

REFUGEE LAW RESEARCH-A-THON GUIDE

PRESENTED BY: UVIC CHAPTER
OF THE CANADIAN ASSOCIATION
OF REFUGEE LAWYERS

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ABOUT CARL

The Canadian Association of Refugee Lawyers (CARL) is a national not-for-profit organization made up of lawyers and law students which serves as an informed national voice on refugee law and the human rights of refugees and forced migrants, and promotes just and consistent practices in the treatment of refugees in Canada. To learn more about the national organization, visit their [website](#).

The UVic Law Chapter of the Canadian Association of Refugee Lawyers (CARL) is an LSS-funded club within the Faculty of Law at the University of Victoria which aims to increase awareness of pressing issues in refugee law, engage students in advocacy and research projects, and expose students to the practice area of refugee law!

Events the club has hosted in the past include:

- “What is Refugee Law” panel
- Documentary Film screening
- “Bringing Refugee Law to Life: Perspectives of Refugees and Frontline Workers” panel
- Collaboration with FemLaw speaker series
- Volunteer legal research opportunities through CARL National

To stay up to date with UVic CARL, follow our [facebook page](#) or email uvic.carl@gmail.com to join our club emailing list.

OVERVIEW

The purpose of the Refugee Law Research-a-Thon is to gather information to address three research questions that have been provided by the Immigration and Refugee Legal Clinic. The IRLC provides free immigration and refugee legal services for low-income individuals in British Columbia. Their services include: legal advice and information, representation at courts and tribunals, systemic litigation, change advocacy, and mentorship/education. The answers we provide to the IRLC's questions will inform their client work.

QUESTIONS

The questions that we are seeking to address are:

1) Under what circumstances might refugee claimants from Mexico and Central America be able to establish before the Immigration and Refugee Board ("the Board") that facing a risk of gang violence has a nexus to Convention grounds (i.e. political opinion, membership in a particular social group, etc.)?

- Background:
 - The Board often says that risk of gang violence is generalized (that everyone faces that risk) and thus it does not have nexus with a protected ground under the Convention
 - the IRLC is looking for potential arguments it could make in future cases to convince the Board that a risk of gang violence has a nexus with a protected ground under the Convention
- Guidance:
 - this may involve looking at the interaction/intersection of different grounds (ex. gender, political opinion)
 - look at secondary sources, any Canadian case law, and other jurisdictions
 - focus countries: Mexico, Honduras, Guatemala, and El Salvador

2) How has the concept of Internal Flight Alternative (IFA) evolved and how does the Board approach IFA when the claimant can easily be found online? How can claimants use social media/ online presence, etc. to establish that there is no IFA?

- Background:
 - the concept of a refugee claimant having an IFA was developed prior to the wide-spread access of the internet and use of social media.
 - the IRLC is looking for any information we can gather that would support them in the future to argue that a claimant does not have an IFA because of social media
 - ex. they cannot control everything that is published about them online and there is a risk that someone will tag them with their location online
- Guidance:
 - there is not a lot out there on this topic - look at secondary sources and other jurisdictions for ideas of how this type of argument could be advanced
 - evidence required might include data such as the number of people in the country with access to the internet and who use certain social media platforms

QUESTIONS

3) With respect to refugee claims based on gender-based persecution, what is the line between discrimination and persecution? How does the Board interpret gender-based persecution, for instance, in countries where there is generalized discrimination based on gender? What are the arguments for gender-based discrimination to amount to persecution?

- Background:
 - there is a high threshold to establish that discrimination rises to the level of persecution.
 - the IRLC is looking for information to help them to understand what is required to make an argument that gender-based discrimination amounts to persecution
- Guidance:
 - look at secondary sources and caselaw
 - focus countries: Mexico, Nigeria, Iran, and India (in that order)

INSTRUCTIONS

Thank you for volunteering to participate in UVic CARL's first Research-A-Thon.

Please check in at the start of your shift with one of the event organizers to sign in and receive your research assignment. Your assignment will contribute to one of the three research questions provided to us from the IRLC.

Once you have received your question:

- First, make sure you read the backgrounder on the law in this document - especially the section applicable to your legal question. There you will find the basics of the law and some key cases to help you get started.
- Then, visit the appropriate [Google Drive Folder](#) for your research question, to recap any research that has already been done on the question to avoid duplicating work.
- Download the below template from this guide to record your research results and to keep a research log - since other students will also be working on your question, it's important to keep a record of sources you consulted and search terms you used.
- Use the list of research resources (listed in this guide) compiled by the University of Victoria Law Librarians and CARL to get started.
- Before your time slot is up, make sure your completed research document includes (see below for samples)
 - a. Max. 250-word summary of the law/policy/case/program you researched
 - b. Research log that tracks the steps you took by answering the questions laid out in the template below
 - c. proper McGill Guide citations for your sources (check with another student, an organizer, or a librarian as needed)
- Save your research in the appropriate Google Drive Folder using the following name format: Question # - FirstName LastName - timeslot [ex. 1:00pm - 3:00pm]
- Before you leave after your time slot check in with one of the organizers to confirm:
 - completion of your research question or if not possible, proper handover to the next student working on the question
 - that your file is saved to the right folder
 - that your research hours have been accurately recorded by the organizers.

RESEARCH TEMPLATE:

Click here for the template in [Google Doc form](#), that you can copy and paste into a word document and save in the relevant Google drive folder for your topic.

(A) 250 WORD MAX BLURB

BLURB:

(B) RESEARCH LOG

LEGAL QUESTION:

TYPE OF LEGAL INSTRUMENT OR DOCUMENT LOOKED AT (LEGISLATION, REGULATION, CASE LAW, POLICY, PROGRAM ETC.):

CONTENT (2 SENTENCES):

REFERENCES:

WHERE DID YOU SEARCH/KEYWORDS YOU SEARCHED?:

SECONDARY SOURCES

BOOKS:

CANADIAN IMMIGRATION AND REFUGEE LAW : A PRACTITIONER'S HANDBOOK (2017)

LAW OF REFUGEE STATUS, 2ND ED (2014).

NON-CITIZENS IN CANADA : STATUS AND RIGHTS, 2ND ED (2019).

IMMIGRATION LAW, 2ND ED (2015).

IMMIGRATION LAW AND PRACTICE, 2ND ED (LOOSELEAF).

REFUGEE LAW, 2ND ED (2017).

E-BOOKS:

CANADIAN IMMIGRATION AND REFUGEE LAW PRACTICE (2021 ED).

IMMIGRATION LAW, 2ND ED (2015).

IMMIGRATION LAW AND PRACTICE, 2ND ED (LOOSELEAF).

REFUGEE LAW, 2ND ED (2017).

LEGAL ENCYCLOPEDIAS:

HALSBURY'S LAWS OF CANADA – IMMIGRATION AND CITIZENSHIP
CED – IMMIGRATION AND REFUGEES

JOURNAL ARTICLES:

SEARCH ACROSS LEGAL INDEXES & DATABASES

KEY JOURNALS TO LOOK OUT FOR:

INTERNATIONAL JOURNAL OF REFUGEE LAW

GEORGETOWN IMMIGRATION LAW JOURNAL

IMMIGRATION AND NATIONALITY LAW REVIEW

JOURNAL OF REFUGEE STUDIES

CANADA'S IMMIGRATION & CITIZENSHIP BULLETIN

SECONDARY SOURCES

FOR NON-LEGAL JOURNALS SEARCH SUMMON OR GOOGLE SCHOLAR

JOURNAL OF MIGRATION AND REFUGEE ISSUES

REFUGE

REFUGEE SURVEY QUARTERLY

CURRENT AWARENESS:

SEARCH LEGAL NEWS & BLOGS FOR RECENT OR HIGH PROFILE DECISIONS/CHANGES TO THE LAW

SEARCH QUICKLAW FOR LEXISNEXIS IMMIGRATION LAW NETLETTER, THE LAWYER'S DAILY, AND OTHER LEGAL NEWS

SEARCH ACROSS BLOG AGGREGATORS (MONDAQ, LEXOLOGY, CANLII CONNECTS)

WEBSITES & ORGANIZATIONS:

IMMIGRATION AND REFUGEE BOARD OF CANADA WEBSITE & POLICY INSTRUMENTS JURISPRUDENTIAL GUIDES

IRB LEGAL RESOURCES

CHAIRPERSON'S GUIDELINES

COUNTRY OF ORIGIN INFORMATION

CITIZENSHIP AND IMMIGRATION CANADA

CANADIAN COUNCIL FOR REFUGEES

OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR)

UNITED NATIONS CONVENTION RELATING TO THE STATUS OF REFUGEES

INTERNATIONAL ORGANIZATION FOR MIGRATION (IOM)

CASE LAW RESOURCES

Case digests:

Use digests to find topical summaries of decisions

- Canadian Abridgment Digests (Westlaw) > IMM Immigration and citizenship > IMM.III Refugee protection
- All Canada Digests (Quicklaw) > Canada Immigration Digest > Refugee Protection

See sections on IFA, gender based violence, membership in particular social groups, particular countries, etc.

Annotated acts:

Annotated Immigration and Refugee Protection Act of Canada KE4454 A32C35

Searching Immigration and Refugee Board of Canada decisions :

Note: there are four divisions: Refugee Protection Division, Refugee Appeal Division, Immigration Division and Immigration Appeal Division.

- Westlaw: Selected coverage of the four divisions commencing in 1968 including all decisions reported or cited in Immigration Law Reporter since 1997 and full coverage of all decisions provided by the board in the previous 2 years.
- Quicklaw: Tribunal decisions -> federal -> can select decision for each of the divisions. Coverage: immigration appeal division decisions (January 1989 – current, selected significant decisions from 1980-1988), immigration division decisions (February 2001 – current, selected significant decisions from 1994-2000) , refugee appeal division decisions (Dec 15 2012 – current) and refugee protection division decisions (March 1989 – current)
- CanLII: full coverage 2004 – current, partial coverage 1996 – 2003.
- IRB website: lists persuasive refugee claim decisions, selected noteworthy refugee appeals, and IRB decisions of public interest

Also consider searching federal court decisions for judicial review of IRB decisions.

- “Jurisprudence update 2020: Judicial reviews of immigration and refugee board decisions” CLEBC Immigration Issues in Depth 2020.

REFUGEE LAW BACKGROUND

Introduction

The definition of “refugee” was initially defined under the 1951 Geneva Convention (the “Convention”) , by the United Nations High Commissioner for Refugees (UNHCR). The Convention limited protection to European refugees fleeing before 1951, but these restrictions were later removed in the 1967 Protocol Relating to the Status of Refugees. The Convention definition and the 1967 Protocol were adopted into Canadian law under s. 96 of the Immigration and Refugee Protection Act (IRPA).

Refugees have the right to seek asylum, but not to be granted asylum. That is, there is no obligation on a state, such as Canada, to accept a person as a refugee claimant. The only obligation is for the state to provide a process to determine whether the claimant is a refugee.

The principle of “non-refoulement” is at the core of refugee law. Under this principle, no refugee shall be returned to any country where they would be at risk of persecution. This principle has also been incorporated into Canadian law through s. 115 of the IRPA.

The Decision-Makers

1. Refugee claims are heard by one member of the **Immigration and Refugee Board (IRB)** in the **Refugee Protection Division (RPD)**. The claimant has an opportunity to present their narrative, followed by questioning and an examination of the evidence.
2. If the claim is rejected, the claimant can appeal to the **Refugee Appeal Division (RAD)** in certain circumstances.
3. Claimants then have a right to pursue judicial review in the federal court system in the following order, even if there is no right to appeal to the RAD.
 - a. the **Federal Court (FC)**;
 - b. the **Federal Court of Appeal (FCA)**, if the issues in the trial division raise a serious question of general importance; and
 - c. the **Supreme Court of Canada (SCC)**, with leave.

General Elements of Refugee Definition

The definition of a “Convention refugee” is provided under s. 96 of the Immigration and Refugee Protection Act:

“A Convention refugee is a person who, by reason of a **well-founded fear of persecution** for reasons of **race, religion, nationality, membership in a particular social group or political opinion,**

- (a) is outside each of their countries of nationality and is **unable** or, by reason of that fear, **unwilling** to avail themselves of the protection of each of those countries; or
- (b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.”
- The claimant has the burden of proving these elements on a balance of probabilities. Notably, refugee claims can only be made once a claimant has left their country of origin, under subsection (a).

Well-Founded Fear:

There are two elements to establishing a well-founded fear. The first is a subjective element, where a claimant must assert that they have a fear and provide reasons for it. The credibility of the claimant is vital here.

The second element is that the fear must be objectively reasonable (*Sivaraththinam v Canada (MCI)*, 2014 FC 162 [*Sivaraththinam*]). There need not be more than a 50 per cent chance (i.e. a probability) of persecution, but there must be more than a minimal possibility. The test asks whether there would be a reasonable chance that persecution would take place if the applicant returned to his country of origin (*Adjei v Canada (MEI)*, 1989 2 FC 680). A member’s decision that an applicant has failed to establish a well-founded fear of persecution only needs to fall within a range of reasonable accepted outcomes (*Sivaraththinam*).

A well-founded fear can be demonstrated by pointing to documentary or anecdotal evidence of past persecution – either faced by the claimant personally, or by another person similarly situated to the claimant (*Chan v. Canada (MEI)*, [1995] 3 SCR 593 [*Chan*]). This fear must continue from the moment the claim was made, to the time of the hearing. In other words, the persecutory conditions in the country of origin must persist.

The court held that there is no requirement for a claimant to hide who they are to avoid persecution (*Chen v Canada (MCI)*, 2010 FC 258).

Persecution:

Persecution is not a defined term. The **court must ask whether a claimant's core human rights are in fundamental jeopardy** (Chan). Basic human rights are determined by reference to the standards the international community has agreed to. **Alternatively, lesser forms of harm may cumulatively amount to persecution.** Discrimination, by itself, is not equivalent to persecution.

Persecution does not require the claimant to have been physically harmed or mistreated, nor to have been deprived of their freedom (IRB, Chapter 3.1.3). A single act can be sufficient to establish persecution - there is no requirement that persecution be ongoing.

Persecution can take the following forms (this is NOT an exhaustive list (IRB, Chapter 3.1.3)):

- Death or threat of death
- Torture, beatings, rape, and other forms of cruel, inhuman, or degrading treatment or punishment
- Psychological violence
- Interference in the due process of law
- Denial of a right to return
- Punishment for violation of a law concerning dress
- Serious economic deprivation may be a component of persecution

Not persecution (this is NOT an exhaustive list (IRB, Chapter 3.1.3)):

- Suffering curtailment of freedom of speech, in and of itself
- Confiscation of property, by itself

It is not enough for the claimant to show that a particular regime is generally oppressive (*Zolfagharkhani v. Canada (MEI)*, [1993] 3 FC 540 [*Zolfagharkhani*]). If the claimant is alleging persecution on the basis of a law of general application, they must show that the law in question is persecutory in relation to a Convention ground. The effect or intent of the impugned law is relevant to the existence of persecution – and not the motivation of the claimant (*Zolfagharkhani*).

If there is an absence of state protection, and the claimant has established a fear of persecution, the IRB is entitled to presume that persecution was likely, and the fear was well-founded (*Canada (AG) v Ward*, 1993 SCJ No 74 [*Ward*] at para 52).

Unable or Unwilling to Avail Selves of State Protection:

The UNHCR handbook suggests that state protection is absent if

- Persecution is tolerated by state authorities (e.g. police, courts, etc)
- The authorities are unable to provide protection (ie., they lack the capacity to do so); or
 - State complicity in the persecution is not required (Ward at para 33). In other words, persecution can be committed by non-state actors.
- The authorities are unwilling to provide protection (ie. they refuse to do so)
 - Unwillingness relates to a claimant's subjective choice not to turn to the state because they do not trust the state to protect them. If the police are shown to be "manifestly indifferent," for example, the claimant has established ample justification for their unwillingness to avail themselves of state protection (Rajudeen v Canada (MEI) [1984] F.C.J. No. 601).

There must be some objective evidence to support the contention that the state lacks capacity, or that the state cannot be trusted. This can be demonstrated by a claimant pointing to their own past experience, or to the experience of similarly situated persons (e.g. If you are a Tamil claimant from Sri Lanka, you can point to persecution of other Tamils from Sri Lanka as evidence, even if you have not experienced persecution personally).

Grounds of Persecution – Nexus(Particularly relevant for questions 1 & 3)

There must be a link between the fear of persecution and at least one of the five enumerated grounds under the Convention: race, religion, nationality, membership in a particular social group, and political opinion. For the purposes of this Research-A-Thon, this summary will focus on the latter two.

The RPD determines the ground, if any, applicable to the claimant's situation (IRB, Chapter 4). The relevant consideration is the perception of the persecutor (IRB, Chapter 4). That is, did they persecute the claimant because they thought the claimant was a member of a certain religion, for example?

Membership in a particular social group:

The primary consideration in determining membership in a social group is the "general underlying themes of the defence of human rights and anti-discrimination" (Chan). It is important to distinguish between a claimant who fears persecution because of what they have done, versus a claimant who fears persecution because of who they are, based on their membership in a particular social group. The former does not make one a refugee, whereas the latter does. (IRB, Chapter 4.5)

Ward provides three possible categories of particular social groups that emerge from these tests: (para 78)

1. Groups defined by an innate or unchangeable characteristic
 - a. This includes persecution on the basis of gender and sexual orientation, including: (see full list and citations at IRB Chapter 4.5)
 - i. Women subject to domestic abuse
 - ii. Women forced into marriage without their consent
 - iii. Forced sterilization or abortion
 - iv. Female circumcision
 - v. Uneducated girls in a country where girls are not allowed to go to school
 - vi. Single women without male protection, in some countries and circumstances
2. Groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake that association (e.g. human rights activists); and
3. Groups associated by a former voluntary status, unalterable due to its historical importance.

Political Opinion:

A broad interpretation of political opinion is "any opinion on any matter in which the machinery of state, government, and policy may be engaged". However, this does not mean that only political opinions regarding the state will be relevant. As noted, there is no requirement that the agent of persecution be the state.

Ward gave two refinements to the definition of "political opinion" at para 91:

1. A political opinion need not be expressed outright, and
 - "The court recognized that the claimant might not always articulate their beliefs and that the political opinion will be perceived from the claimant's actions or otherwise imputed to him or her." (IRB, Chapter 4.6)
2. The political opinion ascribed to the claimant and for which he or she fears persecution need not necessarily conform to the claimant's true beliefs.

In *Dezameau*, the Court found that the error of the Board was to use its finding of a widespread risk of violence in Haitian society to rebut the assertion that there is a nexus between the applicant's social group and the risk of rape. A finding of generality does not prohibit a finding of persecution on the basis of one of the Convention grounds.” (IRB, [Chapter 4](#)). The idea that rape can be merely motivated by common criminal intent or desire without regard to gender or status of women in a particular society is wrong, according to Canadian law.

See the Guidelines on *Women Refugee Claimants Fearing Gender-Related Persecution* under the authority in s. 159(1)(h) of the IRPA for an analysis of the grounds as they relate to gender-related persecution. *Narvaez v. Canada (Minister of Citizenship and Immigration)*, [1995] 2 F.C. 55 (T.D.), at 62 stated: “While the guidelines are not law, they are authorized by s. 65(3) of the Act, and intended to be followed unless circumstances are such that a different analysis is appropriate. (IRB, [Chapter 4](#)).

Q1: ESTABLISHING NEXUS FOR CLAIMS BASED ON GANG VIOLENCE

RESEARCH STRATEGIES

Strategies:

- Search for and review commentary in secondary sources (books, journal articles, legal news and blogs)
- Review IRB website decisions to see if any of the persuasive or noteworthy cases relate to the question
- Note up relevant Immigration and Refugee Protection Act, SC 2001, c 27 sections 96 and 97 and add in country and/or other keywords
- Search/browse Canadian Abridgment Digest and/or All Canada Digests Refugee Protection sections, and add in country and/or other keywords to search. (Note the Abridgment only includes Federal Court decisions, while the Canadian Immigration Digest includes IRB decisions)
- Keyword search in Westlaw, Quicklaw or CanLII for tribunal decisions
- For keyword selection:
 - Consider all the ways risk from gangs might be described (Organized criminality, Member of criminal organization, cartel, etc.)
 - Pull terminology directly from primary and secondary sources (Fear of persecution, membership in a particular social group or political opinion, etc.)

Selected Resources:

- Fleeing cartels and maras: international protection considerations and profiles from the northern triangle
- Canada Violated ICCPR in denying Salvadorian asylum on gang-related claim

UN Resources:

- UNHCR Guidance note on refugee claims relating to victims of organized gangs (2010)
- UNDOC Report on Transnational organized crime in Central America and the Caribbean
- Guatemala Background Paper (2013)
- Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Guatemala (2018)
- El Salvador Eligibility Guidelines (2016)
- Honduras Eligibility Guidelines (2016)
- Refworld (UNHCR online database): Gang-related violence (Can narrow results by publisher to “Canada: Federal Court” and “Canada: Immigration and Refugee Board”)

Q1: ESTABLISHING NEXUS FOR CLAIMS BASED ON GANG VIOLENCE

BACKGROUND

See the “Grounds of Persecution – Nexus” section (both “Membership in a Social Group” and “Political Opinion”)

IRB, Chapter 4.7 – Victims of Criminality and Nexus to Grounds

The RPD has held in numerous cases that victims of crime, corruption, or vendettas, including blood feuds generally, cannot establish a link between their fear of persecution and one of the five Convention grounds.

However, these cases must be read with caution in light of *Klinko v Canada (MCI)* [2000] FC 327. There, the court held that the claimant’s public complaint of widespread corruption against the Ukrainian government and police amounted to persecution on the basis of political opinion. This was the case, despite the fact that the government did not endorse or support the corruption.

“In general, an opinion expressed in opposition to a criminal organization will not provide a nexus on the basis of political opinion unless the evidence shows the claimant’s opposition is rooted in political conviction. Similarly, opposition to corruption or criminality may constitute a perceived political opinion when it can be seen to challenge the state apparatus.

A claimant’s exposure of corruption or opposition to crime will not generally place him or her in a particular social group. A claimant who refuses to participate in crime as a matter of conscience is not a member of a political group. However, in some cases, the grounds of political opinion or particular social group can provide a nexus where the claimant fears persecution as a result of criminal activity.” (IRB, Chapter 4.7)

Mancia v Canada (MCI), 2011 FC 949

Merely being related to someone who had been the victim of a crime did not mean that there was nexus to Convention ground. The court dismissed the judicial review application.

This case involved an applicant who was a citizen of El Salvador. She sought refugee protection in Canada after she was allegedly attacked and raped by members of a violent gang. The evidence indicated that the applicant was targeted by the gang as consequence of the gang pursuing her brother due to his perceived wealth. The applicant’s evidence did not indicate that she was targeted due to Convention reasons, namely gender or membership in particular family.

Portillo v Canada (MCI), 2012 FC 678

The claimant in this case sought refugee status on the basis that he was targeted, threatened, assaulted and stabbed by members of a criminal gang in **El Salvador**. The IRB denied the claim, stating that the applicant was not persecuted because he faced a generalized risk. This was overturned by the Federal Court. There was no reason for the IRB to have believed large parts of the applicant's version of events but then not accept what he alleged occurred with the Salvadoran police. The evidence demonstrated that the Salvadoran police acted inappropriately, such that it was reasonable for the applicant to fear the police.

Mejia v Canada (MCI), 2015 FC 434

The applicant was the owner of a shop and a citizen in **Honduras**. He made a refugee claim on the grounds that a military group went to his shop to kill him when he was absent. The Board denied the claim on the grounds that the applicant's testimony was incoherent. The Federal Court overturned this finding, as the applicant was able to explain inconsistencies to the Board in a detailed manner.

Baires-Sanchez v Canada (MCI), 2011 FC 993

The applicant alleged that a gang beat and threatened him with death for refusing to join their gang in **El Salvador**. The IRB rejected the claim on the basis that violence at the hands of gangs were risks faced widely by individuals in El Salvador. The Federal Court upheld the IRB's decision, finding it reasonably open for the IRB to conclude that risk faced by the applicant was generalized risk, owing to the conditions in El Salvador. It was irrelevant that this applicant faced risk for reasons which were different from others in El Salvador, since the nature and basis for the risk (ie. failure to comply with the gang's demands) were the same. The IRB did not need to find that the risk faced by the applicant was a risk faced generally by all residents of El Salvador - it was enough that the evidence demonstrated that young males faced widespread risk of recruitment and violence if they did not comply.

Q2: IFAS IN THE MODERN DIGITAL WORLD

RESEARCH STRATEGIES

Strategies:

- Search for and review commentary in secondary sources (books, journal articles, legal news and blogs)
- Review IRB website decisions to see if any of the persuasive or noteworthy cases relate to the question
- Search/browse Canadian Abridgment Digest and/or All Canada Digests Refugee Protection sections on IFA (Note the Abridgment only includes Federal Court decisions, while the Canadian Immigration Digest includes IRB decisions)
- Keyword search IRB decisions and federal court for decisions discussing social media and IFA
- For keyword selection consider alternative ways of describing “social media” – facebook or twitter, etc.

Selected resources

- Interpretation of the Convention Refugee Definition in the Case Law: Including case law up to March 31, 2019 (Prepared by: IRB Legal Services) – Chapter 8 – Internal Flight Alternative
- Refworld (UNHCR database): Adjudication of asylum claims / Internal flight alternative

Q2: IFAS IN THE MODERN DIGITAL WORLD

BACKGROUND

The question of an Internal Flight Alternative (IFA) “arises when a claimant who otherwise meets all the elements of the Convention refugee definition in his or her home area of the country nevertheless is not a Convention refugee because the person has an IFA elsewhere in that country” (IRB, Chapter 8). That is, if the IRB or Minister raises the issue of an IFA, the claimant must demonstrate evidence that there was nowhere else *within the state* they could have turned to, to flee persecution (*Rasaratnam v Canada (MEI)*, 1992 1 FC 706). It is irrelevant whether the claimant would prefer to be in that IFA or not (*Thirunavukkarasu v Canada (MEI)*, 1994 1 FCR 589).

The test for whether there is an IFA is two-pronged:

1. “The Board must be satisfied on a balance of probabilities that there is **no serious possibility of the claimant being persecuted** in the part of the country to which it finds an IFA exists.
2. Moreover, conditions in the part of the country considered to be an IFA must be such that **it would not be unreasonable**, in all the circumstances, including those particular to the claimant, **for him to seek refuge there.**” (IRB, Chapter 8)
 - For example, if the claimant could not access the proposed IFA because they would have to cross a war zone to get there, that location is not an IFA.

Q3: GENDER BASED PERSECUTION

RESEARCH STRATEGIES

Strategies:

- Search for and review commentary in secondary sources (books, journal articles, legal news and blogs)
- Search in the key legal treatises for gender, could also be under “membership in a particular social group”
- Review IRB website decisions to see if any of the persuasive or noteworthy cases relate to the question
- Note up relevant *Immigration and Refugee Protection Act*, SC 2001, c 27 ss96 and 97, keyword searching for gender, specifically looking at “membership in a particular social group”
- Keyword search in Westlaw, Quicklaw or CanLII for tribunal decisions
- Look at Refworld (UNHCR database): gender-based persecution. Results can be narrowed by publisher to “Canada: Federal Court” and “Canada: Immigration and Refugee Board”
- Search/Browse Canada Abridgment Digest and Canadian Immigration Digest (Note the Abridgment only includes Federal Court decisions, while Canadian Immigration Digest includes IRB decisions)

Selected Resources:

IRB Guidelines

- IRB Chairperson guidelines 4: Women refugee claimants fearing gender-related persecution (1993) (currently under review)
- IRB Chairperson’s Guideline 9: Proceedings before the IRB involving sexual orientation and gender identity and expression (2017)

IRB current work:

- IRB Gender related task force
- IRB Gender based analysis plus

UNHCR

- Guidelines on Sexual Orientation and Gender Identity (2012)

RESEARCH STRATEGIES (Continued)

Books

- Gendering the international asylum and refugee debate
 - Chapter 3: Gender-related persecutions: why do women flee?
 - Chapter 4: Gender and Asylum in International Law – The Geneva Convention Revisited
- Gender in Refugee Law
 - Chapter 12: Evaluating Canada’s approach to gender-related persecution: revisiting and re-embracing ‘refugee women and the imperative of categories’

Journal articles:

- Report: Gendering Canada’s Refugee Process (2006)
- Gendered Perspectives on Refugee Determination in Canada (2014)
- “Wherever we would go, we would be together” the challenges for queer refugee couples claiming joint asylum in Canada (2019)
- Denying refugee protection to LGBTQ and marginalized persons: a retrospective look at state protection in Canadian refugee law (2017)
- Sexual orientation, gender identity and the refugee determination process in Canada (2014)
- Taking it personally: delimiting gender-based refugee claims using the complementary protection provision in Canada

Q3: GENDER BASED PERSECUTION

BACKGROUND

See the “Grounds of Persecution – Nexus” section (“Membership in a Social Group”)

In a gender-based claim, a claimant’s burden is to satisfy the Board that she was targeted as a woman. In other words, the **claimant must demonstrate that she would not have been attacked but for the fact that she was a woman** (*Mancia v Canada*, 2011 FC 949).

UNHCR Handbook: Persecution VS Discrimination

Discrimination on its own is not persecution. Whether prejudicial actions or threats amount to persecution depends on the circumstances of the claimant, including their subjective views. It is possible for separate elements, which do not constitute persecution by themselves, to cumulatively amount to persecution.

Discrimination can amount to persecution

- **if it leads to consequences of a substantially prejudicial nature** or seriously restricts the claimant’s fundamental human rights (eg. serious restrictions on right to earn a livelihood/ access normally available education)
- **where the discrimination itself is not of a serious character, but produces a feeling of apprehension and insecurity with respect to the claimant’s life**, in the mind of the claimant

These above situations are distinguishable from discrimination resulting merely in preferential treatment. The existence of discriminatory laws by themselves will not normally equate to persecution, though they can be an important factor to be taken into account. One must look to the implementation and effects of such laws.

In *Dezameau v Canada (MCI)*, 2010 FC 559 [*Dezameau*], a Haitian woman claimed a fear of persecution based on political opinion and her fear of gender-based persecution, in the form of sexual violence. The court overturned the IRB’s rejection of her claim, remitting the matter for redetermination. The court cited the principle in *Ward* that gender can provide the basis for a particular social group. The Court also found that rape and other forms of sexual assault are crimes grounded in the status of women in society.