KENYA	2011-08-22
64. IMM-5752-11	SOMALIA	ETHIOPIA	2011-08-24
65. IMM-5754-11	SOMALIA	DJIBOUTI	2011-08-24
66. IMM-5755-11	SOMALIA	DJIBOUTI	2011-08-24
67. IMM-5757-11	SOMALIA	ETHIOPIA	2011-08-24

68.	IMM-5758-11	SOMALIA	ETHIOPIA	2011-08-24
69.	IMM-5759-11	SOMALIA	ETHIOPIA	2011-08-24
70.	IMM-5859-11	ETHIOPIA	UGANDA	2011-08-26
71.	IMM-5861-11	ETHIOPIA	UGANDA	2011-08-26
72.	IMM-5962-11	AFGHANISTAN	TADJIKISTAN	2011-08-26
73.	IMM-6200-11	AFGHANISTAN	PAKISTAN	2011-09-09
74.	IMM-6245-11	ERITREA	SUDAN	2011-09-12
75.	IMM-6461-11	ERITREA	SUDAN	2011-09-20
76.	IMM-6742-11	AFGHANISTAN	PAKISTAN	2011-09-30
77.	IMM-6792-11	AFGHANISTAN	TADJIKISTAN	2011-10-03
78.	IMM-6857-11	SOMALIA	UGANDA	2011-10-05
79.	IMM-6858-11	SOMALIA	UGANDA	2011-10-05
80.	IMM-6861-11	SOMALIA	UGANDA	2011-10-05
81.	IMM-6862-11	SOMALIA	UGANDA	2011-10-05
82.	IMM-6975-11	SOMALIA	KENYA	2011-10-11
83.	IMM-7029-11	AFGHANISTAN	PAKISTAN	2011-10-12
84.	IMM-7211-11	IRAN	TURKEY	2011-10-18
85.	IMM-7833-11	AFGHANISTAN	TADJIKISTAN	2011-11-02
86.	IMM-7835-11	SOMALIA	KENYA	2011-11-02
87.	IMM-7959-11	SOMALIA	KENYA	2011-11-07
88.	IMM-8270-11	AFGHANISTAN	PAKISTAN	2011-11-14
89.	IMM-8604-11	ERITREA	SOUTH AFRICA	2011-11-25
90.	IMM-8602-11	ERITREA	EGYPT	2011-11-25
91.	IMM-8719-11	AFGHANISTAN	TADJIKISTAN	2011-11-30
92.	IMM-8801-11	AFGHANISTAN	KYRGYSTAN	2011-12-01
93.	IMM-9101-11	SOMALIA	SOUTH AFRICA	2011-12-08
94.	IMM-9531-11	ERITREA	EGYPT	2011-12-20
95.	IMM-274-12	IRAN	TURKEY	2012-01-06
96.	IMM-1439-12	ERITREA	EGYPT	2012-01-10
97.	IMM-577-12	IRAN	PAKISTAN	2012-01-20
98.	IMM-610-12	LIBYA	MALTA	2012-01-20
99.	IMM-596-12	ERITREA	EGYPT	2012-01-20
100.	IMM-633-12	SOMALIA	KENYA	2012-01-23
101.	IMM-928-12	ERITREA	EGYPT	2012-01-31
102.	IMM-1446-12	AFGHANISTAN	PAKISTAN	2012-02-10
103.	IMM-1437-12	ERITREA	EGYPT	2012-02-10
104.	IMM-1654-12	ETHIOPIA	KENYA	2012-02-16
105.	IMM-1775-12	AFGHANISTAN	PAKISTAN	2012-02-20
106.	IMM-1852-12	ERITREA	SUDAN	2012-02-22
107.	IMM-1854-12	ERITREA	SUDAN	2012-02-22
108.	IMM-1904-12	AFGHANISTAN	PAKISTAN	2012-02-23
109.	IMM-1955-12	IRAN	TURKEY	2012-02-24
110.	IMM-1957-12	IRAN	TURKEY	2012-02-24
111.	IMM-2050-12	AFGHANISTAN	PAKISTAN	2012-02-28
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113.	IMM-2248-12	ERITREA	EGYPT	2012-03-06
114.	IMM-2368-12	AFGHANISTAN	TADJIKISTAN	2012-03-08
115.	IMM-2423-12	AFGHANISTAN	TADJIKISTAN	2012-03-12
116.	IMM-2842-12	SOMALIA	DIJIBOUTI	2012-03-23
117.	IMM-2921-12	AFGHANISTAN	PAKISTAN	2012-03-26
118.	IMM-3413-12	SOMALIA	ETHIOPIA	2012-04-10
119.	IMM-3505-12	AFGHANISTAN	PAKISTAN	2012-04-13
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122.	IMM-3729-12	AFGHANISTAN	PAKISTAN	2012-04-19
123.	IMM-3877-12	AFGHANISTAN	TADJIKISTAN	2012-04-24
124.	IMM-3988-12	AFGHANISTAN	PAKISTAN	2012-04-27
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128.	IMM-4254-12	SOMALIA	KENYA	2012-05-07
129.	IMM-4450-12	ETHIOPIA	UGANDA	2012-05-10
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133.	IMM-4855-12	ETHIOPIA	EGYPT	2012-05-18
134.	IMM-5094-12	ETHIOPIA	DIJIBOUTI	2012-05-28
135.	IMM-5097-12	ERITREA	SUDAN	2012-05-28
136.	IMM-5158-12	AFGHANISTAN	TADJIKISTAN	2012-05-29
137.	IMM-5725-12	SOMALIA	KENYA	2012-06-11
138.	IMM-5721-12	AFGHANISTAN	PAKISTAN	2012-06-11
139.	IMM-5801-12	AFGHANISTAN	PAKISTAN	2012-06-12

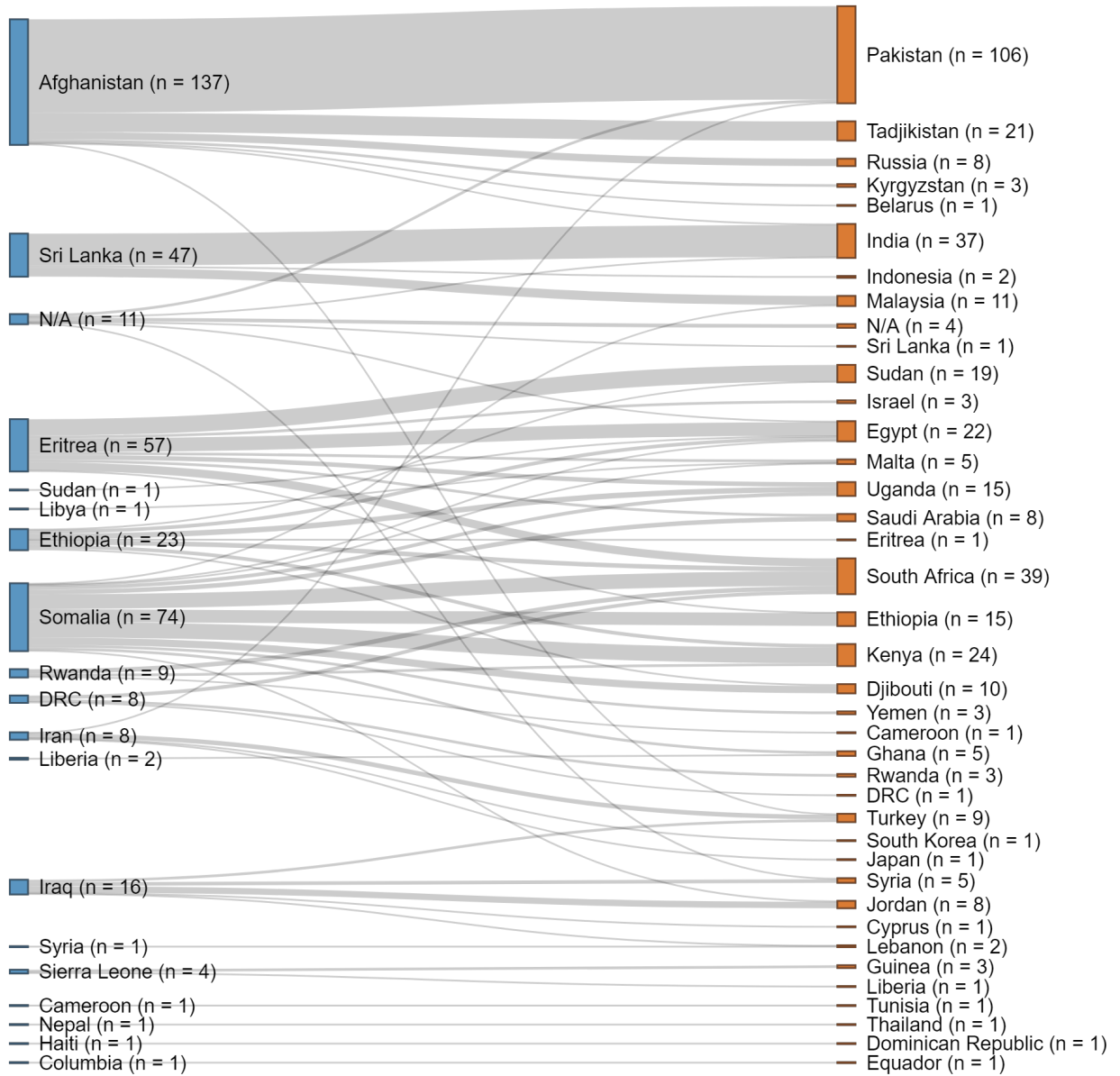
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142.	IMM-6201-12	ERITREA	EGYPT	2012-06-21
143.	IMM-6290-12	SRI LANKA	INDIA	2012-06-25
144.	IMM-6292-12	SRI LANKA	INDIA	2012-06-25
145.	IMM-6323-12	AFGHANISTAN	PAKISTAN	2012-06-26
146.	IMM-6400-12	DRC	RWANDA	2012-06-27
147.	IMM-6401-12	DRC	RWANDA	2012-06-27
148.	IMM-7521-12	ETHIOPIA	KENYA	2012-07-26
149.	IMM-7509-12	AFGHANISTAN	PAKISTAN	2012-07-26
150.	IMM-7641-12	ERITREA	UGANDA	2012-07-30
151.	IMM-7812-12	RWANDA	SOUTH AFRICA	2012-08-02
152.	IMM-7931-12	ERITREA	UGANDA	2012-08-07
153.	IMM-7933-12	ERITREA	UGANDA	2012-08-07
154.	IMM-8540-12	ETHIOPIA	EGYPT	2012-08-24
155.	IMM-8615-12	SRI LANKA	INDIA	2012-08-27
156.	IMM-9092-12	ETHIOPIA	UGANDA	2012-09-05
157.	IMM-9176-12	ERITREA	UGANDA	2012-09-07
158.	IMM-9177-12	ERITREA	UGANDA	2012-09-07
159.	IMM-9239-12	ERITREA	SOUTH AFRICA	2012-09-10
160.	IMM-9481-12	SRI LANKA	INDIA	2012-09-12
161.	IMM-9484-12	SRI LANKA	INDIA	2012-09-12
162.	IMM-9652-12	N/A	EGYPT	2012-09-18
163.	IMM-10409-12	SRI LANKA	INDIA	2012-10-09
164.	IMM-10471-12	AFGHANISTAN	PAKISTAN	2012-10-11
165.	IMM-10509-12	AFGHANISTAN	PAKISTAN	2012-10-11
166.	IMM-10748-12	AFGHANISTAN	PAKISTAN	2012-10-19
167.	IMM-11415-12	SOMALIA	KENYA	2012-11-07
168.	IMM-11416-12	AFGHANISTAN	PAKISTAN	2012-11-07
169.	IMM-11480-12	RWANDA	CAMEROON	2012-11-09
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171.	IMM-12346-12	SOMALIA	KENYA	2012-11-30
172.	IMM-12434-12	COLUMBIA	EQUADOR	2012-12-03
173.	IMM-12623-12	LIBERIA	GHANA	2012-12-10
174.	IMM-12748-12	ERITREA	SUDAN	2012-12-13
175.	IMM-12441-12	N/A	SYRIA	2012-12-14
176.	IMM-12975-12	AFGHANISTAN	PAKISTAN	2012-12-19
177.	IMM-96-13	SOMALIA	SOUTH AFRICA	2013-01-04
178.	IMM-122-13	SOMALIA	KENYA	2013-01-07
179.	IMM-404-13	ERITREA	EGYPT	2013-01-11
180.	IMM-463-13	DRC	DRC	2013-01-15
181.	IMM-617-13	SRI LANKA	INDIA	2013-01-23
182.	IMM-631-13	DRC	RWANDA	2013-01-23
183.	IMM-634-13	N/A	SRI LANKA	2013-01-23
184.	IMM-677-13	SRI LANKA	INDIA	2013-01-24
185.	IMM-675-13	AFGHANISTAN	PAKISTAN	2013-01-24
186.	IMM-966-13	IRAQ	SYRIA	2013-02-06
187.	IMM-1426-13	ERITREA	SUDAN	2013-02-22
188.	IMM-1513-13	CAMEROON	TUNISIA	2013-02-26
189.	IMM-1568-13	SRI LANKA	INDIA	2013-02-28
190.	IMM-1671-13	AFGHANISTAN	PAKISTAN	2013-03-04
191.	IMM-1792-13	IRAQ	SYRIA	2013-03-07
192.	IMM-1788-13	ERITREA	EGYPT	2013-03-07
193.	IMM-1926-13	IRAN	SOUTH KOREA	2013-03-13
194.	IMM-1928-13	AFGHANISTAN	PAKISTAN	2013-03-13
195.	IMM-1986-13	ETHIOPIA	UGANDA	2013-03-14
196.	IMM-1984-13	ETHIOPIA	UGANDA	2013-03-14
197.	IMM-2183-13	IRAQ	LEBANON	2013-03-22
198.	IMM-2716-13	SOMALIA	SAUDI ARABIA	2013-04-10
199.	IMM-2718-13	SOMALIA	SAUDI ARABIA	2013-04-10
200.	IMM-2719-13	SOMALIA	SAUDI ARABIA	2013-04-10
201.	IMM-2722-13	SOMALIA	SAUDI ARABIA	2013-04-10
202.	IMM-2777-13	N/A	N/A	2013-04-12
203.	IMM-3139-13	DRC	SOUTH AFRICA	2013-04-30
204.	IMM-3698-13	ERITREA	SUDAN	2013-05-27
205.	IMM-3863-13	ERITREA	SOUTH AFRICA	2013-06-04
206.	IMM-3934-13	DRC	SOUTH AFRICA	2013-06-07
207.	IMM-4307-13	SRI LANKA	MALAYSIA	2013-06-25
208.	IMM-4305-13	SOMALIA	DJIBOUTI	2013-06-25
209.	IMM-4378-13	SOMALIA	KENYA	2013-06-28
210.	IMM-4714-13	AFGHANISTAN	TADJIKISTAN	2013-07-15
211.	IMM-4948-13	ERITREA	SUDAN	2013-07-25

212.	IMM-5027-13	SRI LANKA	MALAYSIA	2013-07-29
213.	IMM-5077-13	SRI LANKA	INDIA	2013-07-31
214.	IMM-5233-13	AFGHANISTAN	TADJIKISTAN	2013-08-07
215.	IMM-5263-13	AFGHANISTAN	PAKISTAN	2013-08-08
216.	IMM-5302-13	SRI LANKA	MALAYSIA	2013-08-12
217.	IMM-5175-13	SRI LANKA	MALAYSIA	2013-08-16
218.	IMM-5532-13	ETHIOPIA	ERITREA	2013-08-21
219.	IMM-6046-13	N/A	INDIA	2013-09-19
220.	IMM-6276-13	AFGHANISTAN	TADJIKISTAN	2013-09-30
221.	IMM-6528-13	AFGHANISTAN	TADJIKISTAN	2013-10-09
222.	IMM-6740-13	AFGHANISTAN	PAKISTAN	2013-10-18
223.	IMM-6788-13	ERITREA	SOUTH AFRICA	2013-10-21
224.	IMM-6879-13	SRI LANKA	INDIA	2013-10-24
225.	IMM-6909-13	ERITREA	SOUTH AFRICA	2013-10-25
226.	IMM-6910-13	ERITREA	SOUTH AFRICA	2013-10-25
227.	IMM-7161-13	ERITREA	SOUTH AFRICA	2013-11-07
228.	IMM-7347-13	SOMALIA	SOUTH AFRICA	2013-11-18
229.	IMM-7348-13	SOMALIA	SOUTH AFRICA	2013-11-18
230.	IMM-7349-13	SOMALIA	SOUTH AFRICA	2013-11-18
231.	IMM-7350-13	SOMALIA	SOUTH AFRICA	2013-11-18
232.	IMM-7941-13	AFGHANISTAN	PAKISTAN	2013-12-12
233.	IMM-8072-13	SRI LANKA	MALAYSIA	2013-12-18
234.	IMM-8135-13	SRI LANKA	MALAYSIA	2013-12-19
235.	IMM-8245-13	ERITREA	SUDAN	2013-12-24
236.	IMM-60-14	SRI LANKA	INDIA	2014-01-06
237.	IMM-228-14	SRI LANKA	MALAYSIA	2014-01-13
238.	IMM-246-14	AFGHANISTAN	KYGYZSTAN	2014-01-13
239.	IMM-269-14	SRI LANKA	INDONESIA	2014-01-15
240.	IMM-740-14	AFGHANISTAN	PAKISTAN	2014-02-06
241.	IMM-783-14	SRI LANKA	INDIA	2014-02-10
242.	IMM-912-14	AFGHANISTAN	BELARUS	2014-02-14
243.	IMM-1307-14	SRI LANKA	INDIA	2014-03-03
244.	IMM-1455-14	AFGHANISTAN	TURKEY	2014-03-10
245.	IMM-1542-14	N/A	PAKISTAN	2014-03-12
246.	IMM-1634-14	SRI LANKA	INDIA	2014-03-17
247.	IMM-2110-14	SRI LANKA	INDIA	2014-03-31
248.	IMM-2821-14	AFGHANISTAN	KYGYZSTAN	2014-04-15
249.	IMM-2820-14	N/A	PAKISTAN	2014-04-15
250.	IMM-2890-14	AFGHANISTAN	RUSSIA	2014-04-17
251.	IMM-2895-14	AFGHANISTAN	PAKISTAN	2014-04-17
252.	IMM-3752-14	HAITI	DOMINICAN REPUBLIC	2014-05-07
253.	IMM-3906-14	AFGHANISTAN	TADJIKISTAN	2014-05-13
254.	IMM-3935-14	SRI LANKA	MALAYSIA	2014-05-15
255.	IMM-4049-14	SRI LANKA	INDIA	2014-05-21
256.	IMM-4250-14	AFGHANISTAN	TADJIKISTAN	2014-05-29
257.	IMM-4747-14	RWANDA	KENYA	2014-06-10
258.	IMM-5046-14	ERITREA	SUDAN	2014-06-25
259.	IMM-5100-14	SRI LANKA	MALAYSIA	2014-06-27
260.	IMM-5233-14	IRAN	TURKEY	2014-07-04
261.	IMM-5500-14	AFGHANISTAN	PAKISTAN	2014-07-16
262.	IMM-5595-14	N/A	PAKISTAN	2014-07-18
263.	IMM-5614-14	SRI LANKA	INDONESIA	2014-07-18
264.	IMM-5722-14	N/A	N/A	2014-07-24
265.	IMM-5765-14	SOMALIA	EGYPT	2014-07-25
266.	IMM-5839-14	AFGHANISTAN	PAKISTAN	2014-07-31
267.	IMM-5900-14	AFGHANISTAN	PAKISTAN	2014-08-01
268.	IMM-5902-14	AFGHANISTAN	PAKISTAN	2014-08-01
269.	IMM-5903-14	AFGHANISTAN	PAKISTAN	2014-08-01
270.	IMM-6075-14	AFGHANISTAN	PAKISTAN	2014-08-12
271.	IMM-6100-14	IRAN	JAPAN	2014-08-13
272.	IMM-6254-14	AFGHANISTAN	PAKISTAN	2014-08-22
273.	IMM-6393-14	SOMALIA	SOUTH AFRICA	2014-09-02
274.	IMM-6481-14	AFGHANISTAN	PAKISTAN	2014-09-05
275.	IMM-6623-14	AFGHANISTAN	PAKISTAN	2014-09-12
276.	IMM-6624-14	AFGHANISTAN	PAKISTAN	2014-09-12
277.	IMM-6677-14	AFGHANISTAN	RUSSIA	2014-09-16
278.	IMM-6678-14	AFGHANISTAN	PAKISTAN	2014-09-16
279.	IMM-6802-14	AFGHANISTAN	RUSSIA	2014-09-23
280.	IMM-6803-14	N/A	N/A	2014-09-23
281.	IMM-6917-14	ERITREA	SUDAN	2014-09-30
282.	IMM-7467-14	AFGHANISTAN	TADJIKISTAN	2014-10-31
283.	IMM-7501-14	AFGHANISTAN	PAKISTAN	2014-11-03

284.	IMM-7502-14	AFGHANISTAN	PAKISTAN	2014-11-04
285.	IMM-7655-14	AFGHANISTAN	PAKISTAN	2014-11-12
286.	IMM-7718-14	AFGHANISTAN	TADJIKISTAN	2014-11-17
287.	IMM-7734-14	SOMALIA	MALTA	2014-11-17
288.	IMM-7735-14	ERITREA	MALTA	2014-11-17
289.	IMM-7738-14	ERITREA	MALTA	2014-11-17
290.	IMM-7744-14	N/A	N/A	2014-11-17
291.	IMM-7745-14	AFGHANISTAN	TADJIKISTAN	2014-11-17
292.	IMM-7739-14	ERITREA	MALTA	2014-11-17
293.	IMM-7760-14	ERITREA	SUDAN	2014-11-18
294.	IMM-7828-14	ERITREA	ETHIOPIA	2014-11-20
295.	IMM-8297-14	AFGHANISTAN	PAKISTAN	2014-12-19
296.	IMM-8333-14	AFGHANISTAN	PAKISTAN	2014-12-19
297.	IMM-8334-14	ETHIOPIA	KENYA	2014-12-19
298.	IMM-226-15	RWANDA	KENYA	2015-01-15
299.	IMM-263-15	AFGHANISTAN	PAKISTAN	2015-01-20
300.	IMM-275-15	AFGHANISTAN	PAKISTAN	2015-01-20
301.	IMM-309-15	AFGHANISTAN	PAKISTAN	2015-01-22
302.	IMM-909-15	IRAQ	TURKEY	2015-02-24
303.	IMM-1095-15	ETHIOPIA	SOUTH AFRICA	2015-03-05
304.	IMM-1097-15	SOMALIA	SOUTH AFRICA	2015-03-05
305.	IMM-1096-15	SOMALIA	SOUTH AFRICA	2015-03-05
306.	IMM-1118-15	SOMALIA	KENYA	2015-03-06
307.	IMM-1126-15	AFGHANISTAN	RUSSIA	2015-03-06
308.	IMM-1124-15	AFGHANISTAN	RUSSIA	2015-03-06
309.	IMM-1201-15	AFGHANISTAN	PAKISTAN	2015-03-11
310.	IMM-1221-15	IRAQ	JORDAN	2015-03-12
311.	IMM-1222-15	IRAQ	JORDAN	2015-03-12
312.	IMM-1213-15	AFGHANISTAN	PAKISTAN	2015-03-12
313.	IMM-1223-15	IRAQ	JORDAN	2015-03-12
314.	IMM-1265-15	IRAQ	JORDAN	2015-03-16
315.	IMM-1264-15	IRAQ	JORDAN	2015-03-16
316.	IMM-1476-15	AFGHANISTAN	RUSSIA	2015-03-26
317.	IMM-1557-15	SOMALIA	KENYA	2015-03-31
318.	IMM-1671-15	AFGHANISTAN	PAKISTAN	2015-04-09
319.	IMM-1866-15	AFGHANISTAN	RUSSIA	2015-04-22
320.	IMM-1955-15	AFGHANISTAN	PAKISTAN	2015-04-27
321.	IMM-2013-15	AFGHANISTAN	PAKISTAN	2015-04-30
322.	IMM-2066-15	ETHIOPIA	SOUTH AFRICA	2015-05-04
323.	IMM-2119-15	SOMALIA	SOUTH AFRICA	2015-05-06
324.	IMM-2136-15	AFGHANISTAN	PAKISTAN	2015-05-07
325.	IMM-2158-15	AFGHANISTAN	PAKISTAN	2015-05-08
326.	IMM-2188-15	AFGHANISTAN	PAKISTAN	2015-05-11
327.	IMM-2249-15	IRAQ	JORDAN	2015-05-14
328.	IMM-2266-15	AFGHANISTAN	PAKISTAN	2015-05-15
329.	IMM-2342-15	ETHIOPIA	SOUTH AFRICA	2015-05-20
330.	IMM-2402-15	SOMALIA	ETHIOPIA	2015-05-22
331.	IMM-2531-15	ERITREA	ISRAEL	2015-05-29
332.	IMM-2614-15	AFGHANISTAN	PAKISTAN	2015-06-04
333.	IMM-2611-15	AFGHANISTAN	PAKISTAN	2015-06-04
334.	IMM-2613-15	AFGHANISTAN	PAKISTAN	2015-06-04
335.	IMM-2612-15	AFGHANISTAN	PAKISTAN	2015-06-04
336.	IMM-2646-15	SOMALIA	SOUTH AFRICA	2015-06-05
337.	IMM-2807-15	AFGHANISTAN	PAKISTAN	2015-06-16
338.	IMM-2805-15	AFGHANISTAN	PAKISTAN	2015-06-16
339.	IMM-2799-15	AFGHANISTAN	PAKISTAN	2015-06-16
340.	IMM-2893-15	SOMALIA	MALAYSIA	2015-06-19
341.	IMM-3043-15	SOMALIA	SOUTH AFRICA	2015-06-30
342.	IMM-3212-15	ERITREA	SAUDI ARABIA	2015-07-13
343.	IMM-3211-15	ERITREA	SAUDI ARABIA	2015-07-13
344.	IMM-3213-15	ERITREA	SAUDI ARABIA	2015-07-13
345.	IMM-3215-15	AFGHANISTAN	PAKISTAN	2015-07-13
346.	IMM-3210-15	ERITREA	SUDAN	2015-07-13
347.	IMM-3272-15	ERITREA	ISRAEL	2015-07-16
348.	IMM-3315-15	SOMALIA	ETHIOPIA	2015-07-20
349.	IMM-3314-15	SOMALIA	ETHIOPIA	2015-07-20
350.	IMM-3370-15	IRAQ	CYPRUS	2015-07-22
351.	IMM-3406-15	SOMALIA	ETHIOPIA	2015-07-24
352.	IMM-3409-15	SOMALIA	DJIBOUTI	2015-07-24
353.	IMM-3410-15	SOMALIA	DJIBOUTI	2015-07-24
354.	IMM-3412-15	SOMALIA	DJIBOUTI	2015-07-24
355.	IMM-3407-15	SOMALIA	ETHIOPIA	2015-07-24

356.	IMM-3411-15	SOMALIA	ETHIOPIA	2015-07-24
357.	IMM-3396-15	AFGHANISTAN	PAKISTAN	2015-07-24
358.	IMM-3439-15	ETHIOPIA	SOUTH AFRICA	2015-07-27
359.	IMM-3454-15	SOMALIA	ETHIOPIA	2015-07-28
360.	IMM-3462-15	SOMALIA	JORDAN	2015-07-28
361.	IMM-3468-15	IRAQ	TURKEY	2015-07-28
362.	IMM-3469-15	IRAQ	TURKEY	2015-07-28
363.	IMM-3458-15	SOMALIA	SOUTH AFRICA	2015-07-28
364.	IMM-3456-15	SOMALIA	SOUTH AFRICA	2015-07-28
365.	IMM-3595-15	AFGHANISTAN	PAKISTAN	2015-08-06
366.	IMM-3695-15	AFGHANISTAN	PAKISTAN	2015-08-12
367.	IMM-3721-15	SOMALIA	ETHIOPIA	2015-08-13
368.	IMM-3722-15	ERITREA/ETHIOPIA	SOUTH AFRICA	2015-08-13
369.	IMM-3756-15	AFGHANISTAN	PAKISTAN	2015-08-17
370.	IMM-3762-15	AFGHANISTAN	PAKISTAN	2015-08-17
371.	IMM-3924-15	SYRIA	LEBANON	2015-08-27
372.	IMM-3933-15	RWANDA	SOUTH AFRICA	2015-08-27
373.	IMM-3934-15	RWANDA	SOUTH AFRICA	2015-08-27
374.	IMM-3964-15	RWANDA	SOUTH AFRICA	2015-08-31
375.	IMM-3963-15	DRC	SOUTH AFRICA	2015-08-31
376.	IMM-3972-15	AFGHANISTAN	PAKISTAN	2015-08-31
377.	IMM-3962-15	DRC	SOUTH AFRICA	2015-08-31
378.	IMM-4010-15	AFGHANISTAN	PAKISTAN	2015-09-02
379.	IMM-4154-15	AFGHANISTAN	PAKISTAN	2015-09-14
380.	IMM-4297-15	IRAQ	JORDAN	2015-09-21
381.	IMM-4354-15	AFGHANISTAN	PAKISTAN	2015-09-24
382.	IMM-4400-15	AFGHANISTAN	PAKISTAN	2015-09-29
383.	IMM-4782-15	AFGHANISTAN	PAKISTAN	2015-10-26
384.	IMM-4804-15	SOMALIA	SAUDI ARABIA	2015-10-27
385.	IMM-4881-15	SOMALIA	GHANA	2015-10-30
386.	IMM-4927-15	SOMALIA	SOUTH AFRICA	2015-11-03
387.	IMM-4953-15	AFGHANISTAN	PAKISTAN	2015-11-05
388.	IMM-5037-15	AFGHANISTAN	PAKISTAN	2015-11-10
389.	IMM-5108-15	SOMALIA	GHANA	2015-11-13
390.	IMM-5107-15	SOMALIA	GHANA	2015-11-13
391.	IMM-5087-15	AFGHANISTAN	PAKISTAN	2015-11-23
392.	IMM-5248-15	AFGHANISTAN	PAKISTAN	2015-11-23
393.	IMM-5343-15	NEPAL	THAILAND	2015-11-27
394.	IMM-5360-15	SOMALIA	SOUTH AFRICA	2015-11-30
395.	IMM-5349-15	AFGHANISTAN	PAKISTAN	2015-11-30
396.	IMM-5468-15	AFGHANISTAN	PAKISTAN	2015-12-07
397.	IMM-5557-15	ERITREA	ISRAEL	2015-12-11
398.	IMM-5655-15	AFGHANISTAN	PAKISTAN	2015-12-17
399.	IMM-5656-15	AFGHANISTAN	RUSSIA	2015-12-17
400.	IMM-5732-15	AFGHANISTAN	PAKISTAN	2015-12-21
401.	IMM-5794-15	AFGHANISTAN	PAKISTAN	2015-12-23
402.	IMM-5820-15	AFGHANISTAN	PAKISTAN	2015-12-23
403.	IMM-5810-15	ERITREA	SOUTH AFRICA	2015-12-23

APPENDIX B - Flight Paths



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