

Investigating deception findings in Canadian refugee status rejections: legal inferences and psychological assumptions

Hilary Evans Cameron^a, Jane Herlihy^b and Michaela Hynie^c

^aLincoln Alexander School of Law, Toronto Metropolitan University, Toronto, Canada; ^bUniversity College London, London, UK and Centre for the Study of Emotion & Law, Royal Holloway, University of London, Egham, UK; ^cDepartment of Psychology and Centre for Refugee Studies, York University, Toronto, Canada

This study uses a novel methodology that combines legal and psychological approaches to analyse a large set of Canadian refugee status rejections (n = 120). It distinguishes legal inferences from their underlying psychological assumptions and quantifies both inferences and assumptions in a set of 89 written decisions. Its findings yield new insights that inform the use of social science in the evaluation of deception findings in this field: it identifies the most important categories of legal inference that support these findings (inferences drawn from observations of ‘inconsistency’, ‘non-probative supporting evidence’ and ‘risk response’), and it is the first study to identify the most significant kinds of assumption that underlie the finding that a refugee claimant is lying. These include assumptions that have been observed in previous studies: assumptions about *the consistency of truthful and deceptive accounts* and about *how people act when they are at risk*. Perhaps most importantly, this study has identified a new and significant category of psychological assumption operating in these decisions: assumptions about the robustness of a claimant’s metacognition, their ability to understand and explain their own cognitive processes.

Keywords: assumption; credibility; deception; decision-making; inference; metacognition; refugee.

Introduction

Denying protection to a refugee claimant is one of the most consequential decisions that a legal system can make. Credibility assessment lies at the heart

of this process.¹ In Canada, most denials of refugee status hinge on an adjudicator's finding that the claimant is lying.²

How often do these judgements rest on unreliable assumptions about how to spot deception? This question has long troubled scholars and advocates. Credibility assessment is uncertain at the best of times – many widely held notions about how to spot deception are demonstrably untrustworthy³ – and credibility assessment in refugee claims is exceptionally uncertain. The mechanics of fact-finding in refugee status decision making vary widely from jurisdiction to jurisdiction, as do approaches to judging a claimant's truthfulness. But across the globe, refugee status decision makers must often draw their conclusions based solely on their impression of a claimant's testimony, as there are typically no witnesses and few, if any, supporting documents. As a result, there is ample opportunity for confusion and misunderstanding, especially when decision makers assess claimants from a different culture; with a different gender identity or sexual orientation; who are suffering the after effects of trauma; and/or who are using an interpreter.

Since mistaken deception findings not only put the claimant's safety at risk, but do so in a way that 'adds the worst kind of insult to the worst kind of injury',⁴ many have looked carefully at how credibility assessment operates in the refugee law context.⁵ In particular, from within their respective fields, scholars in psychology and in law have drawn on social scientific evidence to evaluate the reasons that refugee status decision makers give to support their deception findings⁶ – reasons that often look quite similar across national jurisdictions, as discussed below, especially in the Canadian, Australian and British common law systems. A recurring theme in this literature is the pressing need for refugee law systems internationally to work together with social scientists 'to build an evidence base in order to help inform the decision making process in this crucial area of law'.⁷

Conceptual framework

In many fields of inquiry, investigation leads to a discovery. In a legal setting, investigation leads to a prediction. When decision makers decide, based on the evidence before them, which allegations they will accept and which they will reject,⁸ they are predicting: 'filling in missing information' using their observations.⁹ 'Prediction takes information you have ... and uses it to generate information you don't have'.¹⁰ In law, these kinds of predictions are called

findings of fact. This predictive fact-finding process invariably requires legal decision makers to draw inferences that rest on assumptions.

To draw an *inference* is to decide that a conclusion follows from an observation. When a decision maker notes something in the evidence that leads them to make a finding (ie prediction), the ‘inference’ is the reasoning process itself: it is the arrow that links this observation to this conclusion. Assumptions are ideas about the world that we accept as reliable without requiring proof.¹¹ Assumptions are often what allow us to draw inferences. They explain why an observation leads to a conclusion.

Many people assume that a true story will remain consistent over repeated retellings.¹² Even if we do not believe that this assumption is always reliable, if we accept that it is sufficiently reliable, we may draw an inference that derives its cogency from this assumption’s explanatory power: we may conclude from inconsistencies in a story, for example, that the story is fabricated. This idea about the world is ‘the basis for believing that inconsistencies suggest lying’.¹³

Over a decade ago, a team of psychologists in the United Kingdom developed a systematic data-driven methodology for examining the assumptions about human psychology – assumptions about people’s ‘behaviour, intentions or motivations’¹⁴ – that underlie the reasoning in refugee status decisions.¹⁵ This methodology was used subsequently in two further studies, in Australia and in Finland, where the methodology was further developed and the assumption categories further refined.¹⁶ Similar assumptions were identified in all three studies. Scholars working at the intersection of psychology and refugee law have noted that many of these assumptions run counter to the relevant body of social scientific evidence, as well as to the body of legal guidance that draws on this evidence in advising decision makers.¹⁷

This body of research has identified cause for serious concern. Yet the scope of the problem is unclear. What role do these unreliable assumptions play in refugee status rejections? The three previous assumption studies analysed relatively small sets of decisions (Herlihy et al. 20 cases; Dowd et al. 50 cases; Skrifvars et al. 56 cases); only one quantified how often the decision makers relied on the assumptions in question (Skrifvars et al); and while one study screened the assumptions for relevance – ‘To qualify as an assumption the observation must have influenced the Tribunal member’s reasoning’ – none

sought to establish how important these assumptions were to the decision makers' conclusions.¹⁸

At the same time, two recent studies in the legal field have considered how decision makers use inferences in supporting their deception findings. Since Canadian adjudicators must identify in their written decisions the factors that led them to disbelieve a refugee claimant's testimony, these studies used a quantitative methodology to investigate, in a larger data set ($n = 259$), how often adjudicators relied on particular categories of inference in finding that claimants were lying.¹⁹ However, these studies did not catalogue the full range of inferences that the adjudicators relied on, did not measure the significance of the target inferences to the adjudicators' conclusions and did not attempt to identify the assumptions that underlie them.

The present study is the first to differentiate between (legal) inferences and (psychological) assumptions, an important analytical distinction,²⁰ and to explore how these interrelate. It is also the first to capture more precisely the legal effect of the decision makers' assumptions: it determines, in a large set of Canadian refugee status rejections, what kinds of assumption underlie the inferences that most often lend the greatest legal support to adjudicators' deception findings. By answering Herlihy et al.'s call for further investigation 'to identify which are the most important – that is, frequent and crucial – of these assumptions',²¹ this study sets the groundwork for the next phase in the process of bringing refugee law into conversation with social science: determining 'which of these key assumptions can be said to be well-founded, that is, consistent with empirical findings, and which not'.²²

Unlike the previous assumption studies, this study investigates deception findings specifically. This selective focus is grounded in normative legal theory:

Simply put, for reasons arising out of its obligations under the Refugee Convention, a refugee status determination system ought to be more concerned with avoiding mistaken rejections than with avoiding mistaken grants. Moreover, the Canadian Federal Court of Appeal has established that it is a worse mistake to disbelieve a truthful claimant than to believe a liar (*Maldonado v Canada (Minister of Employment and Immigration)* [1980] 2 FC 302). There is therefore both a legal and an ethical obligation to submit the refugee system's rejection mechanisms to careful scrutiny.²³

Of note, this study explores the inferences and assumptions that appear in the written decisions of Canadian refugee status adjudicators. It does not investigate how adjudicators actually reason or what they subjectively believe. Under Canadian law, quasi-judicial administrative decision makers are required to support their findings with reasonable reasons.²⁴ To meet this requirement, an adjudicator could in theory use an inference strategically, either consciously or not, because it is a convenient way to support a conclusion that they have reached for other reasons.²⁵ When this study affirms that an adjudicator relied on an inference in supporting their conclusion, it does not affirm that they in fact relied on this inference in reaching their conclusion. Likewise, when this study affirms that an assumption underlies an inference that the adjudicator drew, it does not affirm that the adjudicator actually believed that this idea about the world was a sufficiently reliable basis for the conclusion. It rather means that a person could not sincerely and cogently draw this inference unless they did.

The research questions

To determine which were the most important kinds of assumption underlying the deception findings in the decisions under review, this study looked to answer the following questions:

- a. In what proportion of the decisions in this set did the adjudicators make deception findings?
- b. Which categories of inference are most prevalent in the subset of decisions that contain deception findings?
- c. Which categories of inference provided the most significant support to the deception findings in the decisions in which they appear?
- d. Which categories of inference are most important (most prevalent and most significant) in the subset of decisions that contain deception findings?
- e. Which categories of assumption are most prevalent in the subset of decisions that contain deception findings?
- f. Which categories of assumption are the most important, i.e. most often correlate with the most important categories of inference in the subset of decisions that contain deception findings?

Materials and methods

Data set

This study analysed a set of 120 rejections made between January and December of 2019 by adjudicators at the Refugee Protection Division of the Canadian Immigration and Refugee Board.²⁶

At the start of this project, the research team requested a set of 350 randomly selected decisions to reject a claim issued by the Board in 2019. We had received 150 of these decisions by the time we were due to begin the study. Of these, we randomly selected 30 which the coders double coded to allow us to measure their interrater reliability. These double-coded decisions were not included in the study data.

The decisions in the study data represented the work of 78 adjudicators, each of whom wrote an average of 1.5 decisions (the median number of decisions per adjudicator was 1).

Although the decisions for this study were collected through nonprobability sampling,²⁷ and are therefore not a random sample in the statistical sense, the distribution of relevant variables is largely in keeping with the profile of the Board's decision making in the most recent years for which the comparator information is publicly available. The decision set analysed had the following features.

- Of the 120 decisions in the study data, 38% (45/120) were made by adjudicators at the Board's Montreal office, 42% (50/120) by adjudicators at the Toronto office and 21% (25/120) by adjudicators at the Vancouver office. Of all rejections made by the Board in 2019, the most recent year for which this information is available, 42% (2666/6330) were made by adjudicators at the Montreal office, 45% (2838/6330) by adjudicators at the Toronto office and 13% by adjudicators at the Vancouver office (826/6330).
- In the 120 decisions in the study data, the Board rejected the claims of citizens of 37 countries. In 2022, the most recent year for which the comparator information is available, the Board rejected 12,537 claims from citizens of 63 countries.²⁸
- The claimant or claimants in the study data were represented (by a lawyer, a consultant or a community member) in 90% of cases (108/120); in 2019, the most recent year for which this information is

available, the claimant or claimants were represented in 94% of the Board's rejections (5980/6330).²⁹

- 57% of the decisions in this set (68/120) were for a single claimant, the remaining 43% (52/120) for a pair of claimants or a family. In 2019, the most recent year for which this information is available, 58% (3702/6330) of the Board's decisions to reject a claim were for a single claimant, and 42% (2628/6330) were for a pair of claimants or a family.³⁰
- Although these factors were not quantified in this study, and the comparator information is not captured in the Board's statistics, the claimants in this sample identified as their agents of persecution a wide range of state and nonstate actors and made claims based on a large spectrum of grounds recognised under Canadian law as giving rise to a claim to refugee protection.

Of note, the genders of the claimants in the cases under review were not recorded. This is discussed further in the Limitations section, below.

Procedure

An interdisciplinary team of nine coders conducted this study's analysis: three upper-year law students, three refugee lawyers and three graduate students in psychology. The analysis proceeded in three stages.

Stage 1 – inferences: prevalence

To establish which inferences were most prevalent in the decisions in which the adjudicators made deception findings, this study used a coding methodology employed by Evans Cameron in two previous studies.³¹

As in the previous studies, the codes for this study built on an initial set of codes that Evans Cameron developed in an earlier pilot study.³² In that pilot study, she had analysed a different set of the Board's rejections ($n = 200$) and developed a set of codes that drew on: deception inferences recognised in Canadian law (e.g. inconsistencies, omissions, implausibility); inferences reported in the Board's decisions reviewed by the Federal Court; and others that Evans Cameron encountered in her clients' cases during 10 years in practice. As she read the 200 cases, she refined the initial codes. As new categories and subcategories of inference emerged, she recoded the decisions that she had previously coded, following an iterative process until she found no new categories of inference in

the decisions. This work ultimately yielded a set of 53 codes and sub-codes. For the present study, to simplify the coding while maintaining the most important conceptual categories, the researchers identified a number of overly granular codes and sub-codes that capture distinctions that were not meaningful and combined these into higher-order codes, resulting in the 25 codes and sub-codes set out below.³³

The coders in this study, three upper-year law students, analysed each decision in the set and first determined whether the adjudicator had made a finding of deception, defined as follows:

The member [adjudicator] concludes that the claimant has invented some or all of their allegations with the intention of deceiving the Board. This includes overall findings that the claim was manifestly unfounded and that it had no credible basis, and it also includes findings that the claimant was generally credible but lied on discrete occasions.

Tallying the number of decisions coded at this code (A1) answers *our first research question*: in what proportion of the decisions in this set did the adjudicators make deception findings?

The coders then analysed each decision in the subset of cases in which the adjudicator had made a finding of deception. Since the remainder of this study's analysis considers the decisions in this subset, in the sections below, 'the decisions under review' refers to this subset of decisions in which the adjudicator made a deception finding. As in the previous studies that used this inference coding methodology, the researchers would have removed from the set of decisions under review any decisions in which the adjudicator made an exclusion or identity finding that ended their analysis.³⁴ In this data set, however, there were no such findings. In all decisions in which the adjudicator made a deception finding, they concluded that the claimant was lying about some aspect of the risk that they faced.

For each of the decisions under review, the coders identified whether the adjudicator had relied on any of the following categories and subcategories of legal inference. Although an inference, as noted above, is most properly thought of as the link between an observation and a conclusion, for ease of reference, this study names its inference categories according to the observation from which the adjudicator is inferring deception. For example, the inference category

A2 ('inconsistency') captures inferences that the adjudicator draws from observed inconsistencies. The categories were as follows:

A2 Inconsistency

A2-1 Between two claimant statements

A2-2 Between claimant and other participant statements

A3 Lack of appropriate knowledge

A4 Lack of diligence A5 Lack of supporting evidence

A6 Manner, general quality or texture of testimony

A6-1 Hesitancy

A6-2 Lack of detail

A6-3 Lack of spontaneity A6-4 Vagueness and/or evasiveness

A6-5 Other suspicious behaviour or mannerisms

A7 Non-probative supporting evidence

A7-1 Non-probative supporting documents A7-2 Non-probative supporting witness testimony

A8 Previous deception A9 Promise, oath or affirmation

A10 Risk response

A10-1 Delay in claiming A10-2 Delay in leaving

A10-3 Failure to claim

A10-4 Reavailment A10-5 Other implausibly risky behaviour

A11 Otherwise illogical or unlikely

A12 Other

This coding captured whether the adjudicator relied on a particular category of inference within a single decision, not the number of times that they relied on it. Since the adjudicators differ in how often they repeat themselves in their reasons and in how often they use a mix of general and specific statements (e.g. they identify particular inconsistencies, but also refer to the problem of 'inconsistencies' more broadly), differences in the number of references to a particular inference category were not meaningful. Ranking the inference categories and subcategories according to how often they appear in the decisions under review answers our *second research question*: the most prevalent inferences categories are those that appear most often in the decisions in which the adjudicators draw deception findings.

Stage 2 – inferences: significance

When adjudicators rely on a certain kind of inference to support their deception findings, how much of a difference does it make? How much stronger is their conclusion as a result?

To develop a coding methodology that would capture the significance of the inference categories in these decisions, a team of three refugee lawyer coders drew on their collective experience representing refugee claimants in applications for judicial review. These coders had between three and five years of experience asking Federal Court judges to overturn refugee status rejections on the basis that the adjudicator's deception finding was not legally supported. By asking themselves how much easier that task would be, in any given case, without the inference category in question, they weighed the support that that category was bringing to the adjudicator's deception finding. The more the claimant's argument would be strengthened if the portion of the reasons relying on that inference were taken away, the more legal support that inference category was providing to the adjudicator's conclusion.

For each of the decisions under review, these coders coded each category of inference at one of the following three codes that they developed in conjunction with the researchers:

Z1 Sufficient

This category of inference alone would arguably be sufficient to ground the member's negative credibility conclusion.

Z2 Significant but not sufficient

This code captures all categories of inference that are not captured by either of the other two codes.

Z3 Insignificant

This category of inference lends at most minimal support to the member's negative credibility conclusion. If you removed it from the decision, the negative credibility conclusion would be, at most, somewhat weaker.

In making their determinations, the coders were guided by the following non-exhaustive list of considerations:

- Scope: how much of the member's reasoning around credibility involves this category of inference? In other words, how much of the relevant text related to credibility in the decision overall is taken up with this category?

- Centrality of the subject matter: the centrality/importance of the substance of the alleged lie, as distinct from the strength (reasonableness) of the deception inference drawn from it. For example, the member might identify convincing reasons for concluding that the claimant lied about a minor or peripheral matter, or unconvincing reasons for concluding that the claimant lied about a central matter. What may be relevant here is how central/important the alleged deception under discussion is, rather than how reasonable or persuasive the finding is.
- Breadth of the subject matter: whether the inferences in the category all relate to a single incident or observation, or whether the member has identified a number of incidents or observations from which they draw the inferences. As above, the member might identify convincing reasons for concluding that the claimant lied about one thing or on one occasion, or unconvincing reasons for concluding that the claimant lied about many things or on many occasions. What may be relevant here is how broad the support for the finding is, rather than how reasonable or persuasive the finding is.
- Position: where in the decision does this category of inference appear? Is much/ all of the relevant text upfront at the beginning? Is much/all of it tacked on at the end? The norm in legal drafting is to write ‘point first’, to put the most important information upfront.³⁵ In this context, information that appears for the first time in a document’s concluding remarks may read as an afterthought.
- Language: does the text itself emphasise or de-emphasise an inference? For example:
 - emphasising: ‘the panel was struck hard by’, ‘the panel found very significant the fact that’.
 - de-emphasising: ‘while it did not play a major role in the panel’s decision’, ‘it is also worth noting that’, ‘the panel also observed that’.

The coders found that this metric could only be meaningfully applied to the inference categories rather than to the subcategories. Moreover, in developing this coding, we recognised that this approach would only enable us to see broadly how often a category was irrelevant (Z3); how often it mattered *at all* (Z2); and how often it mattered *as much as possible* (Z1). To understand which categories were most significant, however, what we ultimately wanted to know

was how often a category mattered *a lot*. By taking an average of Z1 and Z2 factors, we were able to obtain a weighted score of importance; the more frequently a category was deemed to be sufficient, rather than merely significant, the higher the averaged score. This provides an estimate of the relative importance. (For transparency, the Z1 and Z2 coding results are provided separately in [Table 3](#)). There is, of course, no analytical space between ‘insignificant’ and ‘significant’, and ‘sufficient’ is a ceiling; but between ‘significant’ and ‘sufficient’ is a notional mid-way point. We took that mid-way point as a measure of support that is ‘very significant’. For each category of inference, we averaged the number of decisions where the inference provided ‘sufficient’ support and the number of decisions where it provided support that was ‘significant but not sufficient’. In our analysis, the resulting figure, expressed as a proportion of the decisions in which this inference appears, represents how often, on average, this inference provided ‘very significant’ support to the deception findings in the decisions in which it operates.

Ranking the inference categories according to how often they are ‘very significant’ in the decisions in which they operate answers our *third research question*: the most significant categories of inference are those that are most often ‘very significant’.

The product of the two proportions captured above (prevalence and significance), ranked by inference category, provides the answer to our fourth research question: the most ‘important’ inference categories are those with the highest combined measures of prevalence and significance.³⁶

Table 1. Inference category prevalence within deception findings, ranked (metrics categories omitted).

	Number of decisions	Proportion of all decisions with deception findings (A1: $N = 89$)
A2 Inconsistency	78	0.88
A2-1 Between two claimant statements	67	0.75
A7 Non-probative supporting evidence	60	0.67
A7-1 Non-probative supporting documents	55	0.62
A2-2 Between claimant statement and other participant statement	49	0.55
A11 Otherwise illogical or unlikely	35	0.39
A5 Lack of supporting evidence	34	0.38
A10 Risk response	34	0.38
A8 Previous deception	33	0.37
A6 Manner, general quality or texture of testimony	25	0.28
A3 Lack of appropriate knowledge	18	0.20
A10-3 Failure to claim	18	0.20
A6-4 Vagueness and/or evasiveness	17	0.19
A10-4 Reavailment	16	0.18
A6-2 Lack of detail	14	0.16
A10-2 Delay in leaving	12	0.13
A9 Promise, oath or affirmation	11	0.12
A4 Lack of diligence	10	0.11
A6-3 Lack of spontaneity	8	0.09
A10-5 Other implausibly risky conduct	8	0.09
A7-2 Non-probative supporting witness testimony	5	0.06
A6-1 Hesitancy	3	0.03
A10-1 Delay in claiming	3	0.03
A6-5 Other suspicious behaviour or mannerisms	2	0.02
A12 Other	2	0.02

Table 2. Inference category support rating.

	Z1 Sufficient	Z2 Significant but not sufficient	Z3 Insignificant
	Proportion of decisions	Proportion of decisions in	Proportion of decisions in
Number of	Number of in inference	Number of inference	Number of inference

	decisions in inference category	decisions coded at Z1	category coded at Z1	decisions coded at Z2	category coded at Z2	decisions coded at Z3	category coded at Z3
A2	78	32	0.41	44	0.56	2	0.03
A3	18	1	0.06	9	0.50	8	0.44
A4	10	1	0.10	6	0.60	3	0.30
A5	34	2	0.06	20	0.59	12	0.35
A6	25	2	0.08	18	0.72	5	0.20
A7	60	4	0.07	38	0.63	18	0.30
A8	33	1	0.03	16	0.48	16	0.48
A9	11	1	0.09	4	0.36	6	0.55
A10	34	6	0.18	24	0.71	4	0.12
A11	34*	3	0.09	23	0.68	8	0.24
A12	1*	0	0.00	0	0.00	1	1.00

*Owing to coder error, this inference category appeared in the dataset in one more decision than is reflected here. One decision in which this inference appeared was omitted from this support coding analysis.

Table 3. Very significant support, ranked.

	Number of decisions in inference category	Number of decisions coded at Z1	Number of decisions coded at Z2	Average of Z1 and Z2: very significant	Proportion of decisions in inference code: very significant
A2 Inconsistency	78	32	44	38	0.49
A10 Risk response	34	6	24	15	0.44
A6 Manner, general quality, texture	25	2	18	10	0.40
A11* Otherwise illogical/ unlikely	34	3	23	13	0.38
A4 Lack of diligence	10	1	6	3.5	0.35
A7 Non-probative supporting evidence	60	4	38	21	0.35
A5 Lack of supporting evidence	34	2	20	11	0.32
A3 Lack of appropriate knowledge	18	1	9	5	0.28
A8 Previous deception	33	1	16	8.5	0.26
A9 Promise, oath or affirmation	11	1	4	2.5	0.23
A12* Other	1	0	0	0	0.00

*Owing to coder error, this inference category appeared in the dataset in one more decision than is reflected here. One decision in which this inference appeared was omitted from this support coding analysis.

Stage 3 – assumptions coding

Three graduate students in psychology coded the decisions under review for the assumptions that underlie the adjudicators' reasoning. In developing the coding matrix, the research team took as their point of departure the assumption categories used in the previous assumption studies. The team modified these categories to reflect our understanding of the difference between an inference and an assumption: we selected those categories that reflected an idea, or a collection of ideas, about human 'behaviour, intentions or motivations' that provide a reason for a deception inference.³⁷

As with the inference categories, and for the same reasons, this coding captured whether the adjudicator relied on a particular assumption category within a single decision, not the number of times that they relied on it.

As in the previous studies, these assumption categories were divided into three notional groups.³⁸ The first ('NOW') contains assumptions that underlie inferences that the adjudicator draws from an observation about how claimants presented their account of persecution:

P1 Demeanour

P1-1 Appearance/behaviour

P1-2 Manner of speech P1-3 Expression of emotion

P2 Consistency

P2-1 Internal consistency P2-2 External consistency

P3 Detail/specificity P4 Disclosure of sensitive information

P5 Lying in one place means lying elsewhere P6 Now – other

The second ('HERE') contains assumptions that underlie inferences that the adjudicator draws from an observation 'about the behaviour or knowledge or motivation of people in the course of living in Canada and making an asylum claim':

P7 Delay/disclosure

P7-1 Late disclosure

P7-2 Timing of asylum application P8 How people behave (claimant)

P8-1 How 'intelligent people' behave P8-2 People's behaviour claiming asylum

P9 How people behave (family/friends) P10 How people behave (others e.g. professionals)

P11 Knowledge or understanding

P11-1 Assumptions about knowledge in general
P11-2 People know what is important for a claim
P11-3 Other assumptions about what people know about claiming asylum
P11-4 Other assumptions about what people know
P11-5 People can explain their memory processes/motivations/behaviours
P12 Here – other

The third group ('THERE') contains assumptions that underlie inferences that the adjudicator draws from an observation 'about the behaviour or knowledge or motivation of people in their country of origin'.

P13 Judging others' behaviour based on self
P14 How people behave (claimant) P14-1 Rationally and consistently
P14-2 Other assumptions about how people behave in danger
P14-3 Other assumptions about how people behave in their country of origin
P15 How people behave (family/friends) P15-1 Rationally and consistently
P15-2 Other assumptions about how families/ friends behave in danger
P15-3 Other assumptions about how families/ friends behave in their country of origin
P16 How people behave (others)
P16-1 Rationally and consistently
P16-2 Assumptions about how persecutors behave
P16-3 Other assumptions about how people behave in danger
P16-4 Other assumptions about people in authority
P17 Knowledge of matters in the country of origin
P17-1 Knowledge of the geography of their country of origin.
P17-2 Other assumptions about what people know in their country of origin
P18 There – other

Ranking the assumption categories according to how often they appear in the decision under review answers our fifth research question: the most prevalent categories of assumption are those that appear most often in the decisions in which the adjudicators made deception findings.

Ranking the assumption categories according to how often they appear in the decisions in which the adjudicators relied on the most important inference categories answers our final research question: the most important' assumption categories were those that most often co-occur with the most important inference categories.³⁹

Interrater reliability

As noted above, each of our three teams of coders double coded 30 decisions from our original dataset that were not included in the 120 decisions that this study analysed. Using Gwet's AC₁ to assess the interrater reliability of the coding in the double-coded cases revealed that the coding was quite consistent ('moderate' to 'almost perfect' agreement) across almost all categories and subcategories of code in each stage of the analysis.⁴⁰ The only exceptions were for three categories, and one subcategory, of assumption (P7-'delay disclosure', P16-'how people behave (others)', P17-'knowledge of matters in country of origins' P17-2 'other assumptions about what people know in their country of origin'), where the agreement was 'fair'.⁴¹ The research team concluded that overall the coding for each stage of the analysis was sufficiently reliable.⁴²

Results

How often did the adjudicators make deception findings?

The adjudicators made deception findings in 73% of the decisions under review (87/120).

Which categories of inference are most prevalent in the decisions in this set?

In supporting their deception findings, the adjudicators relied most often on the 'inconsistency'(A2) and 'non-probative supporting evidence'(A7) inference categories. 'Inconsistency'(A2) appeared in 88% of the decisions under review (78/89), and both of its subcategories appeared in over half of the decisions under review ('inconsistency between two claimant statements'(A2-1): 75% (67/89); 'inconsistency between claimant and other participant statement'(A2-2): 55% (49/89)).

'Non-probative supporting evidence'(A7) appeared in 67% of the decisions under review (60/89), and one of its subcategories, 'non-probative supporting documents'(A7-1), appeared in 62% (55/89).

The next most commonly used inferences were: 'otherwise illogical or unlikely'(A11): 39% (35/89); 'lack of supporting evidence' (A5): 38% (34/89); 'risk response'(A10): 38% (34/89); and 'previous deception'(A8): 37% (33/89). See [Table 1](#): Inference category prevalence within deception findings, ranked (metrics categories omitted).

Which categories of inference provided the most significant support to the deception findings in the decisions in which they appear?

The ‘inconsistency’ (A2), ‘risk response’ (A10) and ‘manner, general quality or texture of testimony’ (A6) inference categories provided the most significant support to the adjudicators’ deception findings in the decisions in which they appear.

‘Inconsistency’ (A2) provided significant support in 56% of the decisions in which it appeared (44/78), and in 41% of them it was sufficient to uphold the deception finding (32/78). On average, it provided ‘very significant’ support in nearly half (49%) of the decisions in which it appeared.

‘Risk response’ (A10) provided significant support in 71% of the decisions in which it appeared (24/34), and in 18% of them it was sufficient to uphold the deception finding (6/34). On average, it provided ‘very significant’ support in 44% of the decisions in which it appeared.

‘Manner, general quality or texture of testimony’ (A6) provided significant support in 72% of the decisions in which it appeared (18/25), and in 8% of them it was sufficient to uphold the deception finding (2/25). On average, it provided ‘very significant’ support in 40% of the decisions in which it appeared. See [Table 2](#): Inference category support rating and [Table 3](#): Very significant support, ranked.

Which categories of inference are most important (most prevalent and most significant) in the decisions in this set?

In the decisions under review, the most important categories of inference –those that the adjudicators used most often in supporting their deception findings and that provides the most support to these findings – were ‘inconsistency’(A2), ‘non-probative supporting evidence’(A7) and ‘risk response’(A10).

On average, ‘inconsistency’(A2) provided significant support to the adjudicator’s deception finding in 43% of the decisions under review; ‘non-probative supporting evidence’(A7) provided significant support to the adjudicator’s deception finding in 23% of these decisions; and ‘risk response’(A10) provided significant support to the adjudicator’s deception finding in 17% of these decisions. See [Table 4](#): Inference category importance, ranked.

Which categories of assumption are most prevalent?

Among the categories of assumption that appeared in the decisions under review, ‘assumptions about people’s knowledge or understanding’ (P11) and ‘consistency’ (P2) were the most prevalent.

Table 4. Inference category importance, ranked.

	Most prevalent: proportion of decisions with deception findings (<i>n</i> =89) with inference category	Most significant: proportion of ‘very significant’ support in inference category	Most prevalent x most significant
A2 Inconsistency	0.88	0.49	0.43
A7 Non-probative supporting evidence	0.67	0.35	0.23
A10 Risk response	0.38	0.44	0.17
A11 Otherwise illogical or unlikely	0.39	0.38	0.15
A5 Lack of supporting evidence	0.38	0.32	0.12
A6 Manner, general quality or texture of testimony	0.28	0.40	0.11
A8 Previous deception	0.37	0.26	0.10
A3 Lack of appropriate knowledge	0.20	0.28	0.06
A4 Lack of diligence	0.11	0.35	0.04
A9 Promise, oath or affirmation	0.12	0.23	0.03

The P11 category (‘assumptions about people’s knowledge or understanding’) appeared in 87% of the decisions under review (77/89); two of its subcategories appeared in 60% of these decisions or more: ‘people can explain their memory processes/motivations, behaviours’(P11-5): 67% (60/89), and ‘people know what is important in the claim process’(P11-2): 60% (53/89).

The ‘consistency’ category (P2) appeared in 74% of the decisions under review (66/89); one of its subcategories appeared in 71% of these decisions: ‘internal inconsistency’ (P2-2): (63/89).

The next most prevalent assumption categories were: ‘lying in one place means lying elsewhere’(P5): 48% (43/89); ‘detail or specificity’(P3): 47% (42/89);

‘behaviour (others e.g. officials, agents of persecution, doctors, police) in country of origin’(P16): 47% (42/89); ‘behaviour (claimant) in country of origin’(P14): 46% (41/89). See [Table 5](#): Assumption category prevalence, ranked.

Which categories of assumption are the most important, i.e. most often co-occur with the most important categories of inference?

In the decisions in which the adjudicators supported their deception findings using one of the three most important inference categories (‘inconsistency’(A2), ‘non-probative supporting evidence’(A7) and ‘risk response’(A10)), the most prevalent assumption categories were: ‘knowledge or understanding’(P11) and in particular ‘people can explain their memory processes/motivations/behaviours’(P11-5); ‘consistency’ (P2) and in particular ‘internal inconsistency’(P2-1); and ‘behaviour (claimant) in country of origin’(P14) and in particular ‘people in fear act rationally and consistently’(P14-1).

On average, ‘assumptions about people’s knowledge or understanding’(P11) appeared in 60% of these decisions, and ‘people can explain their memory processes/motivations, behaviours’(P11-5) in 41%; ‘consistency’(P2) in 51%, and ‘internal inconsistency’(P2-1) in 43%; ‘behaviour (claimant) in country of origin’(P14) in 41%, and ‘people in fear act rationally and consistently’(P14-1) in 34%. See [Table 6](#): Correlation of most important inference categories and all assumption categories, ranked.

Discussion

That the majority of the decisions in our dataset contained deception findings (73%) is inline with the results of other Canadian studies.⁴³ This underlines the central role that credibility assessment plays in the most consequential decision to reject an asylum claim. Given the inherent frailty of deception judgements,⁴⁴ this finding further confirms the need to subject refugee status rejections to careful scrutiny.

Table 5. Assumption category prevalence, ranked.

	Total number of decisions with assumption	Proportion of decisions with deception findings (<i>n</i> = 89)
P11 Knowledge or understanding	77	0.87
P2 Consistency	66	0.74
P2-1 Consistency: Internal inconsistency	63	0.71
P11-5 Knowledge or understanding: people can explain their memory processes/ motivations/behaviours	60	0.67
P11-2 Knowledge or understanding: people know what is important for a claim	53	0.60
P5 Lying in one place means lying elsewhere	43	0.48
P3 Detail/specificity	42	0.47
P16 How people behave (others)	42	0.47
P14 How people behave	41	0.46
P2-2 Consistency: external inconsistency	35	0.39
P1 Demeanour	33	0.37
P14-1 How people behave (claimant): rationally and consistently	32	0.36
P15 How people behave (family/friends)	32	0.36
P8 How people behave (claimant)	31	0.35
P7 Delay/disclosure	28	0.31
P11-4 Knowledge or understanding: other assumptions about what people know	27	0.30
P1-2 Demeanour: Manner of speech	26	0.29
P8-2 How people behave (claimant): people's behaviour in claiming asylum	22	0.25
P4 Disclosure of sensitive information	20	0.22
P10 How people behave (others, eg professionals)	20	0.22
P16-2 How people behave (others): assumptions about how persecutors behave	19	0.21
P16-4 How people behave (others): assumptions about people in authority	19	0.21
P7-1 Delay/disclosure: late disclosure	16	0.18
P15-3 How people behave (family/friends): other assumptions about how families/ friends behave in their country of origin	15	0.17
P16-1 How people behave (others): rationally and consistently	15	0.17
P17 Knowledge of matters in the claimant's country of origin	15	0.17
P7-2 Delay/disclosure: timing of asylum	14	0.16
P 17-2 Knowledge of matters in the claimant's country of origin: other assumptions about what people know in their Country of origin	14	0.16

Table 5. (Continued).

	Total number of decisions with assumption	Proportion of decisions with deception findings ($n = 89$)
assumptions about what people know in their country of origin		
P1-1 Demeanour: appearance or behaviour at hearing or interview	13	0.15
P8-1 How people behave (claimant): what 'intelligent' people do	13	0.15
P9 Behaviour (claimant's family or friends) in Canada	12	0.13
P14-3 How people behave (claimant): other assumptions about how people behave in their country of origin	11	0.12
P11-3 Knowledge or understanding: other assumptions about what people know about claiming asylum	10	0.11
P15-2 How people behave (family/friends): other assumptions about how families behave in situations of risk or danger	10	0.11
P11-1 Knowledge or understanding: assumptions about knowledge in general	8	0.09
P14-2 How people behave (claimant): other assumptions about how people behave in danger	8	0.09
P15-1 How people behave (family/friends): rationally and consistently	8	0.09
P13 Judging others' behaviour based on self	5	0.06
P1-3 Demeanour: expression of emotion	4	0.04
P16-3 How people behave (others): other assumptions about how people behave in danger	3	0.03
P6 NOW – other	2	0.02
P12 Here – other	2	0.02
P17-1 Knowledge of matters in country of origin: knowledge of geography in the country of origin	1	0.01
P18 THERE – other	1	0.01

Table 6. Correspondence of three most important inference categories and all assumption categories, ranked by average proportion of correspondence with P category across A2, A7 and A10 decisions.

	Number of decisions where A2 and P category correspond	Proportion of A2 decisions that correspond with P category	Number of decisions where A7 and P category correspond	Proportion of A7 decisions that correspond with P category	Number of decisions where A10 and P category correspond	Proportion of A10 decisions that correspond with P category	Average proportion of correspondence with P category across A2, A7 and A10 decisions
P11 Knowledge or understanding	60	0.77	31	0.52	17	0.50	0.60
P2 Consistency	64	0.82	27	0.45	9	0.26	0.51
P2-1 Internal inconsistency	60	0.77	16	0.27	9	0.26	0.43
P11-5 People can explain their memory processes/motivations/behaviours	51	0.65	14	0.23	12	0.35	0.41
P14 How people behave (claimant)	15	0.19	7	0.12	31	0.91	0.41
P14-1 Rationally and consistently	9	0.12	4	0.07	29	0.85	0.34
P5 Lying in one place means lying elsewhere	16	0.21	31	0.52	4	0.12	0.28
P16 How people behave (others)	26	0.33	19	0.32	3	0.09	0.25
P2-2 External inconsistency	32	0.41	19	0.32	0	0.00	0.24
P11-2 People know what is important for a claim	35	0.45	9	0.15	4	0.12	0.24
P7 Delay/Disclosure	15	0.19	3	0.05	13	0.38	0.21
P3 Detail/Specificity	28	0.36	10	0.17	2	0.06	0.19
P11-4 Other assumptions about what people know	17	0.22	14	0.23	4	0.12	0.19
P15 How people behave (family/friends)	15	0.19	10	0.17	6	0.18	0.18
P1 Demeanour	23	0.29	10	0.17	2	0.06	0.17
P8 How people behave (claimant)	11	0.14	10	0.17	6	0.18	0.16
P1-2 Manner of speech	18	0.23	6	0.10	2	0.06	0.13
P7-2 Timing of asylum application	1	0.01	0	0.00	12	0.35	0.12

(Continued)

Table 6. (Continued).

	Number of decisions where A2 and P category correspond	Proportion of A2 decisions that correspond with P category	Number of decisions where A7 and P category correspond	Proportion of A7 decisions that correspond with P category	Number of decisions where A10 and P category correspond	Proportion of A10 decisions that correspond with P category	Average proportion of correspondence with P category across A2, A7 and A10 decisions
P8-2 People's behaviour claiming asylum	8	0.10	7	0.12	3	0.09	0.10
P16-4 Other assumptions about people in authority	9	0.12	11	0.18	0	0.00	0.10
P10 How people behave (others e.g. professionals)	12	0.15	6	0.10	1	0.03	0.09
P16-1 Rationally and consistently	9	0.12	8	0.13	1	0.03	0.09
P4 Disclosure of sensitive information	15	0.19	3	0.05	1	0.03	0.09
P7-1 Late disclosure	14	0.18	3	0.05	1	0.03	0.09
P16-2 Assumptions about how persecutors behave	9	0.12	5	0.08	2	0.06	0.09
P14-3 Other assumptions about how people behave in their country of origin	6	0.08	2	0.03	5	0.15	0.09
P15-3 Other assumptions about how families/friends behave in their country of origin	8	0.10	5	0.08	2	0.06	0.08
P17 Knowledge of matters in the claimant's country of origin	4	0.05	4	0.07	2	0.06	0.06
P1-1 Appearance/Behaviour	8	0.10	4	0.07	0	0.00	0.06
P9 How people behave (family/friends)	5	0.06	6	0.10	0	0.00	0.05
	3	0.04	4	0.07	2	0.06	0.05

(Continued)

Table 6. (Continued).

	Number of decisions where A2 and P category correspond	Proportion of A2 decisions that correspond with P category	Number of decisions where A7 and P category correspond	Proportion of A7 decisions that correspond with P category	Number of decisions where A10 and P category correspond	Proportion of A10 decisions that correspond with P category	Average proportion of correspondence with P category across A2, A7 and A10 decisions
P17-2 Other assumptions about what people know in their country of origin							
P8-1 How "intelligent people" behave	3	0.04	2	0.03	3	0.09	0.05
P15-1 Rationally and consistently	4	0.05	1	0.02	3	0.09	0.05
P15-2 Other assumptions about how families behave in situations of risk or danger	4	0.05	4	0.07	1	0.03	0.05
P14-2 Other assumptions about how people behave in danger	3	0.04	2	0.03	2	0.06	0.04
P11-3 Other assumptions about what people know about claiming asylum	6	0.08	1	0.02	1	0.03	0.04
P13 Judging others' behaviour based on self	1	0.01	0	0.00	2	0.06	0.02
P11-1 Assumptions about knowledge in general	3	0.04	0	0.00	0	0.00	0.01
P1-3 Expression of emotion	0	0.00	1	0.02	0	0.00	0.01
P18 There - Other	0	0.00	1	0.02	0	0.00	0.01
P12 Here - Other	1	0.01	0	0.00	0	0.00	0.00
P16-3 Other assumptions about how people behave in danger	1	0.01	0	0.00	0	0.00	0.00
P6 Now - Other	0	0.00	0	0.00	0	0.00	0.00
P17-1 Knowledge of geography in the country of origin	0	0.00	0	0.00	0	0.00	0.00

The most important (prevalent and significant) inference categories supporting the adjudicators' findings of deception were 'inconsistency', 'non-probative supporting evidence' and 'risk response'. The finding that the claimant's testimony was inconsistent appeared in a large majority of the decisions under review (88%; 78/89). This category contained two distinct kinds of findings, reflected in its two subcategories. In the first, the adjudicator supported their deception finding with the observation that the claimant's testimony was 'internally inconsistent': the adjudicator noted an inconsistency between two or more statements made by the claimant. These included statements that the claimant made directly to the Canadian authorities (in hearings, interviews, in their written testimony or on their written forms), or to someone other than the Canadian authorities (psychologists, police, other claimants), including statements reported by these third parties. This kind of finding appeared in three-quarters of the decisions under review (75%; 67/89). In the second subcategory, the adjudicator noted an 'external' inconsistency between the claimant's statement and the statement of a third party (eg the testimony of another claimant; a psychologist's report or police report; country conditions documents). This kind of finding appeared in over half of decisions under review (55%; 49/89). Overall, the 'inconsistency' inference category provided 'very significant' support in nearly half of the decisions in which it operated (49%). The finding that some or all of the claimant's supporting evidence was non-probative also included two kinds of findings. In some cases, the adjudicators found that the claimant had submitted a document that was 'non-probative' because it was fraudulent or suspicious. In others, they found that the claimant's evidence was not reliable enough to rehabilitate testimony that the adjudicator had come to disbelieve for other reasons (eg after concluding for other reasons that the claimant had lied about having been assaulted, the adjudicator gives little weight to a letter from the claimant's mother that mentions this assault, on the grounds that the mother was not a witness to the alleged event and was merely repeating what the claimant had told her). While we could often observe this distinction in the reasons, we could not reliably capture it in coding subcategories, as the adjudicators were not consistently transparent about which way they were using this kind of inference. Of note, although we could not quantify this point, we could nonetheless observe that the latter was the more common use, which leads us to speculate that a legal procedural requirement likely accounts in part for the importance of this inference category. This category was only moderately significant: it was 'very significant' 35% of the time, the sixth most significant of the 12 inference categories. It was the second-most prevalent category, however, appearing in over two-thirds of the decisions under review (67%; 60/89). This prevalence likely reflects the fact that, under Canadian law, an adjudicator will often be required to address the (non-)probativeness of a claimant's materials: to justify a deception finding, the adjudicator must typically explain why any relevant supporting evidence does not offset their credibility concerns.⁴⁵

The finding that the claimant's response to an allegedly dangerous situation was not plausible because they failed to take reasonable steps to reduce their risk exposure appeared in 38% of the decisions under review (34/89). This category contained five distinct kinds of findings, reflected in its five subcategories: the finding that the claimant, at some point after the danger arose and before claiming in Canada, entered another country and failed to make a refugee claim in that country (20%; 18/89); the finding that the claimant, having left their country after the danger arose, chose to return home (18%; 16/89); the finding that the claimant delayed in leaving their country after the danger allegedly arose (13%; 12/89); the finding that the claimant, or a third party in the claimant's narrative, allegedly voluntarily exposed themselves to danger in an implausible manner (9%; 8/18); the finding that the claimant delayed in making their refugee claim in Canada or in another country (3%; 3/89). Overall, this category provided 'very significant' support in 44% of the decisions in which it operated.

In the decisions under review, three categories of assumption underly these three most important categories of inference: assumptions about *knowledge or understanding*; *consistency*; and *how people behave (claimant, in country of origin): rationally and consistently*. The adjudicators in the decisions under review drew on assumptions about *the consistency of truthful and deceptive accounts and assumptions about how people act when they are at risk*. The ‘consistency’ category was identified as key in each of the other assumption studies as well,⁴⁶ and the behaviour of people in fear in two of the three⁴⁷ (Skrifvars et al. found that it played only a very minor role in their set of Finnish decisions).⁴⁸ The dangers of both of these kinds of assumption in the refugee law context have been discussed at some length in the scholarly literature.⁴⁹ A large body of scientific study highlights many reasons why truthful accounts may vary across retellings, giving rise even to significant inconsistencies, and a range of ‘psychological, social, and cultural factors ...regularly lead people to reject or postpone taking steps to keep themselves safe’, and instead lead them to respond to risks in ways ‘that fail to reduce – and that may even increase – exposure to deadly hazards’.⁵⁰

The most important kind of assumption that this study identified, however, has received less attention: assumptions about claimants’ knowledge and understanding. Refugee status decision makers frequently use claimants’ knowledge of a region to test the truth of their claim to come from that region, and a recent empirical study has examined the weaknesses of such an approach.⁵¹ Knowledge testing in the context of religious claims⁵² and sexual orientation claims⁵³ has also been problematised in the literature. One subcategory of this kind of assumption was particularly important in the rejections examined in this study: assumptions about ‘metacognition’, the insight that people have into the workings of their own minds. The adjudicators in the decisions under review regularly drew inferences that rested on the P11-5 assumption subcategory: that ‘people can explain their memory processes/motivations/behaviours’.⁵⁴

These kinds of assumption underly what Australian scholar Anthea Vogl describes as the narrative requirement of ‘fully accounting for oneself’, a demand often made of refugee claimants in Australian hearings. As Vogl notes:

The literary conceit of omniscience, and the evidentiary expectation of being sovereign over oneself, function here as part of law’s generic demands and expectations of refugee applicants. The challenges of fully accounting for one’s self, however, are particularly acute for refugee applicants [claimants] in oral hearings, who must perform this sovereign version of self, whilst narrating a difficult and unsettled autobiography for the purposes of protection. As well, they must do so in a fragmented, often adversarial and unstructured oral hearing. Applicants are not necessarily equipped to meet the demand for evidence in a particular narrative or generic form.⁵⁵

In her recent book, in analysing the testimony of a claimant in an Australian refugee hearing, Vogl provides a vivid example of metacognition assumptions at work. She demonstrates how the decision maker treated the claimant as an ‘omniscient narrator’ with full access to her own past internal states. The decision maker expected the claimant, for example, ‘to explain exactly why she chose to leave [her country] on the day that she did’; ‘pressed her to explain why she would voluntarily go to the police to be questioned if she feared for her safety vis-à-vis government forces’; and ‘required [her] to clearly account for why she made a particular decision’ in balancing competing risks. In short, the decision maker required the claimant ‘to explain her own actions and to articulate her decision-making process, as if all her decisions were rational, knowing and self-consciously made’.⁵⁶

That assumptions about metacognition would be important makes sense in the context of a system that incorporates common-law notions of procedural fairness. The Canadian Federal Court, like the courts in Australia, New Zealand and other similar jurisdictions, has held that adjudicators must give refugee claimants the opportunity to respond to serious credibility concerns.⁵⁷ An adjudicator might ask a claimant, for example, ‘why did you tell the interviewing officer that you were detained for three weeks, yet now you say it was four?’, ‘why did you not mention this event in your written narrative?’, ‘why did you not make your refugee claim sooner?’. In judging the plausibility of the claimant’s response –‘I must have been confused’, ‘I did not realise that this information was important’, ‘I needed time to figure out what to do’– the adjudicator draws on assumptions about human metacognition: what a truthful person will understand, remember and be able to explain about how their own minds work, such as what they were thinking on a previous occasion.

The expectation that a person can recall accurately what they were thinking on a previous occasion and can accurately explain their reasoning, decision making or judgement assumes that higher-order cognitive processes are readily available to memory and awareness. A wealth of psychological research demonstrates, however, that automatic and unconscious cognitive processes can control our thinking and behaviour outside of our awareness.⁵⁸ When asked to justify their behaviours, decisions or judgements, people generate demonstrably false explanations as they seek plausible accounts for their cognitions and actions.⁵⁹

A popular explanation for the lack of metacognitive awareness has been Dual Process Theories, which argue that higher order cognitive processes can occur through two (or more) qualitatively different processing systems. For convenience these are often given the generic labels of System 1/Type 1 and System 2/Type 2.⁶⁰ System 1 processes are fast, automatic, effortless and unconscious, whereas System 2 processes are slow, deliberative, rule-based, effortful and conscious.⁶¹ Requesting an explanation of the results of a System 1 outcome, such as a decision or judgement, is invoking System 2 processes, which do not have access to the factors that contributed to the System 1 outcome. This lack of metacognitive awareness may be evident when adjudicators require explanations for claimants’ decisions, judgements or behaviours; claimants may not have conscious access to the factors determining how they arrived at intuitive and automatic decisions.

Whether these are qualitatively different cognitive processes, or simply a matter of degree within a single process, is a subject of ongoing debate.⁶² Moreover, while the existence and influence of unconscious processes on thinking, reasoning, decision making and judgement is accepted, how to measure and theorise the presence of conscious and unconscious processes is also a topic of ongoing debate.⁶³ Given the importance of understanding the scope of conscious awareness in the refugee claimant process, as described above, the authors are currently engaged in a scoping review of metacognitive awareness, with a focus on identifying factors relevant to the adjudicating process.⁶⁴

Limitations

Qualitative coding inevitably requires coders to use their own judgement. The team worked to minimise the resulting subjectivity through careful attention to the codebook and regular review sessions where the coders described their thinking during the coding process. The training protocol and review sessions ensured that a shared understanding was achieved among the coders, and the interrater reliability analysis described above suggests that these measures were largely effective: the codes were consistently coding the data in the same way. The shared understanding is itself subjective, of course, and co-created by these

specific coders, but it is also unclear what an objective measure of assumptions and inferences could be in this context; we believe that a transparent coding process and strong interrater reliability may be the closest one can come to an objective measure of these variables. Nonetheless, we understand that some subjectivity remains and that this is a limitation in our study.

As noted above, the team did not identify any variables in the set of decisions that this study analysed that would detract from its representativeness. We were not able to establish whether it contained a representative distribution of claimant genders, however, and in any case, it is always possible that this set of decisions is unusual in ways that we have overlooked.

As noted above, this study had a limited focus on deception findings. Future studies should explore the credibility decision-making process more broadly, including the inferences and assumptions that underlie findings of truthfulness. This study also focused on the significance and prevalence of decision making inferences and assumptions. Future research should explore other aspects of their use, such as whether decision makers rely disproportionately on certain categories of inference in judging the credibility of claimants from particular national or identity groups. Lastly, this study focused on the reasons that decision makers provide, in writing, to justify their conclusions. Future studies should explore the ‘off-the-record’ inferences that may influence their reasoning without appearing in their written reasons.⁶⁵

Conclusion

This study uses a novel methodology that combines legal and psychological approaches to analyse a large set of refugee status rejections ($n = 120$). Its findings yield new insights that inform the use of social science in the evaluation of deception findings in this field: it is the first study to identify the most significant kinds of assumption that underlie the finding that a refugee claimant is lying. This study has replicated and extended earlier studies of psychological assumptions in refugee status decisions, distinguishing legal inferences from their underlying psychological assumptions and quantifying both inferences and assumptions in a set of 89 written decisions. An analysis of the contribution of individual categories of inference to the final credibility assessment has in turn demonstrated the importance of categories of psychological assumptions underlying those inferences. Perhaps most importantly, this study has identified a new category of psychological assumption operating in these decisions: assumptions about the robustness of a claimant’s metacognition, their ability to understand and explain their own cognitive processes. This category of assumption merits further examination. Future research should interrogate the existing psychological literature in this area and, based on the research evidence, make recommendations to decision and policy makers. The relevant body of social scientific literature, rather than untested assumptions, should inform what adjudicators can reasonably expect of claimants’ metacognition.

This paper continues the call for collaboration.⁶⁶ Together, social scientists, lawyers, legal academics and judicial and administrative decision makers can help to ensure that crucial decisions that determine the fate of vulnerable people across the world are made fairly, transparently and in line with the most reliable scientific evidence.

Disclosure and ethical standards statement

Declaration of conflicts of interest

Hilary Evans Cameron has declared no conflicts of interest.

Jane Herlihy has declared no conflicts of interest.
Michaela Hynie has declared no conflicts of interest.

Ethical approval

All procedures performed in studies involving human participants were in accordance with the ethical standards of the Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans – TCPS 2 (2022) and with the 1964 Helsinki declaration and its later amendments or comparable ethical standards. All personal or sensitive information that could identify the claimant or a witness was removed from the legal judgements that were the subject of the study prior to being publicly available. Human research committee consideration and approval was not required under Article 2.2 of the TCPS 2, which provides that: ‘Research does not require REB review when it relies exclusively on information that is: publicly available through a mechanism set out by legislation or regulation and that is protected by law’.

Informed consent

Informed consent was not obtained from all individual participants included in the study. This was not required in accordance with the exemption from the requirement for human research ethics committee approval, as the research relied exclusively on information on legal judgements that were ‘publicly available through a mechanism set out by legislation or regulation and that is protected by law’ Article 2.2 of the TCPS 2 (2022). All personal or sensitive information that could identify the claimant or a witness was removed from the legal judgements prior to them being made publicly available.

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Data availability statement

The study data is publicly available on Toronto Metropolitan University’s digital repository: <https://doi.org/10.32920/27080332.v1>

Notes

¹ See Tanja van Veldhuizen and others, ‘Interviewing Asylum Seekers: A Vignette Study on the Questions Asked to Assess Credibility of Claims about Origin and Persecution’ (2017) 14 Journal of Investigative Psychology and

Offender Profiling 3; Michael Kagan, 'Believable Victims: Asylum Credibility and The Struggle For Objectivity' (2015) 16 *Georgetown Journal of International Affairs* 123; Anthea Vogl, 'Telling Stories from Start to Finish: Exploring the Demand for Narrative in Refugee Testimony' (2013) 22 *Griffith Law Review* 63; United Nations High Commissioner for Refugees [UNHCR], *Beyond Proof, Credibility Assessment in EU Asylum Systems* (2013) <<https://www.refworld.org/docid/519b1fb54.html>> accessed 12 February 2024. Note that while the term 'credibility' can have different meanings in different contexts, in refugee law internationally it is commonly used to refer to the truthfulness of the claimant's testimony, rather than eg the reliability of their allegations or the nature of their character.

² In one recent study of Canadian refugee status rejections, 85% included a finding that the claimant had been deceptive (259/ 303), and in 84% of these decisions with deception findings, the claimant's lack of credibility 'was the sole determinative issue' (217/259): 'The claimants were rejected based solely on their credibility, therefore, in 72 per cent of the decisions in the data set (217/303)'. Hilary Evans Cameron, 'Sin of Omission: Exploring a Key Credibility Inference in Canadian Refugee Status Rejections' (2023) 60 *Osgoode Hall Law Journal* 127

³ See Maria Hartwig, Pär Anders Granhag and Leif A Strömwall, 'Guilty and Innocent Suspects' Strategies during Police Interrogations' (2007) 13 *Psychology, Crime & Law* 213; Pär Anders Granhag and Leif A Strömwall, 'Repeated Interrogations: Verbal and Non-verbal Cues to Deception' (2002) 16 *Applied Cognitive Psychology* 243; Pär Anders Granhag, Leif A Strömwall and Maria Hartwig, 'Granting Asylum or not? Migration Board Personnel's Beliefs about Deception' (2005) 31 *Journal of Ethnic and Migration Studies* 29; Charles F Bond and Bella M DePaulo, 'Individual Differences in Judging Deception: Accuracy and Bias' (2008) 134 *Psychological Bulletin* 477; Saul M Kassin, Christian A Meissner and Rebecca J Norwick, "'I'd Know a False Confession if I Saw One": A Comparative Study of College Students and Police Investigators' (2005) 29 *Law and Human Behavior* 211

⁴ Hilary Evans Cameron, *Refugee Law's Fact-Finding Crisis: Truth, Risk, and The Wrong Mistake* (Cambridge University Press 2018) 211.

⁵ In addition to the sources in the notes above, see Jaya Ramji-Nogales, Andrew I Schoenholtz and Philip G Schrag, *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (NYU Press 2009); James A Sweeney, 'Credibility, Proof and Refugee Law' (2009) 21 *International Journal of Refugee Law* 700; Steve Norman, 'Assessing the Credibility of Refugee Applicants: A Judicial Perspective' (2007) 19 *International Journal of Refugee Law* 273; Gregor Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Brill 2005); Michael Kagan, 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determinations' (2003) 17 *Georgetown Law Journal* 1; Guy Coffey, 'The Credibility of Credibility Evidence at the Refugee Review Tribunal' (2003) 15 *International Journal of Refugee Law* 377; Cécile Rousseau and others, 'The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-Making Process of the Canadian Immigration and Refugee Board' (2002) 15 *Journal of Refugee Studies* 43.

⁶ See Jenny Skrifvars and others, 'Psychological Assumptions Underlying Credibility Assessments in Finnish Asylum Determinations' (2022) *Nordic Psychology* <<https://doi.org/10.1080/19012276.2022.2145986>> accessed 12 February 2024; Rebecca Dowd and others, 'Filling Gaps and Verifying Facts: Assumptions and Credibility Assessment in the Australian Refugee Review Tribunal' (2018) 30 *International Journal of Refugee Law* 71; Zoe Given-Wilson, Jane Herlihy and Matthew Hodes, 'Telling the Story: A Psychological Review on Assessing Adolescents' Asylum Claims' (2016) 57 *Canadian Psychology* 265; Jane Herlihy and Stuart Turner, 'Untested Assumptions: Psychological Research and Credibility Assessment in Legal Decision-Making' (2015) 6 *European Journal of Psychotraumatology* 1; Hannah Rogers, Simone Fox and Jane Herlihy, 'The Importance of Looking Credible: The Impact of the Behavioural Sequelae of Post-traumatic Stress Disorder on the Credibility of Asylum Seekers' (2015) 21 *Psychology, Crime and Law* 139; Jane Herlihy and Stuart Turner, 'What Do We Know so far about Emotion and Refugee Law?' (2013) 64 *Northern Ireland Legal Quarterly* 47; Jane Herlihy, Laura Jobson and Stuart Turner, 'Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum' (2012) 26 *Applied Cognitive Psychology* 661; Jane Herlihy, Kate Gleeson and Stuart Turner, 'What Assumptions about Human Behaviour Underlie Asylum Judgments?' (2010) 22 *International Journal of Refugee Law* 35; Hilary Evans Cameron, 'Refugee Status Determination and the Limits of Memory' (2010) 22 *International Journal of Refugee Law* 469; Jane Herlihy and Stuart Turner, 'The Psychology of Seeking Protection' (2009) 21 *International Journal of Refugee Law* 171; Jane Herlihy, Peter Scragg and Stuart Turner, 'Discrepancies in Autobiographical Memories—Implications for the Assessment of Asylum Seekers: Repeated Interviews Study' (2002) 324 *British Medical Journal* 324; Jane Herlihy and Stuart Turner, 'Asylum Claims and Memory of Trauma: Sharing our Knowledge' (2007) 191 *British Journal of Psychiatry* 3; Zoe Given-Wilson, Matthew Hodes and Jane Herlihy, 'A Review of Adolescent Autobiographical Memory and the Implications for Assessment of Unaccompanied Minors' Refugee Determinations' (2018) 23 *Clinical Child Psychology and Psychiatry*

209; Hilary Evans Cameron, 'Risk Theory and "Subjective Fear": The Role of Risk Perception, Assessment and Management in Refugee Status Determinations' (2008) 20 *International Journal of Refugee Law* 567; Hilary Evans Cameron, 'Risk and the Reasonable Refugee: Exploring a Key Credibility Inference in Canadian Refugee Status Rejections' (2023) 35 *International Journal of Refugee Law* 10.

⁷ Herlihy, Gleeson and Turner, 'What Assumptions?' (n 6) abstract. See also Jane Herlihy, Hilary Evans Cameron and Stuart Turner, 'Psychological Research Evidence in Refugee Status Determination', *Journal of Refugee Studies* (2023) <<https://doi.org/10.1093/jrs/fead043>> accessed 12 February 2024.

⁸ Note that the purpose of the investigation in a refugee status determination is not to determine whether the claimant is telling the truth, but rather to determine which allegations a decision maker should be prepared to accept. In the words of the United Nations High Commissioner for Refugees, the purpose of the assessment is not 'to determine the accuracy of statements provided by an applicant', but rather to determine whether such statements 'should be considered for the purpose of the determination'. UNHCR *Beyond Proof* (n 1) 28. Although the UNHCR does not go this far, the UK High Court and others have noted that this purpose can be achieved without the need for decision makers to make any findings of fact: '[Refugee] Convention issues from first to last are evaluative, not factual'. *Karanakaran v Secretary of State for the Home Department* [2000] EWCA Civ 11, [2000] 3 All ER 449 [33]. See discussion in Evans Cameron, *Refugee Law's Fact-Finding Crisis* (n 4) Ch 8.

⁹ Ajay Agrawal, Joshua Gans and Avi Goldfarb, *Prediction Machines: The Simple Economics of Artificial Intelligence* (Harvard Business Review Press 2018) 24.

¹⁰ Although we often think of predicting as it relates to future events, a prediction allows us 'to see otherwise hidden information, in the past, present or future' (*ibid*).

¹¹ The relevant definition of 'assumption' in the Merriam-Wester Dictionary is 'a fact or statement (such as a proposition, axiom ... postulate, or notion) taken for granted' <<https://www.merriam-webster.com/dictionary/assumption>> accessed 12 February 2024. Herlihy, Gleeson and Turner frame this idea in terms of a 'working hypothesis' (n 6) 357. The term 'hypothesis' suggests, however, that the person making the assumption thinks that the idea should be investigated and potentially revised based on new information. We use the broader term 'idea' rather than 'hypothesis', as this study makes no claim about what the adjudicators who hold these ideas subjectively believe – they may think of them as testable, or they may hold them as fixed ideas that they would cling to even in the face of counterevidence.

¹² See Granhag, Strömwall and Hartwig (n 3); Catriona Jarvis, 'The Judge as Juror Re-visited' (2003) *Immigration Law Digest* (Winter) 7.

¹³ Herlihy, Gleeson and Turner, 'What Assumptions' (n 6) 353.

¹⁴ Herlihy, Evans Cameron and Turner (n 7) 4.

¹⁵ This methodology was first used in Herlihy, Gleeson and Turner, 'What Assumptions' (n 6). The authors of that study identified 117 assumptions in a set of appeal determinations, then submitted those assumptions to an inductive thematic analysis guided by Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 *Qualitative Research in Psychology* 77.

¹⁶ Dowd and others (n 6); Skrifvars and others (n 6).

¹⁷ Herlihy, Gleeson and Turner, 'What Assumptions' (n 6); Dowd and others (n 6); Skrifvars and others (n 6); Given-Wilson, Herlihy and Hodes (n 6); Rogers, Fox and Herlihy (n 6); Herlihy and Turner, 'Untested Assumptions' (n 6); Herlihy and Turner, 'Psychology of Seeking Protection' (n 6); Herlihy and Turner, 'Sharing Our Knowledge' (n 6); Herlihy and Turner, 'What Do We Know?' (n 6); Herlihy, Scragg and Turner (n 6); Evans Cameron, 'Limits of Memory' (n 6); Evans Cameron, 'Risk Theory' (n 6). See also Laura Smith-Khan, 'Why Refugee Visa Credibility Assessments Lack Credibility: A Critical Discourse Analysis' (2019) 28 *Griffith Law Review* 406; Vogl, 'Telling Stories from Start to Finish' (n 1); Anthea Vogl, 'The Genres and Politics of Refugee Testimony' (2017) *Law & Literature* 81; Douglas McDonald-Norman, 'Simply Impossible: Plausibility Assessment in Refugee Status Determination' (2015) 39 *Alternative Law Journal* 451; Jenni Millbank, "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21 *International Journal of Refugee Law* 1.

¹⁸ Dowd and others (n 6) 74.

¹⁹ Evans Cameron, ‘Sin of Omission’ (n 2); Evans Cameron, ‘Reasonable Refugee’ (n 6).

²⁰ Dowd and others defined an assumption as ‘an inference or a conclusion drawn by a Tribunal member as part of his or her reasoning that is not solidly grounded in evidence’ (n 6) 76. Skrifvars and others defined it as ‘a statement, or statements, about a credibility indicator or any other fact affecting the credibility assessment of the applicant’s claim, in which the asylum officials explained their conclusions’ (n 6) 8.

²¹ Herlihy, Gleeson and Turner, ‘What Assumptions’ (n 6) 366.

²² *ibid.*

²³ Evans Cameron, ‘Reasonable Refugee’ (n 6) 3 [footnote references omitted].

²⁴ *Canada (Minister of Citizenship and Immigration) v Vavilov* [2019] 4 SCR 653.

²⁵ See Sean Rehaag and Hilary Evans Cameron, ‘Experimenting with Credibility in Refugee Adjudication: Gaydar’ (2020) 9 Canadian Journal of Human Rights 1; Norman (n 5) 274.

²⁶ In Canada, unlike in most countries, first-instance refugee status determinations are made by an adjudicator at a quasi-judicial administrative tribunal that is independent from the Canadian government, typically after a full oral hearing into the merits of the claim. See <<https://irb.gc.ca/en/refugee-claims/Pages/index.aspx>> accessed 12 February 2024.

²⁷ See Jason D Rivera, ‘When Attaining the Best Sample is out of Reach: Nonprobability Alternatives when Engaging in Public Administration Research’ (2019) 25 Journal of Public Affairs Education 314.

²⁸ <<https://irb.gc.ca/en/statistics/protection/Pages/RPDStat2022.aspx>> accessed 12 February 2024.

²⁹ Sean Rehaag, 2019 Refugee Claim Data and IRB Member Recognition Rates (12 August 2020) <<https://refugeelab.ca/refugee-claim-data-2019>> accessed 12 February 2024.

³⁰ *ibid.*

³¹ Evans Cameron, ‘Sin of Omission’ (n 2); Evans Cameron, ‘Reasonable Refugee’ (n 6).

³² See Evans Cameron, ‘Sin of Omission’ (n 2) 136.

³³ The codebook with the full definitions of each of the codes can be found at Toronto Metropolitan University’s digital repository: <https://doi.org/10.32920/27080332.v1>.

³⁴ The rationale for this approach is that the error costs may be different when the issue is whether a claimant is lying about who they are or what crimes they may have committed, as opposed to when the issue is whether they are lying about the risk that they face. See Evans Cameron, ‘Sin of Omission’ (n 2); Evans Cameron, ‘Reasonable Refugee’ (n 6).

³⁵ See Point First Legal Writing Academy, University of Ottawa: <<https://www.pointfirstwriting.com>> accessed 12 February 2024.

³⁶ The authors gratefully acknowledge Dr Stuart Turner for his insight in developing this measure.

³⁷ Herlihy, Evans Cameron and Turner (n 7) 4.

³⁸ Note that unlike Skrifvars and others (n 6), we are treating these as notional groups and not as analytical categories. Indeed, some assumption categories would have fit as well under a different heading, eg P11-5 and P17-1 could also fit in the ‘NOW’ group.

³⁹ Note that a finding that a certain assumption category appears in X% of the decisions in which the adjudicators relied on a particular inference category does not establish that this assumption necessarily supported this kind of inference in each of the decisions in which it appeared. It rather shows co-occurrence: that when the adjudicators relied on this kind of inference, there is an X% chance that they were also drawing this kind of assumption.

⁴⁰ Kilem Li Gwet, 'Computing Inter-rater Reliability and its Variance in the Presence of High Agreement (2008) 61 *British Journal of Mathematical and Statistical Psychology* 29.

⁴¹ Of note, in two of these categories ('delay disclosure' (P7) and 'how people behave (others)' (P16)), the coding for each subcategory was quite consistent ('moderate' to 'almost perfect' agreement). In this kind of analysis, instead of averaging out, small differences from perfect agreement in the 'child' subcategories compound in the 'parent' category.

⁴² The full results of the interrater reliability analysis can be found at Toronto Metropolitan University's digital repository: <https://doi.org/10.32920/27080332.v1>.

⁴³ Evans Cameron, 'Sin of Omission' (n 2); Evans Cameron, 'Reasonable Refugee' (n 6). Both of these studies considered the same data set (n = 303), in which 85% of the decisions contained deception findings.

⁴⁴ See discussion accompanying n 3.

⁴⁵ See *Yahia v Canada (Minister of Citizenship and Immigration)*, [2019] FCJ No 64, 2019 FC 84 [45] (Russel J); *Adesida v Canada (Minister of Citizenship and Immigration)*, [2022] FCJ No 1060, 2022 FC 1020 [24] (Sadrehashemi J). We note these points parenthetically as neither the reasons for this category's importance, nor the manner of its use, affected the relevant questions in this study: how significant and prevalent it was, and which assumptions underlie it.

⁴⁶ In Skrifvars and others, the consistency assumption was 'the most frequently occurring type of assumption, making up almost one third of all assumptions' (n 6) 9. See also Dowd and others (n 6) 82–85; Herlihy, Gleeson and Turner, 'What Assumptions' (n 6) 361–62.

⁴⁷ Dowd and others (n 6) 91–93; Herlihy, Gleeson and Turner, 'What Assumptions' (n 6) 358.

⁴⁸ Skrifvars and others (n 6) 14.

⁴⁹ See Herlihy, Scragg and Turner (n 6); Herlihy, Jobson and Turner (n 6); Evans Cameron, 'Limits of Memory' (n 6); Evans Cameron, 'Risk Theory' (n 6); Evans Cameron, 'Reasonable Refugee' (n 6); Granhag, Strofmwall and Hartwig (n 3); Jarvis (n 12); Given-Wilson, Hodes and Herlihy (n 6).

⁵⁰ Evans Cameron, 'Reasonable Refugee' (n 6).

⁵¹ Tanja van Veldhuizen and others, 'The Provenance of Émigrés: The Validity of Measuring Knowledge of Places' (2017) 23 *Psychology, Crime and Law* 553.

⁵² See Michael Kagan, 'Refugee Credibility Assessment and the "Religious Imposter" Problem' (2010) 43 *Vanderbilt Journal of Transnational Law* 1179.

⁵³ See Millbank (n 17) 19–21.

⁵⁴ Codebook (n 33).

⁵⁵ Anthea Vogl, *Judging Refugees: Narrative and Oral Testimony in Refugee Status Determination* (Cambridge University Press 2024) 145–46.

⁵⁶ *ibid*, 146.

⁵⁷ 'While not every inconsistency or implausibility must be put to a witness, fairness requires the [adjudicator] to provide an opportunity to address inferences on central matters': *Kalmykov v Canada (Minister of Citizenship and Immigration)*, [2005] FCJ No 1113, 2005 FC 901 [16] (Dawson J). See *Mohamed v Canada (Minister of Citizenship and Immigration)*, [2015] FCJ No 1450, 2015 FC 1379 [21] (Fothergill J); *Tursunbayev v Canada (Minister of Public Safety and Emergency Preparedness)*, [2012] FCJ No 540, 2012 FC 504 [83–84] (Mactavish J). In Australia: *Szujn v Minister for Immigration and Border Protection* BC201601060 [2016] FCCA 362 [17–25] (Manousaridis J); *Kioa v West* [1985] HCA 81, (1985) 159 CLR 550 [38] (Brennan J). In New Zealand: *B v Refugee Status Appeals Authority* [1997] BCL 1000 (Giles J).

⁵⁸ Gordon Pennycook, 'A Perspective on the Theoretical Foundation of Dual Process Models' in Wim De Neys (ed), *Dual Process Theory 2.0* (Psychology Press 2017).

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- ⁵⁹ Jonathan Haidt, 'The Emotional Dog and its Rational Tail: A Social Intuitionist Approach to Moral Judgment' (2001) 108 *Psychological Review* 814.
- ⁶⁰ James D Grayot, 'Dual Process Theories in Behavioral Economics and Neuroeconomics: A Critical Review' (2020) 11 *Review of Philosophical Psychology* 105.
- ⁶¹ Jonathan St BT Evans, 'Dual-processing Accounts of Reasoning, Judgment, and Social Cognition' (2008) 59 *Annual Review of Psychology* 255; Valerie A Thompson, James A Prowse Turner and Gordon Pennycook, 'Intuition, Reason, and Metacognition' (2011) 63 *Cognitive Psychology* 107.
- ⁶² Wim De Neys, 'On Dual- and Single-Process Models of Thinking' (2021) 16 *Perspectives on Psychological Science* 1412.
- ⁶³ David Soto, Usman Ayub Sheikh and Clive R Rosenthal, 'A Novel Framework for Unconscious Processing' (2019) 23 *Trends in Cognitive Sciences* 372.
- ⁶⁴ Authors (n.d.), 'A Scoping Review of Metacognitive Awareness from the Perspective of Refugee Status Decision-Making'.
- ⁶⁵ See eg Rehaag and Evans Cameron (n 25); Bennet Capers, 'Evidence Without Rules' (2018) 94 *Notre Dame Law Review* 867.
- ⁶⁶ See Herlihy, Evans Cameron and Turner (n 7).