

**Risk and the Reasonable Refugee:
Exploring a Key Credibility Inference
in Canadian Refugee Status Rejections**

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1. Introduction

People respond in an extensive variety of ways to risky situations, including situations of life-threatening danger. Responses that fail to reduce – and that may even increase – exposure to deadly hazards are firmly within the range of non-pathological human behaviour. Such responses challenge deep-seated assumptions about rationality.¹ They force us to confront the fact that if the only reasonable risk responses are those that help to keep us safe, then we are not reliably reasonable.

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¹ Eg Carlo C Jaeger and others, *Risk, Uncertainty, and Rational Action* (Earthscan 2001); Andrew Hindmoor, *Rational Choice* (Palgrave MacMillan 2006); Donald P Green and Ian Shapiro, *Pathologies of Rational Choice* (Yale University Press 1994). See discussion in Hilary Evans Cameron, *Refugee Law’s Fact-finding Crisis: Truth, Risk, and the Wrong Mistake* (Cambridge University Press 2018) Ch 5.

Scholars stress the importance of these observations in the context of refugee status determination, where credibility assessment is paramount.² In jurisdictions around the globe, refugee status decision makers conclude that claimants are lying because of how they allegedly responded to a dangerous situation: because the claimants violated the common-sense expectation that a person facing a serious risk would flee right away, ask for protection right away in the first safe country that they reach, and never choose to return home to peril.³ Scholars argue that before reaching this conclusion, decision makers would need to consider the kinds of psychological, social, and cultural factors that regularly lead people to reject or postpone taking

² Hilary Evans Cameron, 'Sin of Omission: Exploring a Key Credibility Inference in Canadian Refugee Status Rejections' forthcoming in (2022) 60 *Osgoode Hall Law Journal*; Michael Kagan, 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination' (2003) 17 *Georgetown Immigration Law Journal* 367.

³ Eg 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; Jane Herlihy, Kate Gleeson, Stuart Turner, 'What Assumptions about Human Behaviour Underlie Asylum Judgments?' (2010) 22 *International Journal of Refugee Law* 351; 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, 4.3, 5.1; Laura Smith-Khan, 'Why Refugee Visa Credibility Assessments Lack Credibility: A Critical Discourse Analysis' (2019) 28 *Griffith Law Review* 406; Anthea Vogl, 'Telling Stories from Start to Finish: Exploring the Demand for Narrative in Refugee Testimony' (2013) 22 *Griffith Law Review* 63; 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; Jenny Skrifvars and others, 'Psychological Assumptions Underlying Credibility Assessments in Finnish Asylum Determinations' (2022, under review).

steps to keep themselves safe.⁴ Without this evidence, decision makers may mistakenly conclude that a truthful claimant is lying.

This study analyses a set of 303 decisions by the adjudicators at the Refugee Protection Division of the Immigration and Refugee Board of Canada, the country's first-level refugee status decision makers.⁵ It investigates the role that inferences about the claimant's risk response play in supporting the adjudicators' conclusions that the claimant is lying, and evaluates to what extent the adjudicators' reasoning reflects key insights from the social scientific literature.

2. Conceptual framework

This study does not explore refugee status decision making: it does not seek to understand how the adjudicators reached their conclusions. Rather, it explores how the adjudicators justified the conclusion that the claimant was lying, and whether these justifications are defensible.

⁴ *ibid.* Informing this conversation are also, eg, ethnographic studies of refugee claimants' risk responses and critical reflections on the process of refugee status determination. Eg Christina Clark-Kazak, "'A Refugee is Someone Who Refused to be Oppressed": Self Survival Strategies of Congolese Young People in Uganda' (2014) 3 *Stability International Journal of Security and Development* 1; Vaughan Robinson and Jeremy Segrott, 'Understanding the Decision-making of Asylum Seekers' (2002) UK Home Office Research Study 243; Susan Zimmerman, 'Danger, Loss and Disruption in Somalia after 1991: Practicalities and Needs behind Refugee Decision-Making' (2011) 30 *Refugee Survey Quarterly* 45; Betsy Jose and Peace A. Medie, 'Understanding Why and How Civilians Resort to Self-protection in Armed Conflict' (2015) 17 *International Studies Review* 515; Tanya Aberman, 'Gendered Perspectives on Refugee Determination in Canada' (2014) 30 *Refugee* 57; Dina Taha, 'Women Refugees and Epistemic Privilege: Opening the Borders Between Postcolonial Feminism and Forced Migration Studies' (2017) 3 *Refugee Review*.

⁵ The Immigration and Refugee Board is an independent quasi-judicial tribunal; <www.irb-cisr.gc.ca> accessed 17 July 2022.

This focus on the justifications for rejecting claims is grounded in normative legal theory. Simply put, for reasons arising out of its obligations under the Convention, a refugee status determination system ought to be more concerned with avoiding mistaken rejections than with avoiding mistaken grants.⁶ 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.⁷ There is therefore both a legal and an ethical obligation to submit the refugee system's rejection mechanisms to careful scrutiny.⁸

Guiding this exploration are the following research questions, drawn from the scholarship discussed below.

⁶ Evans Cameron 2018 (n 1).

⁷ *Maldonado v Canada (Minister of Employment and Immigration)* [1980] 2 FC 302, (1979), 31 NR 34 (CA) paras 5, 31 discussed in Evans Cameron 2018 (n 1) 90–93.

⁸ This study adds to a body of literature that follows a similar approach in trying to guard preferentially against this kind of mistake. See eg the studies cited in n 3; Douglas McDonald-Norman, 'No One to Bear Witness: Country Information and LGBTQ Asylum Seekers' (2017) 33 *Refuge* 88; Zoe Given-Wilson, Jane Herlihy, and Matthew Hodes, 'Telling the Story: A Psychological Review on Assessing Adolescents' Asylum Claims' (2016) 57 *Canadian Psychology* 265; 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, Laura Jobson, and Stuart Turner, 'Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum' (2012) 26 *Applied Cognitive Psychology* 661; Hilary Evans Cameron, 'Refugee Status Determination and the Limits of Memory' (2010) 22 *International Journal of Refugee Law* 469. In the criminal law sphere, a similar philosophy underlies, eg, The Innocence Project, which 'exonerates the wrongly convicted through DNA testing and reforms the criminal justice system to prevent future injustice' through an exclusive focus on wrongful convictions; <www.innocenceproject.org> accessed 17 July 2022.

2.1 In what proportion of cases do the adjudicators rely on risk response inferences to justify negative credibility conclusions?

Canadian scholars have been raising concerns about adjudicators' reliance on risk response inferences for almost twenty years.⁹ How widespread is this kind of reasoning in the credibility rejections in the cases under review?

2.2 To what extent do the adjudicators hold the claimants to a general idealized standard of risk response?

Canadian refugee status determinations take place within the common law tradition, and scholars have observed that this tradition's analytical frameworks run into trouble when it comes to judging the credibility of a person's risk response.

Now nearly two hundred years old, the "reasonable man" is the common law's most famous fiction. We find him wherever there is a need to assess risky behaviour. This 'mythical creature' is expressly idealized.¹⁰ He is not the average person; the average driver may exceed the speed limit while the reasonable man may not.¹¹ At the same time, he is necessarily and crucially ordinary. Indeed, judges have gone the extra mile in describing just how ordinary he is: he rides

⁹ Michael Bossin and Laila Demirdache, 'A Canadian Perspective on the Subjective Component of the Bipartite Test for "Persecution": Time for Re-evaluation' (2004) 22 *Refuge* 108; Aberman (n 4); Evans Cameron 2008 (n3).

¹⁰ *Arland v. Taylor* [1955] OR 131 (CA) para 12; Peter Westen, 'Individualizing the Reasonable Person in Criminal Law' (2008) 2 *Criminal Law and Philosophy* 137, 139; William Lloyd Prosser and others, *Prosser and Keeton on the Law of Torts* (5th ed., West Publishing Company 1984) 174.

¹¹ Westen (n 10) 138.

the Clapham omnibus¹² or the Bourke Street tram,¹³ reads magazines, and ‘in the evening pushes the lawnmower in his shirt sleeves.’¹⁴ For centuries, ‘the common law has been transfixed with where the reasonable man lives, his mode of transportation, what kinds of clothes he wears, what activities he engages in.’¹⁵

As Moran notes, this ‘personification’ – which has stuck to the “reasonable man” despite his recent incomplete make-over as the “reasonable person”¹⁶ – has a dangerous downside: it ‘encourages the conflation of “descriptive” attributes of the person with the normative standard of behaviour.’¹⁷ Western thinking about risk and rationality has often conflated descriptive analyses aimed at understanding how a person *would have acted* and normative analyses aimed at establishing how a person *should have acted*.¹⁸ Since the “reasonable man” standard

¹² *Hall v. Brooklands Auto Racing Club* [1933] 1 KB 205; *Beloit Canada Ltée/Ltd. v. Valmet Oy* (1986), 64 NR 287 (FCA), para 17.

¹³ *Re Sortirios Pandos and Commonwealth of Australia* [1991] AATA 18 (25 January 1991) No V89/586, AAT No 6604, para 88.

¹⁴ *Hall v. Brooklands*, n 12, 224.

¹⁵ Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Oxford University Press 2003) 16.

¹⁶ ‘The reasonable man may have been rebranded as the reasonable person but for many purposes the standard is still gendered.’ John Gardner, ‘The Reasonable Person Standard’ (2019) *International Encyclopedia of Ethics* 12. ‘Late in the twentieth century, as people became more aware of the power of gendered language, the reasonable man underwent a gender transformation to become a “reasonable person.” However, this “person” was still fundamentally male, still described by the pronouns “he, him, his.”’ Virginia Sapiro, ‘Sexual Harassment: Performances of Gender, Sexuality, and Power’ (2018) 16 *Perspectives on Politics* 1053, 1062.

¹⁷ Moran (n 15) 16; see also eg Maria Lee, ‘Safety, Regulation and Tort: Fault in Context’ (2011) 74 *The Modern Law Review* 555; Michelle Ciurria, ‘Situationism, Moral Responsibility and Blame’ (2013) 4 *Philosophia* 179.

¹⁸ Evans Cameron 2018 (n 1) 100–2.

‘seamlessly intertwines’ normative and descriptive elements,¹⁹ it brings this ‘confusion’ into the law: it blurs the lines between asking what a decision maker can reasonably expect of a fictitious idealized person as a matter of law and asking what they can reasonably expect of a particular person as a matter of fact.²⁰

Scholars have observed the tendency of refugee status decision makers to use a general idealized standard to judge a claimant’s risk response.²¹ The confusion between descriptive and normative analyses has also been observed in the refugee law judgments of the Canadian Federal Court. Logically, the finding that a claimant’s risk response was *implausible* – that their account cannot reasonably be believed – supports the conclusion that they are lying.²² The finding that it was *improper, unjustified, or inappropriate* does not. Yet the Court at times upholds negative credibility findings based on the claimant’s risk response ‘when its underlying concern seems rather to be... that the claimant has shown a lack of diligence, has acted irresponsibly, or has simply failed to play by the rules.’²³ To what extent do the adjudicators in these cases employ similar reasoning in drawing a negative credibility inference from the claimant’s risk response?

2.3 In what proportion of cases do the adjudicators look to social scientific sources to inform their judgments?

As Moran also notes, by embodying reasonableness in this idealized yet ordinary person, the common law’s “reasonable man” standard ‘in practice turns out to be deeply indebted to

¹⁹ Moran (n 15) 2.

²⁰ *ibid* 16.

²¹ Eg Dowd (n 3); Vogl 2013 (n 3); Vogl 2017 (n 3).

²² The fact that such findings are logical is not to suggest, of course, that they are sound: as many have noted, plausibility determinations, especially in the refugee context, are infamously unreliable. See eg Enide Maegherman, Tanja van Veldhuizen, and Robert Horselenberg, ‘Dropping the Anchor: The Use of Plausibility in Credibility Assessments’ (2018) 7 Oxford Monitor of Forced Migration 37; McDonald-Norman 2015 (n 3); Smith-Khan 2019 (n 3).

²³ Evans Cameron 2018 (n 1) Ch 6.

troubling conceptions of what is normal.²⁴ What is reasonable comes to rest on an ‘unreflective conception of ordinariness’ grounded in judges’ assumptions about how people think and act, derived from their own necessarily limited and culturally specific experiences.²⁵ Perhaps not surprisingly, ‘the reasonable person often turns out to bear a rather suspicious similarity to the judge.’²⁶

Judgments that employ this standard are also often expressed with the ‘distinctive impatience of common sense reasoning’²⁷ and a corresponding ‘lack of imaginative effort’ in addressing challenging facts and theories.²⁸ Indeed, Eberts suggests that ‘on matters where “common sense” lends them confidence,’²⁹ judges often have ‘no time, literally or figuratively’ for expert evidence, because they are ‘very skeptical about there being any need to hear it: reality is already very nicely and very authoritatively described and understood.’³⁰

²⁴ Moran (n 15) 9.

²⁵ *ibid.* For critical explorations of the consequences of this observation, see eg Sapiro (n 16); Foluke Adebisi, ‘Should We Rethink the Purposes of the Law School? A Case for Decolonial Thought in Legal Pedagogy’ (2021) 3 *Amicus Curiae* (Series 2) 428; Raheel Ahmed, ‘The Standard of the Reasonable Person in Determining Negligence-Comparative Conclusions’ (2021) 24 *Potchefstroom Electronic Law Journal* 1; Daniele Alge, ‘Autism, Culpability and the Criminal Law’ (2019) 5 *New Vistas* 18; Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law* (Oxford University Press 2012) 198; Avihay Dorfman, ‘Reasonable Care: Equality as Objectivity’ (2012) 31 *Law and Philosophy* 369.

²⁶ Moran (n 15) 16–17.

²⁷ *ibid.* 9.

²⁸ *ibid.* 125.

²⁹ *ibid.* 77.

³⁰ Mary Eberts, ‘New Facts for Old: Observations on the Judicial Process,’ in Richard F Devlin (ed), *Canadian Perspectives on Legal Theory* (Edmond Montgomery Publications 1991) 494, cited in Moran (n 15) 77.

In short, in guiding decision makers about how to judge risky conduct, the common law lionizes common sense, centres the judges' own experiences, and gives them license to dispense with the need for further evidence. This is a perilous backdrop against which to assess refugee claimants' credibility. Scholars have noted the widespread neglect of social scientific evidence in refugee status decision making.³¹ How often do the adjudicators in these cases look to social scientific sources to inform their risk response reasoning?

2.4 To what extent does the adjudicators' reasoning reflect key insights from the social scientific study of human risk response?

Social scientific research into how people perceive, assess and manage risk offers many important considerations for refugee status decision makers that fall beyond the scope of this

³¹ Eg Jane Herlihy and Stuart Turner, 'Untested Assumptions: Psychological Research and Credibility Assessment in Legal Decision-making' (2015) 6 *European Journal of Psychotraumatology* 1; Dowd (n 3); Laura Smith-Khan, 'Incorporating Sociolinguistic Perspectives in Australian Refugee Credibility Assessments: The Case of CRL18' (2022) *Journal of International Migration & Integration*, <https://doi.org/10.1007/s12134-022-00937-2>; Laura Smith-Khan, 'Different in the Same Way?: Language, Diversity and Refugee Credibility' (2017) 29 *International Journal of Refugee Law* 389; Katrijn Maryns, 'Procedures without Borders: The Language-ideological Anchorage of Legal-administrative Procedures in Translocal Institutional Settings' (2013) 42 *Language in Society* 71; Evans Cameron 2010 (n 8); Evans Cameron 2008 (n 3).

study.³² What follows is an overview of several key insights, identified in refugee law scholarship,³³ that are the focus of this study's analysis.

One of the early insights to come from the study of human risk response is that we control a risk not only through direct action ("behavioural control") but also by how we think about it ("cognitive control").³⁴ The latter may be 'maladaptive,' 'resulting in avoidance or forestalling action, or taking ineffective actions that increase vulnerability.'³⁵ With familiar hazards, for example, 'rather than guarding against the risks themselves, we often guard against thinking about them.'³⁶ This "cognitive control" mechanism helps to explain, in part, why 'risk

³² For an introduction to this literature, see eg Paul Slovic, 'Perceptions of Risk' (1987) 236 *Science* 280; Robin Hogarth and others, 'Emotion and Reason in Everyday Risk Perception' (2011) 24 *Journal of Behavioral Decision Making* 202; Suzanne Thompson and others, 'Could That Happen to Me?: Individual Differences in Perceptions of Threat and Intentions to Take Protective Action' (2011) 16 *Journal of Applied Biobehavioral Research* 78; Elaine Gierlach, Bradley E Belsher, and Larry E Beutler, 'Cross-cultural Differences in Risk Perceptions of Disasters' (2010) 30 *Risk Analysis* 1539; Sarah Dryhurst and others, 'Risk Perceptions of COVID-19 around the World' (2020) 23 *Journal of Risk Research* 994; Murat Yıldırım, Ekmel Geçer, and Ömer Akgül, 'The Impacts of Vulnerability, Perceived Risk, and Fear on Preventive Behaviours against COVID-19' (2020) 26 *Psychology, Health & Medicine* 35; Gloria Bernabe-Valero and others, 'Individual Differences Facing the COVID-19 Pandemic: The Role of Age, Gender, Personality, and Positive Psychology' (2021) 12 *Frontiers in Psychology* 1; Gülbanu Kaptan, Shoshana Shiloh, and Dilek Önköl, 'Values and Risk Perceptions: A Cross-Cultural Examination' (2013) 33 *Risk Analysis* 318.

³³ Evans Cameron 2008 (n 3).

³⁴ Cynthia T F Klein and Marie Helweg-Larsen, 'Perceived Control and the Optimistic Bias: A Meta-Analysis' (2002) 17 *Psychology and Health* 437, 443.

³⁵ Miranda H Mockrin and others, 'Adapting to Wildfire: Rebuilding After Home Loss' (2015) 28 *Society and Natural Resources* 839, 841.

³⁶ Evans Cameron 2008 (n 3) 569. See also eg Michael A Hoyt, Carol J Nemeroff, and David M Huebner, 'The Effects of HIV-Related Thought Suppression on Risk Behavior: Cognitive Escape

perceptions are weak predictors of precautionary behavior’ in many studies of responses to potentially deadly natural hazards. ‘Levels of preparedness are often low, even when those at risk are aware of their circumstances.’³⁷ In the words of a participant in one study who had lost their home in a wildfire, ‘I thought it was very possible and I feared it in the back of my mind... I think I kind of tried to put it out of my mind, though... Just hope for the best.’³⁸

A large body of research, from many fields of study, investigates the risk responses of those facing natural disasters,³⁹ as well as other kinds of potentially deadly hazards such as lethal

in Men Who Have Sex with Men’ (2006) 25 *Health Psychology* 455; Rhidian A Hughes, ‘“When You’re Using Gear You Put HIV to the Back of Your Mind and Forget about It”: Constructs of Risk’ (2004) 36 *Journal of Psychoactive Drugs* 357.

³⁷ Douglas Paton and others, ‘Risk Perception and Volcanic Hazard Mitigation: Individual and Social Perspectives’ (2008) 172 *Journal of Volcanology and Geothermal Research* 179 at 180.

³⁸ Mockrin (n 35). See also Hughes (n 36).

³⁹ Eg re: floods: Philip Bubeck, Wouter JW Botzen, and Jeroen C J H Aerts, ‘A Review of Risk Perceptions and Other Factors that Influence Flood Mitigation Behavior’ (2012) 32 *Risk Analysis* 1481; Torsten Grothmann and Fritz Reusswig, ‘People at Risk of Flooding: Why Some Residents Take Precautionary Action While Others Do Not’ (2006) 38 *Natural Hazards* 101; Luz Adriana Munoz-Duque and others, ‘Risk Perception and Trust Management in Inhabitants Exposed to Coastal Flooding: The Case of Cartagena, Colombia’ (2021) 60 *International Journal of Disaster Risk Reduction* 1055; re: wildfires: Mockrin (n 35); Charishma Ratnam, Danielle Drozdowski, and Rosalie Chapple, ‘Can Place Attachment Mediate Perceptions of Bushfire risk? A Case Study of the Blue Mountains, NSW’ (2016) 31 *Australian Journal of Emergency Management* 62; Sarah McCaffrey, Robyn Wilson, and Avishek Konar, ‘Should I Stay or Should I Go Now? Or Should I Wait and See? Influences on Wildfire Evacuation Decisions’ (2018) 38 *Risk Analysis* 1390; Jim McLennan, Douglas Paton and Lyndsey Wright, ‘At-risk Householders’ Responses to Potential and Actual Bushfire Threat: An Analysis of Findings from Seven Australian Post-bushfire Interview Studies 2009–2014’ (2015) 12 *International Journal of Disaster Risk Reduction* 319; re: earthquakes: Julia S Becker and others, ‘Salient Beliefs about Earthquake Hazards and Household Preparedness’ (2013) 33 *Risk Analysis* 1710; Julia S Becker

and others, 'The Role of Prior Experience in Informing and Motivating Earthquake Preparedness' (2017) 22 International Journal of Disaster Risk Reduction 179; John McClure and others, 'When a Hazard Occurs Where It is Not Expected: Risk Judgments about Different Regions after the Christchurch Earthquakes' (2015) 75 Natural Hazards 635; re: volcanic eruptions: Paton (n 37); Matt Davis, Tullio Ricci, Lara M Mitchell, 'Perceptions of Risk for Volcanic Hazards at Vesuvio and Etna, Italy' (2005) 21 The Australasian Journal of Disaster and Trauma Studies 1; re: tornadoes: Jerry Suls and others, 'Optimism following a Tornado Disaster' (2013) 39 Personality and Social Psychology Bulletin 691; Philip L Chaney, Greg S Weaver, Susan A Youngblood, 'Previous Experience and Tornado Preparedness in DeKalb County, Alabama' (2015) 1 Papers in Applied Geography 128; re: hurricanes: Jeffrey K Lazo and others, 'Factors Affecting Hurricane Evacuation Intentions' (2015) 35 Risk Analysis 1837; Shih-Kai Huang and others, 'Household Evacuation Decision Making in Response to Hurricane Ike' (2012) 13 Natural Hazards Review 283; Craig Trumbo and others, 'An Assessment of Change in Risk Perception and Optimistic Bias for Hurricanes among Gulf Coast Residents' (2014) 34 Risk Analysis 1013; Ann Bostrom and others, 'Eyeing the Storm: How Residents of Coastal Florida See Hurricane Forecasts and Warnings' (2018) 30 International Journal of Disaster Risk Reduction 105; re: cyclones and typhoons: Colin Walch, 'Evacuation ahead of Natural Disasters: Evidence from Cyclone Phailin in India and Typhoon Haiyan in the Philippines' (2018) 5 Geo: Geography and Environment 1.

illnesses and diseases,⁴⁰ and attacks and assaults.⁴¹ As this literature makes clear, those facing these kinds of dangers often respond in ways that deviate markedly from the expectation that people at risk will take reasonable steps to keep themselves safe.

⁴⁰ Eg Benjamin J Kuper-Smith and others, 'Risk Perception and Optimism during the Early Stages of the COVID-19 Pandemic' (2021) 8 *Royal Society Open Science* 1; Silvia Riva and others, 'Optimistic Bias in Physical Activity: When Exercise Flows into Addiction' (2018) 7 *International Journal of High Risk Behaviors and Addiction* 1; Lynn A Jansen and others, 'Perceptions of Control and Unrealistic Optimism in Early-phase Cancer Trials' (2018) 44 *Journal of Medical Ethics* 121; Marianna Masiero and others, 'Optimistic Bias in Young Adults for Cancer, Cardiovascular and Respiratory Diseases: A Pilot Study on Smokers and Drinkers' (2018) 23 *Journal of Health Psychology* 645; Hoyt (n 36); Hughes (n 36).

⁴¹ Eg Keren Cohen-Louck and Yael Saka, 'Patterns in Response to Chronic Terrorism Threats: A Construct of Emotional, Cognitive, and Behavioral Responses among Israeli Citizens' (2017) 33 *Stress and Health* 448; Eli Somer and others, 'Terrorism, Distress and Coping: High Versus Low Impact Regions and Direct Versus Indirect Civilian Exposure' (2005) 18 *Anxiety, Stress, and Coping* 165; Moshe Zeidner, 'Individual Differences in Psychological Reactions to Terror Attack' (2006) 40 *Personality and Individual Differences* 771; Miriam Billig, 'Is My Home My Castle? Place Attachment, Risk Perception, and Religious Faith' (2006) 38 *Environment and Behavior* 248; Avraham Bleich, Marc Gelkopf, and Zahava Solomon, 'Exposure to Terrorism, Stress-Related Mental Health Symptoms, and Coping Behaviors among a Nationally Representative Sample in Israel' (2003) 290 *Journal of the American Medical Association* 612; Garry Stevens and others, 'Alert but Less Alarmed: A Pooled Analysis of Terrorism Threat Perception in Australia' (2011) 11 *BMC Public Health* 797; Jenny K Rinehart and others, 'Cognitive Processes Underlying the Self-other Perspective in Women's Judgments of Sexual Victimization risk' (2018) 35 *Journal of Social and Personal Relationships* 1381; Christine A Gidycz, John R McNamara, and Katie M Edwards, 'Women's Risk Perception and Sexual Victimization: A Review of the Literature' (2006) 11 *Aggression and Violent Behavior* 441; Barbara Krahe, 'Cognitive Coping with the Threat of Rape: Vigilance and Cognitive Avoidance' (2005) 73 *Journal of Personality* 609.

Over 60% of the participants in one study, for example, ‘felt that their lives were in danger’ from ongoing terrorist attacks, and with good reason: almost 1 in 6 ‘had been directly exposed to a terrorist attack’ and over 1 in 3 ‘had a family member or friend who had been exposed.’⁴² None had chosen to flee their homes. Instead, nearly half (46.6%) reported using ‘denial’ as a coping strategy: ‘trying to ignore the situation and go on living.’⁴³ Other strategies used by the subjects in these and similar studies, most of whom believed that they were facing an existential threat, include: ‘faith in God’;⁴⁴ ‘self-distraction through activity’;⁴⁵ ‘disengagement from stressful cues’;⁴⁶ ‘humor’;⁴⁷ and ‘belief in fate or luck.’⁴⁸ Researchers note that many of the subjects in these studies had become ‘habituated’ to the risks that they faced.⁴⁹ As one participant said of the ‘numbness’ and ‘indifference’ she feels about this risk, of her attempts ‘to forget about it’: ‘All my senses have adapted, my entire existence has adapted to life under terrorist attacks. We’re used to it.’⁵⁰

⁴² Bleich (n 41) 616–17.

⁴³ *ibid.* See also Cohen-Louck (n 41) 451: ‘Another emotional response expressed by several participants was to ignore or deny the terrorist attack reality’; Somer (n 41) 171: one category of response reported by the participants was ‘ignoring the situation (I lived as if nothing was happening)’; Zeidner (n 41) 774; Grothmann (n 39) 118: ‘Non-protective responses – like denial, wishful thinking, and fatalism – seem to play a major role in ‘de-motivating’ precautionary behavior.’

⁴⁴ Bleich (n 41) 617; Somer (n 41) 176; Billig (n 41) 249. See discussion in Evans Cameron 2008 (n 3) 582–84.

⁴⁵ Bleich (n 41) 617; Somer (n 41) 175.

⁴⁶ Somer (n 41) 175.

⁴⁷ Bleich (n 41) 617; see also Cohen-Louck (n 41) 453.

⁴⁸ Cohen-Louck (n 41) 452–53; see also discussion in Klein (n 34) 443.

⁴⁹ Cohen-Louck (n 41); Bleich (n 41).

⁵⁰ Cohen-Louck (n 41) 454.

Since every refugee claimant will eventually choose to flee their home, decision makers may develop a ‘mobility bias’:⁵¹ ‘fleeing may come to seem the only natural response’ to a seriously dangerous situation.⁵² Yet rather than triggering helpful preventive behaviours, even life-threatening dangers may become the backdrop against which we hope for the best and try to live our lives. Moreover, when choosing to flee means abandoning ‘the things that make life worth living’ – ‘status, financial security, personal property, community, cultural identity, friends and family’⁵³ – this kind of decision may be anything but straightforward.

Faced with such difficult choices, we do not reliably prioritize official sources of information. Our tendency to rely on lay information in making risky decisions has been observed across a range of contexts,⁵⁴ including in many studies of evacuations: people’s decisions about whether and when to leave their homes are ‘influenced by their reliance on personal information sources and the advice of family and friends.’⁵⁵

And crucially, faced with such difficult choices, we do not reliably prioritize our safety.⁵⁶ A host of studies have observed that people at imminent risk from natural disasters refused to evacuate, or delayed leaving, putting their lives at risk, in order to protect their property.⁵⁷ More fundamentally, as a rule, the more appealing a risk – the more benefits we associate with it – the

⁵¹ Eg Alex Braithwaite, Joseph M Cox, and Faten Ghosn, ‘Should I Stay or Should I Go? The Decision to Flee or Stay Home During Civil War’ (2021) 47 *International Interactions* 221.

⁵² Evans Cameron 2008 (n 3) 579.

⁵³ *ibid* 571.

⁵⁴ *ibid* 576–78.

⁵⁵ Lazo (n 39) 1841.

⁵⁶ Evans Cameron 2008 (n 3) 578–79.

⁵⁷ Eg McCaffrey (n 39); Lazo (n 39); McLennan (n 39); Huang (n 39).

safer or more manageable it will seem.⁵⁸ A large literature on ‘place attachment’ has observed that the appeals of home may lead us to underestimate the danger of living in an unsafe environment, or may ‘override the risk,’ reducing our willingness to relocate to avoid harm.⁵⁹ A robust finding in studies of natural hazards and disasters, including those that threaten life, is that place attachment ‘may act as a barrier for enacting preventive behaviours.’⁶⁰ In a wide range of contexts, researchers observe that people who are very attached to their homes and communities ‘are unwilling to relocate’ and ‘are more likely to return to risky areas.’⁶¹ As one participant in a study of bushfire risk explained, ‘I wouldn’t consider moving...I love living here and it’s just our space.’⁶² As another said of the risk of armed attack:

I am attached to this place, to the environment, and to the people I have lived with for many years. I feel I am an integral part of this place. I love this place. I breathe its air, the

⁵⁸ Eg Ali S Alhakami and Paul Slovic, ‘A Psychological Study of the Inverse Relationship between Perceived Risk and Perceived Benefit’ (1994) 14 *Risk Analysis* 1084; Evans Cameron 2008 (n 3) 570–71.

⁵⁹ Eg Ratnam (n 39); Billig (n 41); Fátima Bernardo, ‘Impact of Place Attachment on Risk Perception: Exploring the Multidimensionality of Risk and its Magnitude’ (2013) 34 *Estudios de Psicología* 323; Stefano De Dominicis and others, ‘We are at Risk, and So What? Place Attachment, Environmental Risk Perceptions and Preventive Coping Behaviours’ (2015) 43 *Journal of Environmental Psychology* 66; Sylvia J T Jansen, ‘Place Attachment, Distress, Risk Perception and Coping in a Case of Earthquakes in the Netherlands’ (2020) 35 *Journal of Housing and the Built Environment* 407; Rita B. Domingues, Saúl Neves de Jesus, and Oscar Ferreira, ‘Place Attachment, Risk Perception, and Preparedness in a Population Exposed to Coastal Hazards: A Case Study in Faro Beach, southern Portugal’ (2021) 60 *International Journal of Disaster Risk Reduction* 1; Marino Bonaiuto and others, ‘Place Attachment and Natural Hazard Risk: Research Review and Agenda’ (2016) 48 *Journal of Environmental Psychology* 33.

⁶⁰ Bonaiuto (n 59) 47. See also Jansen (n 59) 408–10; Mockrin (n 35) 850–1.

⁶¹ Bonaiuto (n 59) 33; see discussion in s.3.2, 42–44.

⁶² Ratnam (n 39) 64.

sea, the joint experiences with friends and neighbours. I know I am putting myself at risk for all that.⁶³

That our risk responses are affected not only by what we know about a risk but by how we feel about it helps to explain the variance observed in an extensive body of empirical studies. Risk responses vary widely because, for a host of psychological, social and cultural reasons, different people feel differently about the same hazards and the same people feel differently about equivalently risky hazards. Some people are brave, others timid.⁶⁴ Some are angry and defiant,⁶⁵ while others have developed ‘a sense of learned helplessness where they perceive that it is useless to take precautions.’⁶⁶ And many will feel unrealistically optimistic, even when faced with life-threatening danger.

Unrealistic optimism has been extensively studied, widely observed, and is an ‘archetypal cognitive prejudice’ in risk perception.⁶⁷ Indeed, it is ‘one of the most robust findings in research

⁶³ Billig (n 41) 262.

⁶⁴ Eg Paola Magnano and others, ‘Courage as a Potential Mediator between Personality and Coping’ (2017) 111 *Personality and Individual Differences* 13; Christopher R Rate and others, ‘Implicit Theories of Courage’ (2007) 2 *The Journal of Positive Psychology* 80.

⁶⁵ When people under threat feel not only frightened but angry, studies have observed both increased optimism and reduced preventive behaviours. See Saša Drače and François Ric, ‘The Effect of Emotions on Risk Perception: Experimental Evaluation of the Affective Tendencies Framework’ (2012) 45 *Psihologija* 409; Raymundo M Campos-Vazquez, and Emilio Cuilty, ‘The Role of Emotions on Risk Aversion: A Prospect Theory Experiment’ (2014) 50 *Journal of Behavioral and Experimental Economics* 1; Ming-Hong Tsai and Maia J Young, ‘Anger, Fear, and Escalation of Commitment’ (2010) 24 *Cognition and Emotion* 962.

⁶⁶ Chaney (n 39) 131. See also eg Kathleen J Tierney, Michael K Lindell and Ronald W Perry (eds), *Facing the Unexpected: Disaster Preparedness and Response in the United States* (Joseph Henry 2001) cited in Chaney, *ibid*; Evans Cameron 2008 (n 3) 579–81.

⁶⁷ Riva (n 40) 1.

on social perception and cognition.’⁶⁸ Unrealistic optimism is what allows us to conclude against all odds that bad situations will get better and that we are less likely than others to suffer negative outcomes, that ‘it won’t happen to me.’⁶⁹ In all kinds of contexts, ‘People tend to display a remarkable propensity toward excessive optimism, predicting futures that are often quite unrealistically positive.’⁷⁰ This has been observed ‘in over a thousand studies,’⁷¹ ‘across cultures, genders, educational levels, and age groups,’⁷² and ‘for a diverse array of undesirable events.’⁷³

Our ‘remarkable propensity toward excessive optimism’ is often compounded by the “‘U-shaped” relationship between experience and risk perception: while a lack of direct experience may lead to (naïve) overconfidence, direct experience may also lead to (blasé) overconfidence.’⁷⁴ ‘Think of the growing comfort a worker might feel with using a ladder with a broken rung; the

⁶⁸ Bjørg-Elin Moen and Torbjørg Rundmo, ‘Predictors of Unrealistic Optimism: A Study of Norwegian Risk Takers’ (2005) 8 *Journal of Risk Research* 363, 374.

⁶⁹ James A Shepperd and others, ‘A Primer on Unrealistic Optimism’ (2015) 24 *Current Directions in Psychological Science* 232; Carlo Caponecchia, ‘It Won’t Happen to me: An Investigation of Optimism Bias in Occupational Health and Safety’ (2010) 40 *Journal of Applied Social Psychology* 601.

⁷⁰ Shepperd 2015 (n 69) 232.

⁷¹ *ibid.*

⁷² Hichang Cho, Jae-Shin Lee, and Siyoung Chung, ‘Optimistic Bias about Online Privacy Risks: Testing the Moderating Effects of Perceived Controllability and Prior Experience’ (2010) 26 *Computers in Human Behavior* 987, 988. See generally eg James A Shepperd, Marie Helweg-Larsen and Ligia Ortega, ‘Are Comparative Risk Judgments Consistent Across Time and Events?’ (2003) 29 *Personality and Social Psychology Bulletin* 1169; Moen (n 68).

⁷³ Shepperd 2015 (n 69) 232.

⁷⁴ Evans Cameron 2008 (n 3) 575. See eg Chaney (n 39); Becker 2013 (n 39); Becker 2017 (n 39); Davis (n 39); McClure (n 39); Trumbo (n 39). See generally Bonnie Halpern-Felsher and others, ‘The Role of Behavioral Experience in Judging Risks’ (2001) 20 *Health Psychology* 120.

more times he climbs the dangerous ladder without incident, the safer he feels it is.’⁷⁵ People who are exposed to a hazard and who suffer no harm, who experience a ‘near miss,’⁷⁶ or who suffer a loss or a harm that is ‘relatively benign,’⁷⁷ may come to see the danger as less than it is and may consequently engage in fewer preventive behaviours.

When we do take precautions, we may judge them to be more effective than they are, in turn reducing further our perception of the danger. ‘The greater one’s perception of control, the lower one’s personal risk estimates.’⁷⁸ This effect may operate even when this perceived controllability is itself unrealistically optimistic. ‘Perceptions of control can arise from a common psychological motivation to master one’s environment or situation, and people can have illusions of control

⁷⁵ Catherine Tinsley, Robin Dillon, and Peter Madsen, ‘How to Avoid Catastrophe’ (Apr 2011) Harvard Business Review. Most of us have recently had the chance to observe this first hand. As one reporter noted barely six months into the pandemic, at first most people took the risk of Covid-19 seriously, but ‘a lot of us now feel safe crowding into bars or flying on a full airplane, even though those feelings bear little relation to facts about viral transmission.’ This ‘predictable’ response ‘stems from a principle well-known in psychological therapy: The more we’re exposed to a given threat, the less intimidating it seems.’ Elizabeth Svoboda, ‘How Our Brains Numb Us to Covid-19’s Risks – and What We Can Do about It,’ Washington Post, Aug 22 2020 <www.washingtonpost.com/health/covid-risks-stop-seeming-so-scary/2020/08/21/09c286c4-cc49-11ea-bc6a-6841b28d9093_story.html> accessed 17 July 2022.

⁷⁶ McClure (n 39) 637; Robin L Dillon, Catherine H Tinsley and William J Burns, ‘Near-Misses and Future Disaster Preparedness’ (2014) 34 Risk Analysis 1907.

⁷⁷ Becker (n 39) 1721.

⁷⁸ Klein (n 34) 438. See also eg Shepperd 2015 (n 69); Jansen (n 40); Masiero (n 40); Kuper-Smith (n 40); Cho (n 72); Loran F Nordgren, Joop Van Der Pligt, and Frenk Van Harreveld, ‘Unpacking Perceived Control in Risk Perception: The Mediating Role of Anticipated Regret’ (2007) 20 Journal of Behavioral Decision Making 533. See also discussion in Evans Cameron 2008 (n 3) 571–72.

over uncontrollable events when they are motivated to do so.⁷⁹ When this occurs, and ‘a person believes that they can control events more than they can in fact, this belief will lead them to be more optimistic about their chances of avoiding undesirable outcomes.’⁸⁰ In other words, even taking ineffective measures to control a risk ‘may lead us to believe that the danger is less than it is, simply because we feel that we are doing something about it.’⁸¹

Scholars have noted examples of reasoning in refugee status decisions that fail to account for these observations from the social scientific literature.⁸² When the adjudicators in the cases under review assess the plausibility of the claimants’ alleged risk response, to what extent does their reasoning reflect these key insights?

3. Research design

3.1 The data set

In the context of a larger project, I requested a set of 1000 decisions from Canada’s Refugee Board.⁸³ These 1000 decisions were the first 1000 decisions to reject a claim made in the 2016 calendar year by the adjudicators at the Board’s three offices in Montreal, Toronto, and

⁷⁹Jansen (n 40) 126. See also eg Ryan W Wohleber and Gerald Matthews, ‘Multiple Facets of Overconfidence: Implications for Driving Safety’ (2016) 43 *Transportation Research. Part F, Traffic Psychology and Behaviour* 265.

⁸⁰ Anneli Jefferson, Lisa Bortolotti, and Bojana Kuzmanovic, ‘What is Unrealistic Optimism?’ (2017) 50 *Consciousness and Cognition* 3, 3. See also eg Frank P McKenna, ‘It Won’t Happen to Me: Unrealistic Optimism or Illusion of Control?’ (1993) 84 *British Journal of Psychology* 39; James A Shepperd and others, ‘Exploring the Causes of Comparative Optimism’ (2002) 42 *Psychologica Belgica* 65; Kuper-Smith (n 40).

⁸¹ Evans Cameron 2008 (n 3) 572.

⁸² See sources in n 3.

⁸³ Redacted copies of the Board’s decisions obtained pursuant to a request under the *Access to Information Act* (RSC, 1985, cA-1) become a matter of public record.

Vancouver. The Board released these decisions to me in PDF form, with the claimants' names and any identifying details redacted. They were released in batches of 100, over a period of two years and nine months, beginning with the decisions of the Montreal office (n=316). The data set for the present study comprises these 316 decisions from the Montreal office.

Since this study focuses squarely on the question of whether a claimant meets the legal criteria to be found at risk under the Convention, I removed from the data set the 13 decisions in which the adjudicator did not consider this question: decisions in which the finding that the claimant was excluded from refugee protection, or that the claimant had not established their identity, ended the adjudicator's analysis.⁸⁴ This resulted in a final set of 303 decisions, of which 194 were written in French and 109 in English,⁸⁵ representing the work of 25 adjudicators. Both the mean and median number of decisions per adjudicator was 12 and the highest number of decisions issued by a single adjudicator was 24 (24/303, 8%).

As described above, the decisions for this study were collected through nonprobability sampling.⁸⁶ While the selection was therefore not random, the distribution of relevant variables is largely in keeping with the profile of the Board's decision making in the comparator years for

⁸⁴ Claimants may be excluded from protection if they have status in a safe third country or if they have committed certain kinds of crimes. *Immigration and Refugee Protection Act* S.C. 2001, c. 27 s. 98 (*IRPA*). The theoretical basis for distinguishing these categories of decisions in a study of credibility judgments is that if assessing credibility comes down to resolving doubt, and resolving doubt comes down to deciding which kind of mistake to prefer, there are unique considerations at stake in deciding this question of error preference in the context of findings about a claimant's exclusion or identity that do not arise when the sole question is whether the claimant is at risk.

⁸⁵ All citations from French-language decisions in this study appear in English, translated by the author.

⁸⁶ See eg 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.

which the most recent data is publicly available. The decisions in this set, which were all issued in the first five months of 2016, rejected the claims of citizens of 67 countries. In the full 2021 calendar year, although the percentage of rejections is not specified, the Board heard claims from citizens of 98 countries,⁸⁷ and in the first 3 months of 2022, from citizens of 71 countries.⁸⁸ The claimant or claimants in this data set were represented by counsel in 96% of cases (291/303); in 2019, the claimant or claimants were represented in 92% of the Board's rejections (6075/6631).⁸⁹ 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 non-state actors and made claims based on the full spectrum of legal grounds.

The decisions in this data set reflect a larger proportion of single claimants than the Board's most recent cohort. 77% of the decisions in this set (233/303) were for a single claimant, the remaining 23% (70/303) for a pair of claimants or a family. In 2019, 60% (4003/6631) of the Board's decisions to reject a claim were for a single claimant, and 40% (2628/6631) were for a pair of claimants or a family.⁹⁰ In the cases under review, 68% of the claimants were identified as male (159/233) and 32% as female (74/233); no other gender categories were identified. No data is publicly available on the gender breakdown of the Board's rejections in a comparator year.⁹¹ These factors are discussed further under 'Limitations,' below.

⁸⁷ Immigration and Refugee Board statistics,

<www.irb.gc.ca/en/statistics/protection/Pages/RPDStat2021.aspx> accessed 17 July 2022. This is the last full year for which this information is available.

⁸⁸ Immigration and Refugee Board statistics,

<www.irb.gc.ca/en/statistics/protection/Pages/RPDStat2022.aspx> accessed 17 July 2022.

⁸⁹ *ibid.* This is the last full year for which this information is available.

⁹⁰ Sean Rehaag, '2019 Refugee Claim Data and IRB Member Recognition Rates' (12 August 2020), <www.refugeelab.ca/refugee-claim-data-2019> accessed 17 July 2022. This is the last year for which this data is available.

⁹¹ Statistics from the Government of Canada suggest that in 2020, the last year for which this data is available, 56% of refugee claims were made by male claimants and 44% by female

3.2 Analysis and exploration

For this study's quantitative analysis, I tallied the decisions coded at each of the codes below. For this study's qualitative exploration, I considered the passages in the decisions in which the adjudicators explain their concerns about the claimant's risk response behaviour; in which they set out the claimants' answers to these concerns; and in which they justify why they are not persuaded by these answers. The numerical data provided answers to the quantitative questions ('In what proportion'), and I drew on both kinds of data in exploring the qualitative questions ('To what extent').

3.3 Coding

The larger project of which this study is a part aims to quantify the full set of inferences on which adjudicators rely to justify their negative credibility conclusions and to examine the assumptions that underlie these inferences. To develop a set of codes that would capture every inference, I first ran a pilot project in which I fully coded the first 200 decisions released to me by the Board, using NVivo software.⁹² The initial set of codes drew on: negative credibility inferences recognized in Canadian law (eg inconsistencies, omissions, implausibility); inferences reported in the Board's decisions reviewed by the Federal Court;⁹³ and others that I encountered in my clients' cases during ten years in practice. As I read the 200 cases, I refined the initial codes. As new categories and sub-categories of inference emerged, I recoded the decisions that I had previously coded, following an iterative process until I found no new categories of inference in the decisions. This work yielded a set of 53 codes and sub-codes.

claimants, <www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/departmental-performance-reports/2021/gender-based-analysis-plus.html> accessed 17 July 2022. This data does not record how many claimants from each category were accepted or rejected.

⁹² NVivo Qualitative Data Analysis Software, QSR International Pty Ltd. Version 12, 2018.

⁹³ These decisions are discussed and analyzed in Evans Cameron 2018 (n 1).

For the present study, I used the codes relating to risk response inferences that I had developed in the pilot study, as well as others described below, to investigate the research questions set out above.

3.3.1 In what proportion of cases do the adjudicators rely on risk response inferences to justify negative credibility conclusions?

Using a mix of NVivo and Excel software, I first coded the 303 decisions in this study's data set using six of the codes established in the pilot study. For every decision in the set, I coded for 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.

For all decisions with findings of deception, I coded for each of the five types of risk response inference that I had identified in the pilot study:

Delay in claiming in Canada or abroad: The aspect of the claimant's account that the member [adjudicator] identifies as undermining their credibility is: the finding that the claimant delayed in making their refugee claim in Canada or in another country.

Delay in leaving: The aspect of the claimant's account that the member [adjudicator] identifies as undermining their credibility is: the finding that the claimant delayed in leaving their country after the danger allegedly arose.

Failure to claim in a safe third country: The aspect of the claimant's account that the member [adjudicator] identifies as undermining their credibility is: 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.

Reavailment: The aspect of the claimant’s account that the member [adjudicator] identifies as undermining their credibility is: the finding that the claimant, having left their country after the danger arose, chose to return home.

Other implausibly risky behaviour: The aspect of the claimant’s account that the member [adjudicator] identifies as undermining their credibility is: the finding that the claimant's conduct – other than the conduct covered in the other risk response nodes – exposed them to danger and that this voluntary level of risk exposure is not plausible.

3.3.2 To what extent do the adjudicators hold the claimants to a general idealized standard of risk response?

In his purest form, the “reasonable man” is fully generalized: he is meant to have the character and qualities of an admirable everyman, not those of the person whose risk response is at issue. To capture reasoning that took a generalized approach to assessing the claimant’s conduct, I coded the risk response inferences for the use of a standard that did not reflect any personal quality of the claimant or any distinguishing feature of the risk that they were facing:

The member [adjudicator] frames the risk response inference in general terms, where neither the person nor the risk is qualified in any way (other than ‘serious’ risk, risk ‘to life,’ risk ‘of persecution’). This code captures, eg “a person who fears for their life” “a person at risk” “a person in danger” “a person fearing persecution or harm” “a person who left facing persecution”. This code does not capture any framing that has even the most minimal personalization/qualification (“a woman at risk” “imminent harm” “for reasons of political opinion” “the risks he alleges” etc.).

Since the “reasonable man” is idealized, he is entirely predictable. For any situation, if we know that there is a single reasonable response, we know without question how he will act. In the pilot project, I had noted the adjudicators’ use of an ‘immediacy’ standard. I chose this as an example of a specific and idealized (non-varying) standard and coded the risk response inferences for its use:

The member [adjudicator] uses a fixed ‘immediacy’ standard that permits only one plausible response to the identified risk: acting ‘immediately’ ‘as soon as their feet touch the soil’ ‘at the first opportunity’ etc.

Casting a wide net, I also coded for any recognition that people might respond in varying ways to a risky situation:

The member’s [adjudicator’s] decision shows any express recognition of variance (eg by recognizing that different people might act differently, that there is a range of possible responses that the claimant’s behaviour falls beyond).

The scholarship set out above suggests that the use of a general idealized standard often brings with it the ‘distinctive impatience of common sense reasoning’⁹⁴ and a corresponding ‘lack of imaginative effort.’⁹⁵ To explore this aspect, I coded the risk inferences for brevity:

The member’s [adjudicator’s] engagement with the question of the claimant’s risk response is five sentences or fewer. These five or fewer sentences may lead to one or more findings (delay in claiming, delay in leaving, etc.), but the sum of all findings in the decision relating to risk response is no more than 5 sentences.

As noted above, the “reasonable man” standard ‘seamlessly intertwines’ descriptive and normative elements. I hypothesized that where the normative elements in a standard are heavily predominant, this might affect how the adjudicators justify its use. Adjudicators might recognize that a more palpably normative standard, one that does not seem plausibly descriptive, requires extra support and justification. To explore this possibility, I coded these decisions for references to legal authority in supporting negative credibility inferences, both generally and in the risk response context:

⁹⁴ Moran (n 15) 9.

⁹⁵ *ibid* 125.

The member [adjudicator] supports any negative credibility inference with reference to case law.

The member [adjudicator] supports a risk response inference with reference to case law.

3.3.3 In what proportion of cases do the adjudicators look to social scientific sources to inform their judgments?

To capture how often adjudicators were relying on social scientific sources, I coded for whether the adjudicator, in the context of their credibility finding, had referenced any source (eg publication, report, interview) that was either produced by social scientists or that reported on findings from the social sciences, and whether their reasoning includes ‘anything at all that suggests that, in judging the claimant’s risk response, the member [adjudicator] is drawing on something other than their own common sense,’ apart from references to case law.

3.3.4 To what extent does the adjudicators’ reasoning reflect key insights from the social scientific study of human risk response?

As set out above, refugee law scholarship has identified a set of psychological, social and cultural factors that are key to judging the plausibility of a claimant’s risk response. To assess whether the adjudicators’ reasoning reflects these insights, I first coded whether the adjudicator had addressed the possibility that a psychological, social or cultural factor discussed in this literature could provide a plausible explanation for the claimant’s risk response:

The member [adjudicator] expressly engages with the explanatory potential of any of the enumerated factors⁹⁶ that could support a non-deception counter-theory: the member

⁹⁶ The ‘enumerated factors’ considered under this code were those identified in Evans Cameron 2008 (n 3) and described in this coding as follows: “1) risk perception: familiarity, outcome history, perceived controllability, optimism [whether the claimant’s level of concern about the risk might have been lessened because of: their familiarity with this kind of risk; their previous

expressly considers and rejects the possibility that one or more of these psychological/social/cultural factors could provide a plausible non-deception explanation for the claimant's behaviour.

Where they had done so, I coded whether this was at the claimant's request or on the adjudicator's own initiative:

The member [adjudicator] expressly engages with the explanatory potential of any of the enumerated factors in the 'Psychological/social/cultural explanation' code, without expressly noting that this explanation originated with the claimant, i.e. that the claimant had suggested that this factor was relevant.

For each decision in which the adjudicator had turned their mind to one of these factors, I then coded whether their reasoning acknowledged the related insights from the social scientific literature: I included in this code any decision in which the adjudicator, while rejecting the explanation on the facts of the case, acknowledged that these enumerated factors 'could have explanatory potential' in other circumstances.

experience with this type of risk ('outcome history'); its perceived controllability (eg in status, trying to regularize other ways); optimism]; 2) specific risk management: appeal, place attachment, non-embodied losses, lay knowledge [whether the claimant was willing to expose themselves to a higher level of embodied risk because of their desire for the positive outcome associated with the risk taking (returning home to family, staying home) and/or their desire to avoid non-embodied losses; whether the claimant might have been guided in their risk response by what other lay people told them]; 3) general risk management: risk tolerance, faith, passivity [whether the claimant was willing to expose themselves to a higher level of risk because: they are a brave person (i.e. if the member considered what kind of a person the claimant is: any evidence that they are generally brave, timid etc.); faith played a role in their risk management; their sense of agency was diminished by trauma: they lacked the psychological ability to respond]."

3.4 Limitations

The aims of this study's quantitative analysis were modest. Nonetheless, using multiple coders to minimize subjectivity is best practice as there is always reason for concern that a single coder's unconscious bias may affect their coding.⁹⁷ As this smaller-scale project only allowed for a single coder, I selected codes that I felt minimized this risk: I chose the above codes because I felt that coding for them was straightforward, and rejected others that may have allowed for more subjectivity. The coded data is available for review.⁹⁸

The decisions in this study's dataset all came from one office of the Refugee Board, raising the possibility that its observations apply only to decisions made by that office. While there was no difference in the grant rates among the Board's three offices in 2016 (each granted 66% of the claims decided on the merits),⁹⁹ it is yet possible that the adjudicators may have justified their conclusions differently.

⁹⁷ Eg Chris Barker, Nancy Pistrang, and Robert Elliott, *Research Methods in Clinical Psychology: An Introduction for Students and Practitioners* (2^d ed, John Wiley and Sons Ltd. 2002).

⁹⁸ [This research is currently being added to Toronto Metropolitan University's digital repository. A URL will be available before the date of publication]. To facilitate review, this study refers to the decisions throughout using both the Board's file number and, in parentheses, the corresponding numerical reference within the author's coding system.

⁹⁹ Sean Rehaag, '2016 Refugee Claim Data and IRB Member Recognition Rates' (6 March 2017), <www.ccrweb.ca/en/2016-refugee-claim-data> accessed 17 July 2022, (2.6 "Data"). In an earlier study, Colaiacovo found significant differences in the grant rates in the Board's Toronto, Montreal and Vancouver offices in the 2006–2011 period (51.10%, 36.30% and 39.60%, respectively): Innessa Colaiacovo, 'Not Just the Facts: Adjudicator Bias and Decisions of the Immigration and Refugee Board of Canada (2006–2011)' (2013) 1 *Journal on Migration and Human Security* 122, 128. Rehaag, however, found that for the 2006 year, the grant rates for the three offices were nearly identical (54.29%, 54.43%, 54.38%). Sean Rehaag, 'Troubling Patterns in Canadian Refugee Adjudication' (2008) 39 *Ottawa Law Review* 335, 350–51.

As noted above, this set of decisions contained a larger proportion of single claimants than the most recent comparator set for the Board as a whole. This factor could affect the generalizability of the study's findings, if adjudicators are significantly more or less likely to use risk response reasoning in rejecting the claim of a single claimant as opposed to a pair or a family. In the decisions under review, there was no significant difference between these groups in how the adjudicators used these inferences: the adjudicators used risk response inferences to justify deception findings in 61% of the decisions for single claimants (123/202) and 67% of the decisions for multiple claimants (38/57).

In the cases in this sample, the adjudicators were more likely to use risk response inferences in rejecting male than female claimants: they used these inferences to justify deception findings in 62% of the cases in which the single claimant was male (85/138) and 49% of the cases where the single claimant was female (31/63).¹⁰⁰ The potential significance and implications of this observation should be explored in future studies of the Board's decision making. For present purposes, since the representativeness of the gender distribution in this data set could not be verified, it is possible that this factor could affect the generalizability of the study's findings.

Most notably, by the date of publication, this study's data will be six years old. Several years after these decisions were written, the Board published a new credibility assessment guide for its adjudicators.¹⁰¹ As it relates to the inferences that are the subject of this study, this new guide is an improvement on its predecessor.¹⁰² In particular, it explains that 'cultural or psychological

¹⁰⁰ This study analyzed the genders of the single claimants only, as the decisions did not always specify the genders of the dependant claimants among claimant families.

¹⁰¹ Legal Services, Immigration and Refugee Board, 'Assessment of Credibility in Claims for Refugee Protection' (December 31, 2020), <www.irb.gc.ca/en/legal-policy/legal-concepts/Pages/Credib.aspx> accessed 17 July 2022.

¹⁰² Legal Services, Immigration and Refugee Board, 'Assessment of Credibility in Claims for Refugee Protection' (January 31, 2004), <www.refworld.org/docid/4638af792.html> accessed 17 July 2022.

barriers’ may ‘have a direct bearing on the significance of a delay in claiming refugee protection’ in claims based on sexual identity,¹⁰³ and it directs adjudicators to ‘bear in mind’ the claimant’s age, any ‘psychological condition,’ and ‘the vulnerable circumstances of abused women.’¹⁰⁴

At the same time, the new guide shares much of its content with the previous version. As before, it instructs the adjudicator to consider the claimant’s ‘failure to flee...at the first opportunity,’ ‘failure to go into hiding immediately,’ ‘delay in making a claim,’ ‘returning voluntarily.’¹⁰⁵ It also directs adjudicators to dozens of legal precedents upon which they can rely to justify a negative credibility inference if they feel that the claimant has failed to provide a ‘reasonable explanation’ for their risk response – or indeed, a ‘valid reason’ or ‘a reasonable excuse.’¹⁰⁶ Nonetheless, the adjudicators’ use of risk response inferences may have changed since 2016, either owing to this new guidance or for other reasons.

4. Research results

4.1 The adjudicators rely on risk response inferences in 63% of their negative credibility judgments.

¹⁰³ Legal Services, Immigration and Refugee Board 2020 (n 101) 2-48.

¹⁰⁴ *ibid* 2-49. In so doing, the guide references, at note 4, the Board’s recent guideline addressing claims based on Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (SOGIESC), which contains what I believe to be the Board’s first – and to date only – reference to a social scientific source in any of its published materials: the journal *Traumatology*, for the point that claimants with diverse SOGIESC may be suffering the aftereffects of trauma. Chairperson’s Guideline 9: Proceedings before the IRB involving Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (May 1, 2017, revised Dec 17 2021), <www.irb.gc.ca/en/legal-policy/policies/Pages/GuideDir09.aspx> accessed 17 July 2022.

¹⁰⁵ Legal Services, Immigration and Refugee Board 2020 (n 101) see generally s.2.2.8.

¹⁰⁶ *ibid* 2-50, 2-53, 2-54.

In 85% of the decisions in the data set, the adjudicator concluded that the claimant had attempted to deceive them (259/303).¹⁰⁷ Risk response reasoning was a standard feature of these negative credibility judgments. In the decisions with deception findings, nearly two out of three claimants were found to be lying in part because of how they allegedly responded to a risk. The adjudicators relied on the five risk exposure inferences, in the aggregate, in 63% of their credibility rejections (162/259): ‘delay in claiming’ in 29% of decisions (75/259); ‘other implausibly risky behaviour’ in 24% (62/259); ‘delay in leaving’ in 17% (45/259); ‘failure to claim’ in 15% (38/259); and ‘reavailment’ in 14% (36/259).¹⁰⁸ Since the remainder of this study’s analysis will consider the decisions in which adjudicators drew a risk response inference, in the sections below, ‘decisions under review’ refers to the 162 decisions in which the adjudicators relied on this category of inference.

4.2 The adjudicators often measure the claimants’ risk responses against a general idealized standard.

In just under half of the decisions under review (43%, 70/162), the adjudicator uses the most categorical version of a generalized standard: they draw the inference based on a statement about how ‘a person at risk’ would act, in which neither the person nor the risk is qualified in any

¹⁰⁷ For a more detailed discussion of the breakdown of the credibility and deception findings in the decisions in this data set, see Evans Cameron 2022 (forthcoming) (n 2). As discussed in that article, in just over 1% of the decisions that found deception, the adjudicator concluded that the claim was “manifestly unfounded” (per s.107.1 of the *IRPA*), and in 3% the adjudicator concluded that the claim had “no credible basis” (per s.107(2) of the *IRPA*). Moreover, in 84% of the 259 decisions with deception findings, this deception finding was the sole determinative issue: the claimants were rejected based solely on their credibility in 72% of the decisions in the data set (217/303).

¹⁰⁸ The numbers do not add up to 162 because in some decisions the adjudicators relied on more than one category of inference.

way.¹⁰⁹ That this ‘person’ is a construct, and not the claimant herself, is perhaps clearest when the adjudicator notes in the case of a female claimant that ‘a person who fears for *his* life would claim protection at the first opportunity.’¹¹⁰

Many of these decisions conclude that there is but one single plausible risk response in the circumstances described by the claimant. Almost a quarter of the decisions under review (23%, 38/162), for example, hold the claimant to the standard of ‘immediacy’: a claimant who had been seriously threatened would ‘immediately cease’ dangerous activities,¹¹¹ would flee ‘immediately,’¹¹² and would make their claim ‘immediately,’¹¹³ ‘upon arrival,’¹¹⁴ ‘at the first

¹⁰⁹ Eg the claimant is lying because their behaviour is inconsistent with that of ‘a person whose life is at risk’ [eg (064) MB5-03662]; ‘a person who fears for their life or security’ [(190) MB5-05693; see also eg (241) MB6-00098; (260) MB6-00280; (075) MB5-03948, MB5-03951; (128) MB5-04960]; ‘a person who fears persecution’ [eg (276) MB6-00518; (014) MB5-01088, MB5-01091, MB5-01092, MB5-01093; (051) MB5-03167; (193) MB5-05725] ‘a person who genuinely fears returning to their country’ [eg (288) MB6-00764]. Since this code set a low bar to exclude any qualification, it did not include many decisions in which the standard was qualified but barely: eg, the claimant’s actions are inconsistent with those of ‘a person facing *imminent* harm’ [eg (017) MB4-01062, MB4-01072], a person facing ‘the risks *he has alleged*’ [eg (114) MB5-04747], ‘a *woman* who fears for her life’ [eg (282) MB6-00598], a person at risk ‘in the shoes of the claimant’ [eg (093) MB5-04284]; ‘in such circumstances’ [eg (254) MB6-00165, MB6-00162, MB6-00167, MB6-00168; (296) MB6-00923] [emphasis added].

¹¹⁰ (261) MB6-00281, emphasis added.

¹¹¹ (039) MB5-02605 MB5-02692.

¹¹² Eg (146) MB5-05183, MB5-05369; (179) MB5-05638; see also: ‘at the first opportunity’ eg (017) MB4-01062, MB4-01072; (032) MB5-02101; ‘as soon as possible’ eg (033) MB5-02316; (122) MB5-04882, MB5-04881.

¹¹³ (290) MB6-00821 see also eg (049) MB5-03127; (131) MB5-05032.

¹¹⁴ Eg (053) MB5-03345; (082) MB5-04112; (116) MB5-04801; (136) MB5-05074, see also (134) MB5-05052, MB5-05304.

possible opportunity,¹¹⁵ ‘as soon as their feet touch Canadian soil’¹¹⁶ – and not, for example, three days later,¹¹⁷ or when their temporary status is about to expire.¹¹⁸

In the 162 decisions under review, the following statements are all those that expressly recognize that people might respond in varying ways to a risky situation: 6 statements, each appearing once in a single decision:

‘...*normally*, a refugee who fears for their life on return to their country’ would make a claim abroad;¹¹⁹

A claimant ‘should *normally* claim protection at the first opportunity’;¹²⁰

‘...the claimant therefore should have requested asylum upon his arrival in Canada *or shortly after*’;¹²¹

It is ‘reasonable to expect’ a person who fears for his life to ask for asylum ‘in the first safe country where he puts his feet *or at least that he come more quickly to Canada.*’¹²²

¹¹⁵ Eg (247) MB6-00150, MB6-00169; (011) MB5-00821. See also ‘at the first opportunity’ eg (025) MB5-01817; (033) MB5-02316; (076) MB5-03978; (098) MB5-04494; at the ‘earliest opportunity’ eg (051) MB5-03167; (114) MB5-04747; ‘as quickly as possible’ eg (229) MB6-00025; (017) MB4-01062; MB4-01072.

¹¹⁶ Eg (033) MB5-02316. See also (017) MB4-01062, MB4-01072; (293) MB6-00848.

¹¹⁷ (234) MB6-00049.

¹¹⁸ Eg (201) MB5-05807; (046) MB5-02993; (068) MB5-03797, MB5-03816; (128) MB5-04960 (045) MB5-02869; (014) MB5-01088, MB5-01091, MB5-01092, MB5-01093.

¹¹⁹ (288) MB6-00764, emphasis added.

¹²⁰ (076) MB5-03978, emphasis added.

¹²¹ (225) MB5-06097, emphasis added.

¹²² (254) MB6-00165, MB6-00162, MB6-00167, MB6-00168, emphasis added.

‘...it would have been logical to expect that the claimant...take appropriate measures to try to find safety. *These measures could take different forms*, the most important being to look into the possibilities available to him in regards to a request for protection in Canada.’¹²³

Reavailment and delay in leaving for the reasons that the claimant described ‘may be considered reasonable *in some situations*.’¹²⁴

Adjudicators are legally required to consider the claimant’s explanations for their risk responses, yet in the decisions under review, some do not record any explanation at all.¹²⁵ Others note the claimant’s explanations but skip past them to the conclusion: for example, despite the claimant’s alleged fear, ‘he returned to live with his wife and their children. This behaviour is incompatible with that of a person who fears for his life or his security.’¹²⁶ Others register the claimant’s explanations but dismiss them in a word or a phrase: the adjudicator ‘does not accept the

¹²³ (283) MB6-00618, emphasis added.

¹²⁴ (190) MB5-05693, emphasis added.

¹²⁵ Eg (028) MB5-01890; (043) MB5-02780; (058) MB5-03505; (081) MB5-04090. Under Canadian law, adjudicators are required to consider the claimant’s explanations before concluding that their testimony is implausible. *Malaba v Canada (Minister of Citizenship and Immigration)*, 2013 FC 84 [2013] FCJ No 96, para 15; *Tariq v Canada (Minister of Citizenship and Immigration)*, 2005 FC 404, [2005] FCJ No 502, para 14; *Ruiz v Canada (Minister of Citizenship and Immigration)*, 2012 FC 258, [2012] FCJ No 282, para 57.

¹²⁶ (010) MB5-00668. See also eg (030) MB5-02005: ‘Though she made other efforts to extend her status in Canada, the panel finds this extended delay [in making her claim] incompatible with a person who fears for their life and security.’

claimant's explanations,¹²⁷ these explanations are 'insufficient,'¹²⁸ 'unsatisfying'¹²⁹ or 'unreasonable.'¹³⁰

In more than one decision in ten (14%, 22/162), the adjudicators conclude that the claimant's risk response undermines their credibility in five sentences or fewer. Eg:

The claimant arrived in the United States in [redacted] 2015. She did not request asylum because people she knew allegedly told her that her claim could be rejected and that it was safer to make her claim in Canada. She resorted to a ruse to cross the Canadian-American border. The tribunal sees in this "forum shopping" a behaviour that is not compatible with that of someone who fears for their life.¹³¹

The adjudicators often frame the risk response inference in these decisions using language borrowed from the "subjective" element that Canadian law has appended to the Convention definition:¹³² the claimant's conduct 'shows a lack of subjective fear of persecution.'¹³³ Yet

¹²⁷ (253) MB6-00161.

¹²⁸ (046) MB5-02993; (005) MB4-05278; (051) MB5-03167; (276) MB6-00518.

¹²⁹ (017) MB4-01062, MB4-01072.

¹³⁰ (266) MB6-00398; (123) MB5-04934. See also (017) MB4-01062, MB4-01072; (293) MB6-00848; (254) MB6-00165, MB6-00162, MB6-00167, MB6-00168.

¹³¹ (250) MB6-00156.

¹³² *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, [1993] SCJ No 74, para 52. For a critique of this interpretation, see James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2d ed, Cambridge University Press 2014) 91–105; James C Hathaway, 'The Michigan Guidelines on Well-Founded Fear' (2005) 26 Michigan Journal of International Law 492, 497; James C Hathaway and William S Hicks, 'Is There a Subjective Element in the Refugee Convention's Requirement of "Well-Founded Fear"?' (2005) 26 Michigan Journal of International Law 505; Bossin (n 9). For further discussion, see Evans Cameron 2018 (n 1) Ch 3.

¹³³ Eg (055) MB5-03378; (057) MB5-03503; (074) MB5-03892; (084) MB5-04162; (152) MB5-05256.

many provide no further justification for rejecting the claimant's testimony than the observation that the situation was *objectively* dangerous.¹³⁴ The claimants put forward many explanations, for example, for why they did not make their claims immediately. A number noted that they had had valid temporary status when they arrived in Canada and so had been in no danger of removal.¹³⁵ Others explained that they had looked for other ways to regularize their status and had only asked for refugee protection 'as a last resort' when all else had failed.¹³⁶ One explained that she 'did not want to use her religion as an excuse to remain in Canada',¹³⁷ another that 'he never wanted to be a refugee.'¹³⁸ Rather than asking for refugee protection, or before doing so, many claimants applied to prolong their visitors' visas;¹³⁹ applied for work or study permits;¹⁴⁰ applied for a humanitarian visa;¹⁴¹ or pinned their hopes on marrying a Canadian.¹⁴² The adjudicators dismiss these explanations because they find that not claiming immediately left the claimants exposed to too great a risk of deportation.

¹³⁴ Eg (014) MB5-01088, MB5-01091, MB5-01092, MB5-01093; (025) MB5-01817, (146) MB5-05183, MB5-05369; (241) MB6-00098; (069) MB5-03810, MB5-03811, MB5-03812, MB5-03813, MB5-03882; (070) MB5-03835.

¹³⁵ Eg (131) MB5-05032; (046) MB5-02993; (068) MB5-03797, MB5-03816; (128) MB5-04960; (045) MB5-02869.

¹³⁶ (182) MB5-05644.

¹³⁷ (030) MB5-02005.

¹³⁸ (074) MB5-03892.

¹³⁹ Eg (182) MB5-05644.

¹⁴⁰ Eg (030) MB5-02005; (230) MB6-00027; (246) MB6-00149; (309) MB6-01082; (233) MB6-00044.

¹⁴¹ Eg (182) MB5-05644.

¹⁴² Eg (217) MB5-06011, MB5-06020; (268) MB6-00432; (248) MB6-00153; (084) MB5-04162. See also (074) MB5-03892.

In many of the decisions under review, the adjudicators conclude that the claimant's conduct was not believable. The claimant's explanation 'defies common sense,'¹⁴³ it 'makes no sense,'¹⁴⁴ it 'is not serious.'¹⁴⁵ If the claimant did not 'see fit' to protect herself,¹⁴⁶ she could not really have been afraid. Yet in many others, and at times in different passages within the same decisions, the adjudicators hold the claimants to a standard of proper rather than plausible conduct. They conclude that a claimant 'should' have taken protective measures;¹⁴⁷ the claimant 'ought to have'¹⁴⁸ or 'reasonably ought to have'¹⁴⁹ acted otherwise; the claimant was not able to 'justify' their behaviour;¹⁵⁰ their lack of preventive behaviours showed 'negligence'¹⁵¹ and a 'lack of diligence';¹⁵² the claimant's actions were not 'appropriate';¹⁵³ they were not 'reasonable.'¹⁵⁴ The adjudicator 'should have the right to expect' that a person at risk would act differently.¹⁵⁵

Of note, of the many hundreds of discrete reasons that the adjudicators cite for disbelieving the claimants in these decisions, only 33 are supported with reference to case law. More than half of

¹⁴³ (021) MB5-01313; (192) MB5-05700; (160) MB5-05348, MB5-05357; (028) MB5-01890.

¹⁴⁴ (150) MB5-05213.

¹⁴⁵ (148) MB5-05189.

¹⁴⁶ (170) MB5-05539.

¹⁴⁷ (150) MB5-05213; (076) MB5-03978; (011) MB5-00821.

¹⁴⁸ (225) MB5-06097.

¹⁴⁹ (181) MB5-05643; (053) MB5-03345; (246) MB6-00149 .

¹⁵⁰ (175) MB5-05581; (208) MB5-05869, MB5-05881; (218) MB5-06013, MB5-06021; (134) MB5-05052, MB5-05304; (084) MB5-04162; (005) MB4-05278.

¹⁵¹ (094) MB5-04323; (085) MB5-04164.

¹⁵² (175) MB5-05581.

¹⁵³ (283) MB6-00618.

¹⁵⁴ (254) MB6-00165, MB6-00162, MB6-00167, MB6-00168; (190) MB5-05693; (168) MB5-05469, MB5-05470, MB5-05471, MB5-05472, MB5-05473; (160) MB5-05348, MB5-05357; (159) MB5-05346; (095) MB5-04430; (053) MB5-03345; (076) MB5-03978; (082) MB5-04112; (248) MB6-00153.

¹⁵⁵ (229) MB6-00025.

these support one single inference: that the claimant is lying because they did not make their claim at the first opportunity (52%, 17/33). The adjudicators note that, since this inference is legally valid – ‘the jurisprudence is clear,’¹⁵⁶ delay in claiming is ‘an important factor’¹⁵⁷ – it can ‘be used to undermine [the claimant’s] credibility.’¹⁵⁸

4.3 In no cases (0%) do the adjudicators look to social scientific sources to inform their judgments.

In over half of these decisions (57%, 92/162), the adjudicator considers and rejects the possibility that one of the psychological, social, or cultural factors identified in the refugee law literature could provide a plausible non-deception explanation for the claimant’s alleged risk response. The adjudicators almost never consider these factors on their own initiative.¹⁵⁹ In only two cases (2/162) do the adjudicators consider a potential explanation that *may not* have been put forward by the claimants themselves.¹⁶⁰

¹⁵⁶ (233) MB6-00044.

¹⁵⁷ (188) MB5-05657.

¹⁵⁸ (045) MB5-02869.

¹⁵⁹ Of note, one branch of Canadian jurisprudence follows the guidance of the UN Handbook, which advises that ‘while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner.’ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (revised ed, Office of the United Nations High Commissioner for Refugees, 1992), para 203. A refugee status decision maker must therefore ‘do more than simply judge the case’ as the claimant presents it; they must also consider on their own initiative ‘any potential winning arguments “that arise on the evidence” and that the claimant has failed to put forward.’ *Gutierrez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1055, [2011] FCJ No 1274, para 35. See discussion in Evans Cameron 2018 (n 1) 79–82.

¹⁶⁰ (155) MB5-05286; (225) MB5-06097. As noted above, this code captured those cases where the adjudicator did not *expressly* state that the idea had come from the claimant.

In considering these explanations, one single decision in this study expressly references social scientific evidence about risk response (1/162) – and concludes that this evidence is irrelevant. Counsel in that case had submitted an article from the *International Journal of Refugee Law* setting out ‘factors that might influence the actions of an asylum claimant, such as the perception, evaluation and management of risk.’¹⁶¹ The adjudicator concludes that ‘this document deserves no weight in the evaluation of the claimant’s credibility.’¹⁶² For a start, the author’s ‘credibility, experience and knowledge’ could not be evaluated.¹⁶³ But in addition, and crucially, by its nature this kind of evidence has nothing to contribute to refugee status determination. As the author ‘prefers to refer to articles from psychology’ rather than legal authority, it is ‘difficult for the tribunal to make the analogy’ between the examples cited and ‘their application in a refugee law context.’¹⁶⁴ Such examples, ‘drawn from the risks taken in a person’s everyday life, such as smoking a cigarette,’ simply ‘have no link with specific cases in refugee law.’¹⁶⁵

In no decision in this study did the adjudicator’s reasons indicate, directly or by implication, that ‘in judging the claimant’s risk response, [they were] drawing on something other than their own common sense’ (0/162).

4.4 The adjudicators’ reasoning does not reflect key insights from the social scientific study of risk response.

To explain their delay in fleeing their homes, some claimants, citizens of some of the most dangerous countries in the world, explained that they had initially downplayed the danger that they faced. A claimant from Iraq, for example, noted that at first she ‘did not pay any attention’

¹⁶¹ (203) MB5-05817. The article in question was Evans Cameron 2008 (n 3).

¹⁶² (203) MB5-05817.

¹⁶³ *ibid.*

¹⁶⁴ *ibid.*

¹⁶⁵ *ibid.*

to the threat and did not ‘take [it] seriously.’¹⁶⁶ Another from Colombia told himself for a time that the threat ‘could be a bad joke.’¹⁶⁷ A claimant from Afghanistan explained that he did not relocate because he felt safe enough: ‘there was sufficient security at work,’ ‘he lived near his employment and the district in which they lived was secure.’¹⁶⁸ Several claimants described how they became habituated to living with an ever-present risk: they ‘got used to it’¹⁶⁹ and tried ‘to live their normal life.’¹⁷⁰ One claimant from El Salvador explained that she put her faith in God.¹⁷¹

In the latter decision, while rejecting the explanation as ‘insufficient,’ the adjudicator nonetheless acknowledges ‘that those who believe in God may in fact turn to him and put a lot of hope in him.’¹⁷² This decision is the only one in this set to recognize the role that faith can play in moderating risk response (1/162). Not one of the decisions under review acknowledges that the familiarity of a risk might decrease a claimant’s level of concern (0/162), and not one acknowledges that it might ever be possible for a person who recognizes that they face a serious danger to push that thought to the back of their mind (0/162). On the contrary, since the claimant ‘knew of the dangers,’ she ‘would have taken precautions.’¹⁷³ A person who knows that they face a serious risk ‘would leave the area where they are living as quickly as possible and would not try “to live their normal life.”’¹⁷⁴

¹⁶⁶ (236) MB6-00063, MB6-00064. See also (039) MB5-02605, MB5-02692.

¹⁶⁷ (039) MB5-02605, MB5-02692.

¹⁶⁸ (240) MB6-00092, MB6-00093, MB6-00094.

¹⁶⁹ (138) MB5-05106, MB5-05107, MB5-05108.

¹⁷⁰ (160) MB5-05348, MB5-05357.

¹⁷¹ (309) MB6-01082.

¹⁷² *ibid.*

¹⁷³ (236) MB6-00063, MB6-00064. See also (160) MB5-05348, MB5-05357; (039) MB5-02605; MB5-02692.

¹⁷⁴ (160) MB5-05348, MB5-05357.

Not one decision acknowledges the potential for people in dangerous situations to live with the cognitive dissonance illustrated in the literature: our human ability to recognize a risk, and at the same time to refuse to recognize it (0/162). On the contrary, risk perception is a binary: we either know that we are at risk, or we do not know. One claimant, for example, attempted to explain his “awareness” of the risk using a spectrum: ‘I wasn’t 100% aware of the danger that we were in.’ The adjudicator countered that the claimant was well familiar with the agents of persecution. Since he and his family had in fact taken ‘a series of important precautions,’ they evidently knew that they were at risk. The claimant therefore ‘cannot affirm that they were *unaware* of the danger.’¹⁷⁵

The claimants in the decisions under review describe their optimism in words that echo the findings in the social scientific literature. They thought ‘that this could happen to someone else, but never to us.’¹⁷⁶ They held out hope: they put off leaving or making a refugee claim because they hoped that the situation would improve, allowing them to stay or to return home. They were waiting ‘for things to calm down.’¹⁷⁷ They figured that the agents of persecution would eventually lose interest.¹⁷⁸ One claimant thought that ‘with the new government things would get better.’¹⁷⁹ Another simply ‘hoped with all his heart that things would change.’¹⁸⁰

Not one of the decisions under review acknowledges that a person might ever feel unrealistically optimistic (0/162). On the contrary, the adjudicators routinely conclude that the claimant’s

¹⁷⁵ (039) MB5-02605, MB5-02692.

¹⁷⁶ (039) MB5-02605, MB5-02692.

¹⁷⁷ (025) MB5-01817; (123) MB5-04934; (204) MB5-05818; (207) MB5-05836; (016) MB4-00709, MB4-00712. See also (017) MB4-01062, MB4-01072.

¹⁷⁸ (216) MB5-05978; (282) MB6-00598; (025) MB5-01817; (016) MB4-00709, MB4-00712.

¹⁷⁹ (262) MB6-00319.

¹⁸⁰ (101) MB5-04533. See also (201) MB5-05807.

optimism was implausible because it was unrealistic,¹⁸¹ it was not ‘reasonable.’¹⁸² The claimants ‘could not explain what allowed them to believe’ that the situation would improve.¹⁸³ ‘The claimant has not sufficiently explained how he would reasonably expect situation to change.’¹⁸⁴ ‘[J]ust hoping that things would get better is not reasonable.’¹⁸⁵

In several cases, the adjudicators conclude that where risk exposure increases, concern will logically increase. With each trip up the ladder, the worker should, logically, feel a more pressing sense of danger. One claimant, for example, had lived for nine years in the UK without status and without incident. The adjudicator concludes that, having been exposed for so many years to the threat of deportation, the claimant would have been primed to take that threat very seriously. ‘With such experience,’ the claimant would have ‘made more of an effort to make a refugee claim’ promptly when he arrived in the US ‘to avoid being illegally in the US and risking deportation.’¹⁸⁶ The decision does not address the fact that the claimant’s lived experience of that particular risk was that, for nearly a decade, nothing bad ever came of it.¹⁸⁷ In another case, the adjudicator concludes that the claimant’s behaviour ‘is not compatible with a person who alleges harm on account of her sexual orientation’ because, although the claimant was allegedly ‘homosexual since the mid-2000s,’ she did not attempt to leave her country until 2015.¹⁸⁸ In the next sentence, the adjudicator notes: ‘What is more, she did not allege having had problems during the dozen years when she would have been in a relationship with another

¹⁸¹ Eg (201) MB5-05807; (176) MB5-05594; (101) MB5-04533; (045) MB5-02869; (016) MB4-00709, MB4-00712; (207) MB5-05836.

¹⁸² Eg (183) MB5-05646; (204) MB5-05818; (237) MB6-00066; (021) MB5-01313.

¹⁸³ (017) MB4-01062, MB4-01072.

¹⁸⁴ (183) MB5-05646.

¹⁸⁵ (045) MB5-02869.

¹⁸⁶ (075) MB5-03948, MB5-03951.

¹⁸⁷ See also eg (241) MB6-00098, (246) MB6-00149.

¹⁸⁸ (043) MB5-02780.

woman.’¹⁸⁹ Not one of the decisions under review acknowledges that a person’s past experience avoiding negative outcomes could decrease their level of concern (0/162).

Asked to explain their risk response decisions, many claimants described the precautions that they took. Rather than flee immediately, they went into hiding,¹⁹⁰ stayed home,¹⁹¹ stopped going out alone or at night,¹⁹² stopped answering phone calls from unknown numbers.¹⁹³ When the claimants risked returning home to visit a dying relative, they were ‘picked up directly at the airport and remained indoors during their stay.’¹⁹⁴ The claimants described how they tried to make various other kinds of dangerous activities safer. To be intimate, a claimant and his same-sex partner rented a car and went at night to ‘a place where cars and people don’t pass regularly.’¹⁹⁵ One claimant who wrote an exam while in hiding travelled early in the morning and late at night to avoid being seen.¹⁹⁶ Another who risked a visit to his family in his hometown before fleeing used a rental car and kept the windows closed.¹⁹⁷

The adjudicators in these cases routinely dismiss these explanations as implausible because these precautions were *objectively* insufficient: they would have left the claimant exposed to too much danger.¹⁹⁸ Not one of the decisions under review acknowledges that a person may optimistically overestimate their ability to control a risk (0/162). Not one acknowledges that, by taking even

¹⁸⁹ *ibid.*

¹⁹⁰ Eg (216) MB5-05978; (190) MB5-05693.

¹⁹¹ Eg (160) MB5-05348, MB5-05357.

¹⁹² Eg (121) MB5-04880, MB5-04884, MB5-04887, MB5-04888, MB5-04889.

¹⁹³ Eg (039) MB5-02605, MB5-02692.

¹⁹⁴ (014) MB5-01088, MB5-01091, MB5-01092, MB5-01093. See also (229) MB6-00025.

¹⁹⁵ (215) MB5-05974.

¹⁹⁶ (075) MB5-03948, MB5-03951.

¹⁹⁷ (118) MB5-04834. See also eg (068) MB5-03797, MB5-03816.

¹⁹⁸ Eg (121) MB5-04880, MB5-04884, MB5-04887, MB5-04888, MB5-04889; (237) MB6-00066; (182) MB5-05644; (075) MB5-03948, MB5-03951; (068) MB5-03797, MB5-03816; (014) MB5-01088, MB5-01091, MB5-01092, MB5-01093; (215) MB5-05974.

ineffective precautions, a person may gain some level of comfort that may decrease their concern (0/162). Might *bravery* have accounted for the claimant's risk response, such as the decision of a dedicated journalist to continue pursuing a story in the face of threats,¹⁹⁹ or of an activist to continue his political activities?²⁰⁰ Not one decision considers this possibility (0/162). Not one recognizes that anger, defiance or passivity may play a role in moderating risk response and reducing preventive behaviours (0/162, 0/162, 0/162).

When claimants explain that they put a lot of store in what they were told by people they trusted and what was generally known in their communities, the adjudicators conclude that this response is implausible; the claimants would have been more likely to rely on official sources of information.²⁰¹ A number of claimants from Muslim-majority countries, for example, who travelled through the US to Canada, explained that they did not make a claim in the US because they did not feel safe there²⁰² or because they did not believe that their claims would have a good chance of success.²⁰³ Claimants from Syria explained that they 'knew many people, including Syrians, were not successful in claiming asylum in the United States.'²⁰⁴ The adjudicator rejected this explanation because 'it was not demonstrated that it was difficult to obtain protection in the United States.'²⁰⁵ A claimant from Iraq explained that 'he considered that American authorities would not believe his account' and that 'Canada has a better reputation in terms of the rights of refugees.' The adjudicator concluded that the claimant was 'speculating.'²⁰⁶ In making their

¹⁹⁹ (237) MB6-00066. See eg Lidia Peralta García and Tania Ouariachi, 'Syrian Journalists Covering the War: Assessing Perceptions of Fear and Security' (2021) *Media, War & Conflict* 1.

²⁰⁰ See also (276) MB6-00518; (021) MB5-01313.

²⁰¹ Eg (176) MB5-05594; (248) MB6-00153; (236) MB6-00063, MB6-00064; (148) MB5-05189; (250) MB6-00156; (084) MB5-04162; (134) MB5-05052, MB5-05304.

²⁰² (247) MB6-00150, MB6-00169; (138) MB5-05106, MB5-05107, MB5-05108. See also (055) MB5-03378; (105) MB5-04569.

²⁰³ (120) MB5-04859; (134) MB5-05052, MB5-05304; (148) MB5-05189.

²⁰⁴ (134) MB5-05052, MB5-05304.

²⁰⁵ *ibid.*

²⁰⁶ (120) MB5-04859.

decisions, the claimants would have consulted a lawyer rather than trusting the advice of their parents, families or friends.²⁰⁷ Ironically, the single decision that recognizes that lay knowledge could play a role in this kind of decision making (1/162) puts claimants in a Catch-22 situation by reaching the opposite conclusion: the claimant would have sought information from her relatives and community rather than trusting her lawyer.²⁰⁸

The claimants in these cases also routinely highlight the most viscerally compelling reasons for taking the risks that concern the adjudicators. The claimant did not flee sooner because ‘she was attached to her roots, her culture and her parents,’²⁰⁹ ‘he had young children at home,’²¹⁰ she was caring for her younger siblings after their parents had fled.²¹¹ Before fleeing, he took the risk of visiting his family one last time.²¹² In Canada, rather than claim protection right away, the claimant waited and watched the situation back home, hoping to return, because he did not want ‘to 100% abandon his family’ including his newborn daughter.²¹³ Having fled to safety, the claimant risked returning home because a loved one was sick or dying.²¹⁴

²⁰⁷ Eg (045) MB5-02869: ‘The claimant was 25 years old and is fluent in English and educated. In our opinion, if he feared persecution...the claimant would have applied for asylum sooner without relying on his father’s perspectives.’ See also eg (023) MB5-01644; (248) MB6-00153; (236) MB6-00063, MB6-00064; (192) MB5-05700.

²⁰⁸ (111) MB5-04720, MB5-04731. ‘Even though her Canadian lawyer did not tell her’ that she could make a refugee claim, if the claimant were really afraid, she would have sought further advice ‘from her relative in Canada and the large Lebanese community here.’

²⁰⁹ (241) MB6-00098.

²¹⁰ (146) MB5-05183, MB5-05369.

²¹¹ (095) MB5-04430.

²¹² (118) MB5-04834.

²¹³ (053) MB5-03345.

²¹⁴ (204) MB5-05818; (190) MB5-05693; (014) MB5-01088, MB5-01091, MB5-01092, MB5-01093.

Several claimants explain that permanently abandoning a previous life, even one fraught with danger, was a difficult decision: ‘the claimant declared that it was hard for him to change countries’;²¹⁵ he ‘stated his feeling that it is not easy to leave one’s house.’²¹⁶ One testified that she did not want to flee because ‘she had a good job, she had property, she had a good status in her country, she had a good income.’²¹⁷ Another put off the decision because she had ‘a luxurious life.’²¹⁸

Further, many describe how they were motivated to take risks by other kinds of pragmatic considerations. Rather than quit their jobs, they continued to work while avoiding or evading their persecutors (eg ‘he had to continue to work to support his family’).²¹⁹ Before fleeing, several claimants arranged to sell their belongings,²²⁰ to complete medical treatments,²²¹ to conclude the process of gaining credentials.²²² One, for example, while living in hiding, traveled in secret to write an English exam. She explained that ‘she had already paid for the exam’ and that she ‘wanted to improve her job prospects with an English exam result.’²²³ Others took risks with evidently tempting payoffs. One young claimant went to ‘public places, like cafes, discotheques and beaches’ while hiding from her father (‘places that her father did not normally visit’).²²⁴ Another risked walking with her girlfriend alone at night, and kissing her, despite the danger.²²⁵

²¹⁵ (204) MB5-05818.

²¹⁶ (146) MB5-05183, MB5-05369.

²¹⁷ (208) MB5-05869, MB5-05881.

²¹⁸ (017) MB4-01062, MB4-01072.

²¹⁹ (138) MB5-05106, MB5-05107. See also eg MB5-05108; (276) MB6-00518; (253) MB6-00161; (216) MB5-05978.

²²⁰ (278) MB6-00525, MB6-00530; (093) MB5-04284.

²²¹ (138) MB5-05106, MB5-05107, MB5-05108; (134) MB5-05052, MB5-05304.

²²² (075) MB5-03948, MB5-03951. See also (290) MB6-00821; (203) MB5-05817.

²²³ (075) MB5-03948, MB5-03951.

²²⁴ (068) MB5-03797, MB5-03816.

²²⁵ (215) MB5-05974; (106) MB5-04623. See also (068) MB5-03797, MB5-03816.

Not one of the decisions under review acknowledges the moderating effect on a person's risk response of the appeals of home (0/162) and the costs of non-embodied losses (0/162). Not one recognizes that the claimants were facing difficult choices (0/162). Instead, emotional connections to their children, spouses, parents, family, and community are simply 'insufficient' to explain a claimant's decision not to flee sooner or their decision to return home²²⁶ – to say nothing of other kinds of considerations. The claimant did not need to sell his belongings as he had enough money to flee.²²⁷ She 'did not need to write the exam in order to leave...and secure her safety.'²²⁸ One adjudicator is simply 'stunned by the alleged behaviour of a claimant' who testified that he left hiding and returned home to protect what remained of his property.²²⁹ Another claimant, while living with precarious status in a safe third country, underwent eye surgeries before coming to Canada, procedures that he felt were 'necessary' to allow him to continue working.²³⁰ The adjudicator 'does not see how the desire to improve his vision justifies delaying efforts to save his life.'²³¹

5. Discussion and conclusion

The adjudicators in these decisions regularly infer deception from the claimants' risk response, often using as a benchmark a general idealized "person at risk." When he comes onto the scene, this 'person who fears for *his* life' becomes the focus of an analysis that had until that point centered on the claimant and her narrative. In case after case, the "reasonable man" comes mowing his lawn through the middle of these decisions, bringing with him the common law's characteristic confusion between descriptive and normative risk judgments.

²²⁶ Eg (005) MB4-05278. See also eg (014) MB5-01088, MB5-01091, MB5-01092, MB5-01093; (017) MB4-01062, MB4-01072; (053) MB5-03345; (146) MB5-05183, MB5-05369.

²²⁷ (093) MB5-04284.

²²⁸ (075) MB5-03948, MB5-03951. See also (290) MB6-00821.

²²⁹ (216) MB5-05978.

²³⁰ (134) MB5-05052, MB5-05304.

²³¹ (134) MB5-05052, MB5-05304.

This confusion was already evident in Canadian refugee law, where the idioms that frame conversations about claimants' risk response are steeped in normative language.²³² The law makes clear that risk response is relevant to credibility.²³³ At the same time, rather than instructing adjudicators to consider whether the timing of the claimant's decision to leave or to make their claim was *believable*, the law instructs them to consider the claimant's "delay," the claimant's "failure." This framing directs adjudicators to ask, not whether the claimant has provided a *credible* explanation, but whether they have provided a 'valid reason,' a 'reasonable excuse' for falling short.²³⁴

Against this backdrop, the adjudicators in these cases often made overtly normative judgments: the claimant's actions were unreasonable, inappropriate, unjustified. Normative reasoning may be appealing to adjudicators for at least two reasons. For a start, it sits well with what scholars have observed of the cultural tendency in contemporary Western societies – famously termed "Risk Societies" – to lay heavy normative judgments on risky decisions: 'failing to take proper measures to ensure one's personal security is seen not only as "foolhardy" and "careless," but

²³² Normative/descriptive confusion is also evident in other aspects of credibility judgments in Canadian refugee claims. Eg in one recent study, when claimants left information out of their written narratives, the adjudicators often 'did not conclude that the claimant *would have* included the missing information in their narrative if they were telling the truth. They concluded that the claimant *should have* included it.' Evans Cameron 2022 (forthcoming) (n 2), emphasis in original. In another case, a claimant who filed her papers late did not attend the hearing that the Board held to determine whether to declare her claim abandoned. She explained that, 'believing that she had filed her papers on time, she had not understood that she needed to attend.' The Court upheld the Board's finding that she had decided not to pursue her claim: 'the claimant "was aware" that she needed to attend [the hearing], "or should have been."' Evans Cameron 2018 (n 1) 104.

²³³ See eg Legal Services, Immigration and Refugee Board 2020 (n 101), s.2.2.8.

²³⁴ *ibid* 2-54.

also as “irresponsible, and even ‘deviant’”,²³⁵ and taking unnecessary health and safety risks has ‘become associated with “deserving the consequences.”’²³⁶ Also, and crucially, credibility assessment is difficult. Normative judgments are easier. To reach a reasonable conclusion about what the claimant *would* have done, the adjudicator would need to take the time to understand them in their context. What factors may have affected how the claimant perceived the risk, how they assessed it, and how they chose to manage to it? To say what the claimant *should* have done, the adjudicator need only set a standard and measure against it.

At the same time, since the law’s approach is not purely normative, adjudicators may be uneasy if they cannot square their findings descriptively. Indeed, the adjudicators in these decisions disproportionately rely on case law to support the finding that the claimant would have made their claim at the first opportunity. In emphasizing that it has a solid legal pedigree – ‘the jurisprudence is clear,’²³⁷ delay in claiming is ‘an important factor’²³⁸ – these decisions not only overstate the law,²³⁹ they seem to protest too much. The adjudicators seem perhaps to recognize that this inference is a decision writing tool rather than a genuine source of insight into the plausibility of the claimant’s narrative. Indeed, one adjudicator seems to acknowledge this overtly: this inference can ‘be used to undermine [the claimant’s] credibility.’²⁴⁰

²³⁵ John Tulloch and Deborah Lupton, *Risk and Everyday Life* (SAGE Publications Ltd 2003) 10, cited in Evans Cameron 2018 (n 1) 101-102.

²³⁶ Mark A Schaan, ‘From Universal to Conditional Risk Take-up: Welfare-to-Work and its Impacts on Citizenship, Agency and Trust’ in Law Commission of Canada (ed), *Risk and Trust: Including or Excluding Citizens?* (Fernwood Publishing 2007) 129, cited in Evans Cameron 2018 (n 1) 101-102.

²³⁷ (233) MB6-00044.

²³⁸ (188) MB5-05657.

²³⁹ As with virtually every aspect of fact finding in Canadian refugee law, the jurisprudence on this point is a ‘bramble of conflicting principles’ that pull in both directions. Evans Cameron 2018 (n 1) 41; see generally 62-68, 114-6.

²⁴⁰ (045) MB5-02869.

Many of the risk response conclusions in the decisions under review are simply perfunctory. In many others, the adjudicators' reasoning is curt and dismissive. What Moran calls the 'distinctive impatience of common-sense reasoning'²⁴¹ is often palpable in these decisions, along with the corresponding 'lack of imaginative effort,'²⁴² a disinclination even to attempt to 're-create the world' of the person in question.²⁴³ Instead of engaging with the claimants' subjective explanations, the adjudicators base their judgments on their own estimation of the danger.

Like normative judgments, objective judgments are easier than the alternative. For people who assess these kinds of risk for a living, assessing the risk that the claimant faced will be easier than investigating how the claimant felt about it. But not only do these judgments give little insight into the plausibility of the claimant's subjective response, at times they are factually questionable. As set out above, many claimants explained that before making a refugee claim they pursued other avenues to try to regularize their status, sometimes while living underground. The adjudicators reject these explanations as implausibly risky: asking for refugee protection immediately would have been the safest way for the claimants to ensure that they would not be caught and deported. Yet for most people living without status in Canada the risk of being caught and deported is low,²⁴⁴ and other avenues may well offer a surer route to legal status, especially since the likelihood of obtaining refugee protection is uncertain. With persistent 'vast disparities' in the grant rates of Canadian adjudicators, winning even the strongest refugee claim requires a

²⁴¹ Moran (n 15) 9.

²⁴² *ibid* 125.

²⁴³ *ibid*.

²⁴⁴ A recent audit by Canada's Auditor General found that the country's deportation agency 'did not have the information it needed to track the status of removal orders' and that 'many [removals processes] were inactive or stalled.' As a result, 'about 50,000 enforceable cases had continued to accumulate in the agency's inventory. In two thirds of these cases, the agency did not know the whereabouts of the individuals. Most of the accumulated cases had been enforceable for several years.' Auditor General, *2020 Spring Reports of the Auditor General of Canada to the Parliament of Canada, Report 1 – Immigration Removals*, <www.oag-bvg.gc.ca/internet/english/parl_oag_202007_01_e_43572.html> accessed 17 July 2022.

good measure of luck,²⁴⁵ to say nothing of weaker claims. Far from being reckless, the claimant who feared that a refugee claim would fail and so made marrying a Canadian her ‘main target’²⁴⁶ was arguably right on the money. She came from a country whose citizens were unlikely to be granted refugee protection (37.5%),²⁴⁷ and a spousal sponsorship application was very likely to succeed (90.3%).²⁴⁸

Most strikingly, when the adjudicators do engage with the claimant’s explanations, and when they do consider whether the claimant’s conduct was plausible rather than proper, their reasoning shows barely any trace of the insights that decades of social scientific research have brought to understanding human risk response. On the contrary, it often directly contradicts the best available evidence. This study adds to the body of literature that documents the ongoing neglect of social scientific insights in credibility rejections in refugee claims and that shows why these insights are crucial.

What role these insights may yet play in Canadian refugee status decision making more broadly is, of course, an open question. When adjudicators accept claims, are they influenced by these

²⁴⁵ Sean Rehaag, ‘2020 Refugee Claim Data and IRB Member Recognition Rates’ (5 August 2021), <www.refugeelab.ca/refugee-claim-data-2020> accessed 17 July 2022; Rehaag 2008 (n 99); Audrey Macklin, ‘Refugee Roulette in the Canadian Casino’ in Jaya Ramji-Nogales, Andrew I Schoenholtz, and Philip G Schrag (eds), *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (New York University Press 2009).

²⁴⁶ (268) MB6-00432.

²⁴⁷ Sean Rehaag, ‘2015 Refugee Claim Data and IRB Member Recognition Rates’ (30 March 2016), <www.ccrweb.ca/en/2016-refugee-claim-data> accessed 17 July 2022 (St. Vincent and the Grenadines).

²⁴⁸ ‘Approval Rates of Permanent Resident Applications Processed between January 1, 2015 and June 30, 2021 under the Spouse or Common Law Partner Immigration Category (in Persons)’ OPP-DART-2021-13697; personal communication from Statistical Reporting Group, Chief Data Officer Branch, Immigration, Refugees and Citizenship Canada to the author, 16 September 2021.

considerations? Efforts to understand and improve adjudicators' decision making, in Canada and abroad, will need to explore this question.²⁴⁹

This study scrutinized credibility rejections. In real life, this responsibility falls to appellate decision makers and judges: in Canada, to members of the Board's Appeal Division and to judges of the Federal Court. They are hampered in this work by the Board's disregard for social scientific evidence. The Board's standard documentation packages, the material that forms the evidentiary backdrop in every refugee hearing, contain hundreds of pages of country of origin information and not one page of social scientific evidence about how people think and act. When claimants themselves have put this evidence before them, the Appeal Division and the Court have at times overturned decisions that run contrary to it.²⁵⁰ When this evidence is not part of the record at first instance, however, claimants are typically unable to rely on it to challenge the

²⁴⁹ For examples of scholarship in this vein, see eg Rebecca Hamlin, *Let Me Be a Refugee: Administrative Justice and the Politics of Asylum in the United States, Canada, and Australia* (Oxford University Press, 2014); Carol Bohmer and Amy Shuman, *Rejecting Refugees: Political Asylum in the 21st Century* (Routledge 2008); Carol Bohmer and Amy Shuman, *Political Asylum Deceptions: The Culture of Suspicion* (Springer International 2018); Benjamin N Lawrance and Galya Ruffer (eds) *Adjudicating Refugee and Asylum Status: The Role of Witness, Expertise, and Testimony* (Cambridge University Press 2015); Efrat Arbel, Catherine Dauvergne, and Jenni Millbank (eds) *Gender in Refugee Law: From the Margins to the Centre* (Routledge 2014); Thomas Spijkerboer (ed) *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum* (Routledge 2013); Trish Luker, 'Decision Making Conditioned by Radical Uncertainty: Credibility Assessment at the Australia Refugee Review Tribunal' (2013) 25 *International Journal of Refugee Law* 502; Livia Johannesson, 'Exploring the "Liberal Paradox" from the inside: Evidence from the Swedish Migration Courts' (2018) 52 *International Migration Review* 1162.

²⁵⁰ See eg *Joseph v Canada (Minister of Citizenship and Immigration)*, 2015 FC 393, [2015] FCJ No 349. See also Smith-Khan 2022 (n 31) for discussion of a recent example of a successful challenge in the Federal Court of Australia.

adjudicators' findings.²⁵¹ This leaves them hoping that the common sense of the appellate decision maker or judge is better informed than the common sense of the adjudicator.²⁵²

Social scientific evidence about human risk response should be on the record in every refugee hearing. Claimants cannot be expected to provide this evidence themselves as a condition to receiving a fair determination. And without it, appellate decision makers and judges cannot be relied upon to recognize when reasoning runs counter to it. Almost a decade ago, the UNHCR stressed in the strongest terms that insights from 'many disciplinary fields, including neurobiology, psychology, gender and cultural studies, anthropology, and sociology' must inform refugee status decision making: 'it is necessary that the whole credibility assessment is duly informed by the substantial body of relevant empirical evidence that exists in these fields.'²⁵³ Ensuring that refugee status decisions are "duly informed" by social scientific evidence is a fundamental system-level requirement.

With this evidence nowhere in sight, the claimants in this study were too often called liars for unconvincing reasons. With so much at stake, a refugee status determination system can and must do better.

²⁵¹ See eg RAD File No TB9-10511, [2019] RADD No 1926; RAD File No TB4-07173, [2015] RADD No 576, [2015] DSAR no 576; RAD File No VB5-00411, [2015] RADD No 1641; RAD File No VB3-03230, [2014] RADD No 1021; *Louis v Canada (Minister of Citizenship and Immigration)*, [2019] FCJ No 373, 2019 FC 355.

²⁵² In the Canadian Federal Court, many judges have made observations about risk response that echo the findings in these studies. Many others, however, have upheld as reasonable the kinds of conclusions that the adjudicators reached in the cases under review. Evans Cameron 2018 (n 3).

²⁵³ UNHCR, *Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report* (2013) 56, <www.refworld.org/docid/519b1fb54.html> accessed 17 July 2022.