

The impact of procedural capital and quality counsel in the Canadian refugee determination process

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Abstract:

In an era where international immigration is increasingly difficult and selective, refugee status constitutes a valuable public good that enables access and membership to the host country. Despite the independent, impartial and discretionary character of refugee decision-making at the Immigration and Refugee Board of Canada (IRB), where an adjudicator determines refugee status following a hearing, critics blame the disparities in refugee status grant rates on the adjudicators. In particular, the disparities are attributed to unfair and inconsistent refugee determination. By examining the pre-hearing period and the refugee hearing, this article questions the attribution of responsibility in inconsistent decision-making solely to the adjudicators. Though refugee status grant rates do in fact vary, when the analytical gaze is turned to the characteristics of the refugee claimants and their counsels we notice that not all claimants have similar resources and abilities, receive equivalent legal consultation or submit case folders prepared in comparable quality.

Key words: refugee decision-making; refugee determination, procedural capital; quality of counsel; administrative tribunals; refugee hearing; credibility assessment

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1 Introduction

Controlling international immigration is one of the biggest challenges liberal democracies face today. Despite the expansion and institutionalisation of international human rights, border control remains among the most important principles of state sovereignty (Anderson, 2010). Asylum seekers constitute an exemplary case within this dynamic. As a modern administrative category, refugee status allows the Western refugee-receiving states to keep sovereignty over their borders while also making a commitment to protect non-citizens who escape persecution (Fassin, 2013). This very valuable status is only granted to a small percentage of asylum seekers who demonstrate a well-founded fear of persecution “for reasons of race, religion, nationality, membership of a particular social group or political opinion” (UNHCR, 1966).

In Canada, the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada (IRB), an independent, quasi-judicial administrative tribunal, is charged to make refugee determinations. Its adjudicators, called Board members, hear and decide refugee protection claims on a discretionary basis. Since the publication of Rehaag's influential article in which he illustrated how refugee status grant rates for 2006 varied considerably across Board members, disparities among refugee acceptance rates have become a newsworthy subject (Rehaag, 2008). Rehaag continued to compile data on refugee status grant rates of Board members and to publicize it on the Canadian Council for Refugees website (Rehaag, 2014). When reporting this highly mediatised issue, journalists have claimed that the RPD is characterized by inconsistent decision-making, alleging that the Board member who hears the claim makes a greater difference than the merits of the case (Humphreys, 2014; Keung, 2011, 2012; McKie, 2009; Sanders, 2013; Sheppard, 2012).

Refugee status determination in Canada is a nonadversarial, inquisitorial process based on professional judgment (Hamlin, 2014). On one hand, the role of the Board members in the inconsistency of refugee status acceptance rates is clear, since they are the sole first-instance decision-makers. On the other hand, the critique is based on an assumption that all refugee protection cases are prepared in comparable quality, that the claimants have received equivalent legal advice and that they have similar degrees of legal understanding and abilities to convince the Board member of the well-foundedness of their fear of persecution. Besides admitting that which Board member hears and decides the refugee claim matters, we should also direct our analytical gaze to the pre-hearing process and the hearing.

In this article, I argue that the overemphasis on the role of Board members in the study of refugee determination in Canada moves the attention away from the other actors implied in the process, namely the refugee claimant and the legal counsel. The construction and the preparation of the claim constitute the first stage of the process where the characteristics of the refugee claimants and the counsel matter significantly. Without paying attention to this stage, where claimants with disparate resources and abilities receive varying legal advice, we will fail to tap into the complexity of refugee status determination. The study of the refugee hearing, as the second stage, where the credibility of the claimant is evaluated, reveals how the strategies some counsel employ in relation to corroborative evidence has grave consequences for the claimants.

The next part of this article introduces the decision-making space at the IRB. A theoretical framework follows this introduction and illustrates the findings of two bodies of scholarship on quality of counsel and procedural capital. The fifth section presents methods and data collection. The sixth and final part summarizes three main findings of the study. First, some claimants lack an understanding of important aspects of their claim and what counts as evidence. The characteristics of the claimants themselves matter in choosing good quality counsel. Second, Board members are attentive to the characteristics of the claimants during the refugee hearing and often place disproportionate demands on the claimants in relation to burden of proof. Finally, carelessly prepared case folders and missing corroborative documents are often consequential of bad quality counsel.

2 The complexity of the decision-making space at the RPD

The purpose of refugee and human rights law is essentially a humanitarian one, requiring each Refugee Convention signatory state to extend its protection to non-citizens to whom it owes no obligation and who would otherwise not qualify to stay under immigration law. Canada, like other Western refugee receiving states, aims to identify the claimants who are in need of protection while eliminating those who use the system for speedy landed status.¹ Right to asylum does not exist per se, but a right to seek refugee status does, which means in practice that a non-citizen has the right to ask the relevant administrative authority whether s/he meets the refugee definition (Thomas, 2011).

The IRB is Canada's largest independent administrative tribunal. The refugee determination process functions as follows: After an asylum seeker makes a refugee claim, the claim is referred to the IRB by an immigration officer after an initial eligibility assessment.² Board members examine, through a hearing, whether the refugee claimant fits one of the categories of people that Canada has promised to protect, such as Convention refugees. In order to make these determinations, the RPD requires the claimants to file and submit a detailed document called a Personal Information Form (PIF).³ The claimants hold the burden of proof and in the PIF, they have to explain their reasons for seeking Canada's protection in a narrative format (Galloway, 2011). Alongside the PIF, s/he may submit corroborative evidence and documents regarding general country conditions. During this process, s/he may choose to seek legal representation, at his/her expense or through legal aid. The hearing is an administrative test that the claimants have to pass. To receive refugee status, claimants must show that they are likely to face persecution in their country of origin on the basis of one of the five grounds listed in the Convention's definition of a refugee. Therefore, the Board member is required to determine whether, "at the time of the claim is being assessed, the claimant has good grounds for fearing persecution in the future" (IRB, 2010).

The members have to reach their determinations, as in other refugee decision-making contexts, on very limited evidence. As a result of this scarcity of 'hard' evidence, refugee decisions rely on a judgment of whether the subjective fear of the refugee claimant is credible or not (Cohen, 2001; Rousseau, Crépeau, Foxen, & Houle, 2002; Thomas, 2005). The subjective fear of persecution has to be justified on objective grounds, meaning that there must be valid basis for fear and that the fear must be seen as reasonable. The Board member must also be familiar with the social and human rights conditions of the claimant's country of origin (Diesenhouse, 2006).

Unlike a dispute resolution centred administrative tribunal context, which is adversarial, the RPD is designed as an inquisitorial decision-making space, based on professional judgment (Hamlin, 2014). According to IRB's official documentation, used for the training of new Board members, a refugee hearing is "an inquiry into the circumstances surrounding a claim to Convention refugee status as opposed to litigation about the person's status". This model prescribes that "Board members are to be 'active and engaged' in the process—directing research, questioning the claimant and witnesses, and controlling the proceedings. Thus, the member is responsible, not only for determining the claim, but also for the conduct of the investigation and preparation of the claim."⁴

In the public perception, a refugee hearing suggests an informal space where the claimant tells his story to the Board member and explains why he needs protection. However, the process is highly formal and legalistic. Claimants do not simply tell their story but respond to the Board member who has to resolve the determinative issues of the claim before making a decision. Houle (2008) underlines that the RPD functions in a way analogous to ordinary courts and its evidentiary practices show that claimant testimony is treated with greater caution, while documentary evidence is presumed to be more reliable. Despite the minimisation of the role of the counsel in Canada compared to adversarial refugee determination contexts, as discussed by Hamlin (2014), in reality, the presence of a lawyer is crucial, as is how well s/he has been chosen. Claimants need legal advice not only to fill out the PIF and collect corroborative evidence, but also in formulating the case folder, detecting essential aspects and events of the claim and retelling it in legal language (Kobelinsky, 2012). The presence of a counsel in the hearing is also essential for making observations and intervening when necessary. In the following section, I present scholarship that shows that despite assumptions of the informality of procedures in refugee determination, legal counsel is vital for the success of the claim.

3 The impact and quality of legal counsel in the refugee determination context

Administrative tribunals like the IRB are designed as informal organizations so that parties can file their claims, prepare their cases, collect and present documentation and represent themselves in a less formal setting than a court (Genn, 1993). Despite the procedural informality of administrative tribunals, the issues at stake are often complex and legalistic.

In the refugee determination context, the impact of representation by legal counsel on the acceptance of refugee claims is well established in North America. In the most extensive study of the American asylum system, Ramji-Nogales, Schoenholtz, Schrag, and Kennedy (2009) examine over 78,000 asylum cases and find that legal representation plays a significant role in the acceptance of asylum claims: the acceptance rate was 45.6 percent for represented claims, almost three times as high as the rate of unrepresented claims, 16.3 percent. The authors also underline how the quality of legal representation makes an even more significant difference; claimants represented by large law firms working on a pro bono basis and Georgetown University's legal clinic were accepted at rates of 96 percent and 89 percent respectively. The success of these programs can be explained not as a result of the selection of noncomplex cases but by the time and resources these programs invest in collecting corroborative evidence such as expert opinion and reports about the claimants' mental health conditions.

In Canada, Gould, Sheppard, and Wheeldon (2010), examine a sample of 600 immigration and refugee decisions of leave applications against the claims decided by the IRB when the claimant wants to appeal the case at the Federal Court of Canada (FCC).⁵ They find that the represented claimant is thirty-two times more likely to succeed in a leave application than the claimant who self-represents. In the most extensive Canadian study, Rehaag (2011) explores 70,000 refugee decisions made between 2005 and 2009 and finds that claimants were most successful when represented by lawyers: recognition rate was 15.2 percent for unrepresented claimants, 33.5 percent for claimants represented by immigration consultants and 57 percent for claimants represented by lawyers. He also emphasizes that lawyer's experience (in terms of the numbers of cases represented from 2005 to 2009) play an important role in the grant rate. The more cases the

lawyer represents, the higher his/her refugee grant rate. This might be interpreted as a result of lawyers enhancing their methods of formulating and representing cases through experience.

These studies underline the significance of legal representation for the success of claims in front of administrative tribunals, and give us hints about the quality of legal counsel. Clearly, assuming that all refugee claimants receive services of comparably competent legal counsel would be unrealistic. But turning a blind eye to the claimants' characteristics, resources and abilities would also result in an incomplete analysis.

4 Procedural capital

Claiming refugee status requires mobilisation of a wide range of strategies as well as significant resources to flee danger, leave the country of origin, arrange paperwork and often cross borders illegally (McDowell, 2013). However, another challenge is to prove well-founded fear. For claimants, successfully navigating through the administrative process requires skills and aptitudes that are deemed conventional within the context of administrative tribunals, such as fully appreciating the requirements of the process and the nature of the proceedings, and understanding what is expected of them (Sossin, 2008).

Bourdieu (1997) offers a good starting point for conceptualizing the differences among claimants in relation to their needs and resources in proving their need for protection. *Capital* as an economic, social or cultural asset captures the continuity of individual trajectory through accumulation, potential and competence. Bourdieu shows how accumulated resources or assets can become an individual power source within the society (Swartz, 1997). Capital encompasses financial resources, education, socioeconomic status, education, spoken languages and social networks.

The seamless applicability of Bourdieusian capital to interactions with state organizations has not been free from criticism. In their study of the Administrative Tribunal of Paris in public service and fiscal domain disputes, Spire and Weidenfeld (2011) highlight that capital affects which people file dispute claims and their choice of legal representation, but capital does not explain everything. Only some appellants have the ability to use a juridical vocabulary and choose the best legal counsels, and this is determined neither by education nor professional competences. Some with the highest educational attainment fail to understand the procedural requirements. What matters most is the familiarity with judicial institutions through specialized experience strongly saturated with law. They call this ability *procedural capital*.

Some claimants arrive at Canadian borders better positioned to take advantage of the available services during the pre-hearing process and to choose from whom to seek legal advice, thanks to their **social networks, language skills and understanding of the process**. As a theoretical tool, procedural capital can capture differentiated experiences of refugee claimants. In the refugee determination context, it refers to the ability of differently situated claimants to mobilize available resources—or the capacity to call on others—and to navigate through the administrative system, properly translating their private issue into legal language to respond to the demands of proving their refugee status.

The impact of procedural capital in refugee determination has not been investigated before. We can expect claimants who lack procedural capital to have problems with legal counsel especially in identifying and delivering the important aspects of their claim. When claimants make the decision to leave their country of origin, they often have a broad perception that it is possible to stay in Canada, but they fail to understand that they have the burden of proof to demonstrate their well-founded fear of persecution.

5 Methods and data

The fieldwork on which the present article is based was carried out in Montreal, Ottawa and Kingston between March 2012 and December 2013, with additional work in 2014 in Montreal and Toronto.

For this research, I adopted an ethnographic methodology and collected data through several methods with the aim of getting close to the everyday experiences of the people implicated in the RPD and a deep immersion in their activities (Emerson, Fretz, & Shaw, 2011). I observed 50 private refugee hearings in Montreal, accompanying 12 refugee lawyers.⁶ I conducted 30 semi-structured interviews, 10 with previous Board members and the rest with different actors such as refugee claimants, lawyers, interpreters and members of refugee advocacy and service organizations. I was also present at local, provincial and national meetings of refugee lawyers as well as refugee advocacy groups. My direct and participant observation, informal conversations and semi-directed interviews were supplemented by extensive document analysis of materials requested from the IRB through the Access to Information Act such as training material, contract samples, performance measurements, and written decisions. All data are coded and analysed using qualitative data analysis software. The names of all research participants are changed to protect their anonymity. As a result of the confidentiality of the refugee hearing, I did not have access to the transcripts. I reconstructed the dialogues based on my field notes, conversations with lawyer and claimants and the written decision. The citations from interviews and written decisions are reproduced verbatim.

6 Presenting the complicated journey to asylum and its difficulties

In what follows, I take a closer look at the impact of quality of counsel and procedural capital on refugee determination by directing the analytical gaze to the first stage of the process before the Board member makes the refugee status decision. Three important conclusions emerge from this analysis. First, paying attention to the pre-hearing process allows the investigation of how the claimant's case file was prepared. Second, through examination of the refugee hearing and attention to the claimant's procedural capital, we can see how Board members examine the claimant's credibility and how they interpret oral testimony and corroborative evidence. Finally, we can see how a lack of medical reports, despite the counsel's assertions in relation to the claimant's mental state, results in Board members' disbelief in the claimant and undermines the claim.

In their efforts to identify the claimants who truly need protection, while singling out the "non-genuine claimants," Board members draw heavily on suspicion, similar to other high-volume immigration-control decision-making spaces such as border and customs officers (Gilboy, 1991; Jubany, 2011; Pratt, 2010) or visa officials (Alpes & Spire, 2013; Satzewich, 2014). Refugee

claimants' success largely depends on presenting a coherent and consistent narrative in their written and oral testimony and supporting it through corroborative evidence. Unless guided by legal counsel from the very beginning of their refugee determination process, claimants will usually fail to get everything right. As a result, they may have a hard time in responding to complex legal issues related to contradiction and omission during their hearing, which might even call their credibility into question (Cohen, 2001; Rousseau et al., 2002).

No counsel or bad quality counsel

Claimants who lack procedural capital face significant challenges in the hearing when they initiate their asylum procedure without legal counsel. José Vasquéz's situation is representative of many claimants that I observed. He is from Honduras with primary school education. He was managing a small store when members of Mara-18, a multi-ethnic transnational criminal organization, wanted to recruit him. According to his allegations, they stole his money on two separate occasions and beat him up badly. After hiding at a family friend's house for a few days, he first left to Mexico, then crossed the desert and arrived in the US. His aim was to eventually get to Canada since he had heard some people from his town had settled there. He found a job in order to save some money but he came to know many Central Americans living in the US illegally. He inquired about his chances to legalize his status at an immigration consultancy office, and he was advised not to take any initiative since he could be deported. When he learned that the gang members were still looking for him towards the end of 2010, he claimed refugee status at the Canada-US border. The excerpt below is from his refugee hearing when he was questioned by a Board member:

- *When you arrived at the border, what did you answer to the question, the question of "what are you scared of?" (Showing the port of entry notes filled by the border officer to José)*
- *Maras Pandillas.*
- *You did not mention the fact that they beat you up or that they were still looking for you. Why not?*
- *Yes, since I did not have enough place to write, they asked me to answer the question briefly.*
- *But instead of writing what is most important, you filled the space with the details of the organisation and said that it is very dangerous. Rather than detailing all these you could have described what happened to you.*
- *At that moment I was particularly nervous so I could not think of everything. I did not know the right thing to say.*
- *OK (sighs).*

Incidents described at later stages of the claim which were not mentioned at first raise suspicion. Some Board members suspect that these incidents are made up at the later stages in order to strengthen the claim. As one previous Board member explained to me, "At the port of entry, the claimant will tell a story, and then at the second stage, when he fills out the PIF with the lawyer, he will tell another story, because the first one will not do the trick"⁷

Even when claimants seek legal counsel before they file their claim, it does not mean that all important aspects of the claim will be detailed in the PIF. The competence of the counsel makes a significant difference, which cannot be easily measured with the years of expertise or the numbers of represented cases. Juan Carlos, a young claimant from Guatemala, also claims to be escaping from Mara-18, whose members tried to kill him after a failed attempt to file an official complaint at the Ministry of the Interior. After the gang members allegedly killed his mother and his niece, since they mistakenly thought she was Juan Carlos' wife, he left for Canada with someone else's passport. Juan Carlos did not know he could seek legal aid, and he could not afford to pay the lawyer's fees. He filed his application with an immigration consultant, originally from Guatemala, whom he would pay for his services in installments. Two months before his hearing, Juan Carlos learned from another Guatemalan refugee claimant that she was refused because of the consultant who did not include any details in the claim. He also learned that he could get a lawyer through legal aid. Six weeks before his hearing, Juan Carlos got a new lawyer who made important amendments to his PIF since the most important aspects of his refugee claim—the fact that his mother and his niece were killed by the gang members, his attempt to make a complaint at the Ministry and the fact that the gang members were still inquiring about him—were not in his PIF. The Board member who presided at Juan Carlos' hearing put these inconsistencies to Juan Carlos and his lawyer since he was not satisfied with the explanations. In credibility assessment, Board members draw heavily on the training they received, which views inconsistencies between the initial PIF and the oral testimony in a negative light. The training teaches them to be mindful of such inconsistencies and to expect well-articulated explanations by the claimant; otherwise inconsistencies are often seen as a sign of non-credibility.⁸

Attentiveness of the Board members to procedural capital

Like other first-instance decision-makers in other immigration-control contexts, Board members try to get a fix on the applicants, clients or claimants in front of them. Decision-makers are attentive to who the claimants are and they act on their subjective judgments and assessments (Maynard-Moody & Musheno, 2003). A Board member with over 10 years of experience at the RPD states how he assesses inconsistencies in relation to different claimants:

“For example, if there is an accountant in front of me, I would expect that person to be good with numbers, know dates and hours, etc. I expect that person to remember it [specific dates and hours] when he fills out the forms and in the hearing. For someone who has no education I do not expect that person to know or remember these kind of details”⁹

These expectations are not simply limited to recall. Board members expect that claimants with a certain level of education and experience would behave differently than the rest of the population of the same country of origin. In the following example, a Board member questions Yolanda, a young woman and a citizen of the Dominican Republic, and does not hesitate to show her disbelief. Yolanda claims that she fears persecution by her ex-boyfriend with whom she lived from 2006 to 2008. According to her PIF, his jealous acts at the beginning of their relationship slowly transformed into violent ones, and even after she left him, he kept following her and she managed

to escape from a kidnapping attempt. She arrived in Canada in the second half of 2011, and following the arrival two months later of her minor daughter who was living with Yolanda's ex-husband in the US, they filed a refugee claim based on gender persecution. The Board member below discovers an inconsistency between Yolanda's PIF and oral testimony and treats it as a sign of fabrication based on Yolanda's perceived procedural capital.

- *What does your ex do? What is his work?*
- *He is in the army.*
- *What do you mean that he is in the army? What is his rank?*
- *He is the chief of narcotics team.*
- *Where is his office? In the army or in the police quarters?*
- *He is in the police.*
- *Then, why did you say that he is in the army? In your PIF, here on line 42, you mention that he is in the police, why are you changing your opinion now?*
- *Actually in the Dominican Republic, in my country we call them soldiers; there is not much difference between the army and the police.*
- *Come on... You have higher education which also means superior intelligence. We expect that you know the difference between the police and the army. Why don't you know it?*
- *In daily language, in language we speak, we call them all soldiers.*

One of the main factors that affected Yolanda's credibility and resulted in her rejection as a refugee was her confusion of the police and the military. In her analysis, the Board member said:

[8] The claimant is not credible.

[9] When questioned about the alleged perpetrator's work, the claimant said he was in the army. When questioned that she wrote in line 42 of her refugee claim document that he is a police officer, she responded that he wore a police uniform; his office was in the police headquarters, but in her country the police and the army were the same, everyone called them all soldiers.

[10] The tribunal cannot accept these explanations because they are not credible. The tribunal takes into account the profile of the claimant, who was a lawyer in the Dominican Republic and worked for the government. It is in the same country that the claimant completed her university degree. Under these circumstances it is reasonable to believe that the claimant has acquired and possesses accumulated knowledge about the authorities in place, their role as well as the distribution of power. Her level of knowledge is superior compared to the general population in this respect. Besides, the claimant specified in her initial asylum claim that the perpetrator was a police officer and not in the army, and because of this, the Tribunal cannot accept her explanation of that in her country they call both the police and the army "soldiers" because she herself made the distinction before (RPF File No: MB1-xxxx).

In majority of hearings that I observed, I noticed Board members' attentiveness to the claimants' perceived procedural capital, specifically to the claimant's education level and professional status before arrival to Canada. These claimants had to pass harder credibility tests compared to others. In my observations, claimants with stronger procedural capital usually fared better than the others. However, this was not the general perception. As one Board member recounts:

In 12 years, I took about 2000 decisions, and I was overturned only 10 times. I noticed something. I noticed that the more a claimant is educated, the more it is likely that he will be rejected. In my case, they had very little chance. Why? I wonder the same question. It is because they have a tendency to improve their story. They avoid simplicity, as if there is no truth in simplicity. The claimant adds many other aspects to his claim and ends up contradicting himself in his story¹⁰

Treatment of corroborative evidence

Board members have to make determinations with limited corroborative evidence. The IRB may gather some information through the Research Directorate of the Strategic Communications and Partnerships Branch (SCPB).¹¹ When necessary, Board members can make information requests about general aspects of refugee claims but most of the issues of importance to the claim cannot be searched. In credibility assessments, the RPD clearly instructs that Board members "cannot disbelieve a claimant merely because the claimant presents no documentary or other evidence to confirm his or her testimony" (IRB, 2004). Further, the RPD relies on its members to evaluate the authenticity of the evidence through "specialized knowledge of tribunal (with respect to country conditions, identity documentation, characteristics of documentation)" and to be attentive to "obvious signs of alteration or fabrication on the face of a document."¹²

Board members have to weigh oral testimony in relation to documents concerning country conditions and corroborative evidence. Credibility remains the principal aspect of refugee determination, and if the Board member decides that the claimant is not telling the "truth" as a result of omissions and contradictions, s/he may even refuse to give probative value to the documents that corroborate the allegations¹³.

Before Yolanda's hearing, her lawyer¹⁴ told me that they had submitted enough corroborative evidence from the Dominican Republic that documented the physical violence she experienced: a letter from an independent psychologist, another one from a psychologist at the Ministry of Women, two medical certificates which documented the physical violence she experienced, a letter from a friend who accommodated her for several nights. This evidence, according to Yolanda's lawyer, showed that Yolanda was suffering battered women's syndrome. This evidence would show the Board member that any contradictory testimony or problems with dates were results of the syndrome.

Towards the end of the hearing, however, the Board member announced that she will not accept the evidence, which she thought to be self-serving. She clarified that some letters are not dated and the most recent letter is from early 2010, out-of-date by almost three years. Yolanda's

lawyer stated that his client was clearly suffering battered women's syndrome as recognized in a Supreme Court decision¹⁵, which would explain the contradictions. The Board member replied that she had no expert evidence in front of her that documented such a syndrome. Yolanda's lawyer stated that they thought the evidence they submitted was enough, but that since it clearly was not, they could get a new report in seven to eight weeks. The Board member did not accept this request and said the documents had to be submitted before the hearing.¹⁶

Board members are especially suspicious about the authenticity of lawyers' claims, especially when the lawyers claim different forms of vulnerability of their claimant but do not document it adequately. For instance, on another day the same Board member who rejected Yolanda heard a young male claimant from El Salvador, Guillermo Dominguez, who claims to have escaped from being recruited by Mara Salvatrucha (MS-13), a transnational criminal gang.¹⁷ He had to change lawyers once, because his first lawyer¹⁸, who is very well known in the refugee advocacy community, never met him, and her assistant filed his claim. His new lawyer¹⁹, a well-known activist litigator, claimed before the hearing that his client was suffering psychological and cognitive issues that impacted his recall, but without submitting any medical evidence. He even alleged that his client displayed childlike behavior. The RPD accepts that the counsel is best placed to take notice of the vulnerabilities of the claimants and bring it to the attention of the Board.²⁰ However, these vulnerability claims have to be documented so that the Board member can decide to make procedural accommodations. However, Guillermo Dominguez's lawyer forgot to take into consideration that his client's boss had sent an affidavit and testified on his skills as a manager and an employee. In her analysis, the Board member mentions that the claimant worked in an enterprise as an unloader responsible for eight employees. This, combined with his boss's testimony on his competences and efficacy at work, as well as his inclusion in important business meetings, showed to the Board member that the claimant was not childlike but that his intellectual capacities were well-developed. Further, the panel did not notice any difficulties in the claimant's testimony that would raise doubts about his cognitive or intellectual skills.

These lawyers that I exemplified are not new counsel. They are aware of what kind of corroborative evidence is accepted and what is deemed irrelevant by Board members. However, they did not secure the necessary reports. One can even go as far to speculate that these cases were not only badly represented, but were actually weakened because of the inadequate work of the counsel. The reasons lawyers follow such strategies should be searched elsewhere.

7 Conclusion

In this article, I depart from the critics who assign the responsibility for disparities in refugee acceptance rates solely to the Board members. International law grants a right to escape persecution and seek asylum to anyone, but only non-citizens who demonstrate a well-founded fear of persecution are granted refugee status. By highlighting to the importance of the decision-making space, as well as the other actors implied in the process, namely the refugee claimant and the counsel, I argue that we have to be cognizant of the role of the claimant's procedural capital as well as the quality of the counsel. Through case studies, I have documented how the two interact in refugee determination procedures.

By using original fieldwork data, I show that without quality counsel, claimants with weaker procedural capital are often unaware of what to convey in their case folder. They fail to identify even the most fundamental information relating to their case (Ramji-Nogales et al., 2009). When represented by bad quality counsel, the claimants will often submit carelessly prepared case folders with missing information and corroborative documents which disadvantage them at their hearing. My fieldwork illustrates how the Board members expectations of consistency are inconsistent across claimants. Claimants with stronger procedural capital have to pass stricter credibility tests. I have also documented Board members' suspicion about the truthfulness of the counsels' claims, especially when these are made in relation to claimants' vulnerability without adequate documentation. That is why; for a more complete understanding of refugee determination process, the study of refugee decision-making must focus on other actors as much as the Board members.

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¹ *Urbanek v. Canada (Minister of Employment and Immigration)* (1992), 17 Imm. L.R. (2d) 153 (F.C.A.).

² For a more detailed description of the process please see (Jones & Baglay, 2007).

³ The Canadian refugee determination process was transformed on December 15, 2012 with the entry into force of the *Protecting Canada's Immigration System Act*. PIF was replaced with a simpler and shorter questionnaire called Basis of Claim (BOC). This article investigates the process of the claimants who filed their claims before December 15, 2012.

⁴ ATIP Request, RPD New Member Training, Pre-Course Reading Materials for New Members of the refugee protection division, learning and Professional Development Directorate, The refugee Protection Hearing, (pp. 2091-2099), p. 2091, A-2013-00561/DE

⁵ If a claimant is rejected (or if the Minister intervenes to overturn a positive decision) he can demand a leave to the Federal Court, to appeal the first-instance decision at the Board. If the leave is accepted, the claimant's counsel is allowed to make legal arguments why the decision should be overturned and that the claimant deserves a new hearing.

⁶ Details about access, informed consent and other questions related to the fieldwork are treated elsewhere in detail (Tomkinson, 2015).

⁷ Author's interview, August 29, 2014, Montreal, translated from French.

⁸ ATIP Request, Refugee Protection Division, September 2008, "Mock Hearing", RPD New Member / RPO Training Session, Facilitators' Guide, Learning and Professional Development, pp.373-384, A-2013-00561/DE

⁹ Author's interview, September 2, 2014, Montreal, translated from French.

¹⁰ Author's interview, August 14, 2013, Montreal, translated from French.

¹¹ ATIP Request, Strategic Communications and Partnerships Branch (SCPB), Research Directorate, Researching response to information requests (RIRs): Some issues and challenges, pp. 2184-2187, A-2013-00561/DE.

¹² ATIP Request, Immigration and Refugee Board of Canada, Undated, "Writing on Credibility", pp.2207-2218, p. 2216, A-2013-00561/DE.

¹³ In the following Federal Court decisions, the judge decided that when omissions and contradictions are major, the Board member has the discretion to ignore the documentary evidence: *Abid, Ali Raza v. M.C.I.* (F.C., No. IMM-6896-11); *Francis, Mbaioirem v. M.C.I.* (F.C., No. IMM-7365-10)

¹⁴ He has over 10 years of experience. He represents over 200 cases annually, and has often schedule conflicts. Since he is working with a team of refugee lawyers, he can quite easily ask for a replacement, when he cannot be present at the hearings.

¹⁵ *R. v. Lavallee*, [1990] 1 SCR 852.

¹⁶ New documentation has to be submitted twenty days prior to the hearing according to the Board's regulations.

¹⁷ According to his oral testimony, he was hijacked by MS-13 members in 2006, when he was 16 years old. After making jokes about forcing Guillermo Dominguez to kill someone, they killed a man and they released him. However, in his PIF, there is no indication of killing or forcing him to kill someone. After hiding several days with a friend of his father, he left to the United States towards the end of 2007. After living and working there two years illegally, he claimed status at the Canadian border in 2007.

¹⁸ She has over 15 years of experience and takes over 250 claims a year.

¹⁹ He has over 20 years of experience and takes less than 50 claims a year.

²⁰ ATIP Request, RPD, Jan 2008, "New Member Training: Case Studies for RPD Members, Vulnerable Persons, Facilitator's notes", pp.37-46, A-2013-00561/DE.