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5-16-2018

## The Exclusion Trap for Women Refugee Claimants who Escape Domestic Violence with Children

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### Citation Information

Shelley, Katherine Tess. "The Exclusion Trap for Women Refugee Claimants who Escape Domestic Violence with Children." *Osgoode Hall Law Journal* 55.3 (2019) : 756-790.  
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# The Exclusion Trap for Women Refugee Claimants who Escape Domestic Violence with Children

## Abstract

Women who escape domestic violence with their children are being denied refugee status in Canada on the grounds that, by fleeing with their children, they have committed the crime of child abduction. Article 1(F)(b) of the 1951 Refugee Convention, which has been imported into Canadian law, specifies that individuals who have committed serious, non-political crimes are excluded from the protections associated with being a legal refugee. Consequently, women who travel to Canada with their children risk the denial of their refugee claims solely because they chose not to abandon their children in an abusive or potentially dangerous situation. In this article, I examine publicly available Federal Court and Immigration and Refugee Board decisions from 2000–2017 where the 1(F)(b) exclusion was raised on the basis of the crime of child abduction. More specifically, I focus my analysis on cases where the 1(F)(b) exclusion was raised as an issue in women's refugee claims based on domestic violence. Domestic violence is the form of gender-related persecution most frequently cited as the basis for a refugee claim and presents special significance in the context of allegations of child abduction. Of additional concern for women in this situation is the interaction between their claims and applications for the return of a child under the Hague Convention on the Civil Aspects of International Child Abduction. Ultimately, I conclude there are serious fairness and justice concerns around how decision makers have applied guidelines for women refugee claimants, conducted credibility assessments, and addressed interplay between Hague Convention applications and refugee claims in these cases.

## Keywords

Abused women—Legal status, laws, etc.; Children of abused wives—Legal status, laws, etc.; Refugees—Legal status, laws, etc.; Canada

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# The Exclusion Trap for Women Refugee Claimants who Escape Domestic Violence with Children

KATHERINE TESS SHELLEY\*

Women who escape domestic violence with their children are being denied refugee status in Canada on the grounds that, by fleeing with their children, they have committed the crime of child abduction. Article 1(F)(b) of the 1951 *Refugee Convention*, which has been imported into Canadian law, specifies that individuals who have committed serious, non-political crimes are excluded from the protections associated with being a legal refugee. Consequently, women who travel to Canada with their children risk the denial of their refugee claims solely because they chose not to abandon their children in an abusive or potentially dangerous situation. In this article, I examine publicly available Federal Court and Immigration and Refugee Board decisions from 2000–2017 where the 1(F)(b) exclusion was raised on the basis of the crime of child abduction. More specifically, I focus my analysis on cases where the 1(F)(b) exclusion was raised as an issue in women's refugee claims based on domestic violence. Domestic violence is the form of gender-related persecution most frequently cited as the basis for a refugee claim and presents special significance in the context of allegations of child abduction. Of additional concern for women in this situation is the interaction between their claims and applications for the return of a child under the *Hague Convention on the Civil Aspects of International Child Abduction*. Ultimately, I conclude there are serious fairness and justice concerns around how decision makers have applied guidelines for women refugee claimants, conducted credibility assessments, and addressed interplay between *Hague Convention* applications and refugee claims in these cases.

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\* Counsel, Department of Justice Canada. The views expressed in this article are mine alone and are not to be attributed in any way to the Department of Justice Canada or the Government of Canada generally. I am deeply indebted to Rathika Vasavithasan, Janet Mosher, Joanna Birenbaum, and the staff of the Barbra Schlifer Commemorative Clinic for the initial inspiration and key insights. For generous feedback on earlier drafts, thanks to Stepan Wood, Mark Iyengar, the staff of the Journal, and the Journal's anonymous reviewers. Any mistakes are, of course, my own.

I.	CONTEXT .....	759
	A. The Refugee Convention, Exclusion, and Canadian Law .....	760
	B. Canada's Innovation: The <i>Gender Guidelines</i> .....	764
	C. The <i>Hague Convention</i> in Canadian Law .....	766
II.	METHODOLOGY AND LIMITATIONS .....	767
	A. Methodology .....	767
	B. Limitations .....	770
III.	EXCLUSIONS, INTERSECTIONS, AND IMPOSSIBLE SITUATIONS .....	770
	A. The Changing Use of the <i>Hague Convention</i> .....	770
	B. Implementation and Inherent Limitations of the <i>Gender Guidelines</i> .....	775
	C. Credibility Assessments and Domestic Violence .....	781
	D. Defences, Criminal Proceedings, and Other Considerations .....	784
IV.	CONCLUSIONS AND RECOMMENDATIONS .....	789

IN MARCH 2001, MIKLOSNE KOVACS LEFT HUNGARY for Canada with her three-year-old son, Gergo, and fourteen-year-old daughter, Annet. Ms. Kovacs's departure from Hungary was allegedly prompted by years of physical and emotional abuse by her husband. Upon arrival at Toronto's Pearson International Airport, she claimed refugee status for herself and on behalf of her children. The legal ramifications of Ms. Kovacs's decision to leave Hungary with her children would play out over the next four years in decisions by the Immigration and Refugee Board (IRB), the Ontario Superior Court of Justice, and the Federal Court.<sup>1</sup> Though Ms. Kovacs chose to escape with—and arguably rescue—her children from a violent situation, she was ultimately denied refugee status on the grounds that her actions constituted child abduction, “a serious non-political crime” that excludes a claimant from refugee status under the *Convention Relating to the Status of Refugees* (“*Refugee Convention*”).<sup>2</sup>

Ms. Kovacs is not alone. Since 2005, a significant number of women have been denied refugee status in Canada on the grounds that, in fleeing domestic violence and other dangerous situations with their children, they were purportedly guilty of child abduction. This is a trap created by the combined effect of how Canadian law defines refugees, how adjudicators analyze these claims, how domestic violence is understood, and in some cases, how civil remedies for the return of children taken across borders interact with refugee claims. Moreover, Ms. Kovacs's case prompted the Federal Court to set a precedent for courts dealing

1. *Kovacs v Canada (Minister of Citizenship and Immigration)*, [2004] RPDD No 798 (QL) [*Kovacs v Canada* (RPD)]; *Kovacs v Kovacs*, [2002] 59 OR (3d) 671, 212 DLR (4th) 711 (Sup Ct) [*Kovacs v Kovacs*]; *Kovacs v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1473, 137 ACWS (3d) 802 [*Kovacs v Canada*].

2. *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 art 1(F)(b) (entered into force 22 April 1954, accession by Canada 4 June 1969) [*Refugee Convention*].

with the 1(F)(b) exclusion based on alleged child abduction where there has been a return application under the *Convention on the Civil Aspects of International Child Abduction* (“*Hague Convention*”).<sup>3</sup> As a result, domestic violence survivors who travel to Canada with their children risk the denial of their refugee claims solely because they chose not to abandon their children in abusive situations.

The intersection of 1(F)(b) exclusion on the basis of child abduction with domestic violence is a topic that has received limited attention in the academic literature to date. By contrast, the two constituent parts of this intersection have attracted attention. Substantial work has been done to analyze the structural barriers and inequalities faced by women refugee claimants, including those who base their claim on domestic violence.<sup>4</sup> Separately, a body of academic literature has assessed changes over time in the use of the *Hague Convention* and its ramifications for women who leave situations of domestic violence with their children.<sup>5</sup> There is very limited academic commentary that combines these bodies of work to look at their intersection—specifically, women who have fled domestic violence and are excluded from refugee status on the basis of child abduction.<sup>6</sup>

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3. *Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, Can TS 1983 No 35 [*Hague Convention*].
  4. See e.g. Constance MacIntosh, “Domestic Violence and Gender-Based Persecution: How Refugee Adjudicators Judge Women Seeking Refuge from Spousal Violence—and Why Reform Is Needed” (2010) 26:2 *Refugee* 147; Efrat Arbel, “The Culture of Rights Protection in Canadian Refugee Law: Examining the Domestic Violence Cases” (2013) 58:3 *McGill LJ* 729.
  5. Karen Brown Williams, “Fleeing Domestic Violence: A Proposal to Change the Inadequacies of the Hague Convention on the Civil Aspects of International Child Abduction in Domestic Violence Cases” (2011) 4 *John Marshall LJ* 39 at 44; Brian Quillen, “The New Face of International Child Abduction: Domestic-Violence Victims and Their Treatment Under the Hague Convention on the Civil Aspects of International Child Abduction” (2014) 49 *Tex Intl LJ* 621; Noah L Browne, “Relevance and Fairness: Protecting the Rights of Domestic Violence Victims and Left-Behind Fathers Under the Hague Convention on International Child Abduction” (2011) 60:5 *Duke LJ* 1193; Efrat Arbel, Catherine Dauvergne & Jenni Milbank, eds, *Gender in Refugee Law: From the Margins to the Centre* (New York: Routledge, 2014).
  6. In my initial review of the literature, I was not able to find academic commentary that combined these bodies of work to look at their intersection—specifically, women who have fled domestic violence and are excluded from refugee status on the basis of child abduction. While this article was in its final stages of editing, the following article was published: Michelle Hayman, “Domestic Violence and International Child Abduction at the Border of Canadian Family and Refugee Law” (2018) 29 *J L & Soc Pol’y* 114. Michelle Hayman addresses the interaction of the *Hague Convention* with Canadian refugee law in the context of domestic violence and child abduction.

In this article, I analyze the publicly available Federal Court and IRB decisions from 2000 to 2017 where the 1(F)(b) exclusion on the basis of the crime of child abduction was raised as an issue in assessing a woman's refugee claim based on domestic violence. I argue that this legal intersection creates an untenable position for women experiencing domestic violence, who risk the failure of their refugee claim because of their understandable decision not to abandon their children in potentially violent situations. While the number of publicly available decisions limits the conclusions that can be drawn, there are troubling patterns. I identify fairness and justice concerns around the way decision makers have applied guidelines for women refugee claimants, conducted credibility assessments, and addressed interplay between applications of the *Hague Convention* and refugee claims in this context.

In Part I of this article, I chart the legal context for this issue—specifically, the 1(F)(b) exclusion analysis under the *Refugee Convention* and the *Hague Convention*. I also set out the IRB's *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution* (“*Gender Guidelines*”), which provide guidance for IRB decision makers encountering women refugee claimants.<sup>7</sup> In Part II, I present the article's methodology and limitations. In Part III, I turn to the body of publicly accessible case law and analyze how courts have considered the 1(F)(b) exclusion analysis where child abduction is raised in refugee claims made by women on the basis of domestic violence. I examine the use of the *Gender Guidelines* by the IRB and Federal Court decision makers in this context. I also analyze how courts have addressed the interaction between these claims and applications for the return of a child under the *Hague Convention*. I conclude that there are fairness and justice concerns around how decision makers have applied guidelines for women refugee claimants, conducted credibility assessments, and addressed interplay with *Hague Convention* applications. While the sample size is limited, I also found some consistency issues in the jurisprudence. I close with conclusions and preliminary recommendations.

## I. CONTEXT

One of the challenges in understanding the predicament of domestic violence survivors who travel to Canada with their children and seek refugee status is the multiplicity of international and domestic legal frameworks, non-binding

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7. Immigration and Refugee Board of Canada, *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution* (Ottawa: Immigration and Refugee Board, 1996), online: <[www.irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir04.aspx](http://www.irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir04.aspx)> [*Gender Guidelines*]; Arbel, *supra* note 4 at 731.

guidelines, and procedures that interact with each other and may have an effect on their lives and claims. In Parts I(A) and I(B), I focus on the exclusion provisions of the 1951 *Refugee Convention*, their adoption into Canadian law, and how this legal framework applies to women in the above situation. I also outline the IRB's *Gender Guidelines* for women refugee claimants fearing gender-related persecution, which are intended to provide guidance for IRB decision makers encountering these types of situations.<sup>8</sup> Finally, in Part I(C), I discuss the 1980 *Hague Convention*. By delineating who is excluded from being a refugee and by creating a civil remedy for the return of children taken across borders, these international instruments lay the legal foundation for women refugee claimants who have entered Canada with their children and are fundamental in understanding their predicament.

#### A. THE REFUGEE CONVENTION, EXCLUSION, AND CANADIAN LAW

Article 14 of the 1948 *Universal Declaration of Human Rights* recognizes the right of all persons “to seek and enjoy in other countries asylum from persecution.”<sup>9</sup> The 1951 *Refugee Convention* is the key legal document that defines who is a refugee, what their rights are, and states’ legal obligations towards them. The *Refugee Convention* defines a refugee as someone who, “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion,” is unable or unwilling to return to the country of their nationality or habitual residence.<sup>10</sup> Gender is not specified among the enumerated grounds of persecution.<sup>11</sup> Claimants must further demonstrate that their home state is unable or unwilling to protect them and that they have no internal flight alternative within their home state.<sup>12</sup> The definition of a refugee in article 1(A)(2) of the *Refugee Convention* has been incorporated into Canadian domestic law in section 96 of the *Immigration and Refugee Protection Act (IRPA)*.<sup>13</sup>

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8. *Gender Guidelines*, *supra* note 7.

9. United Nations High Commissioner for Refugees, “Introductory Note” in *Convention and Protocols Relating to the Status of Refugees* (Geneva: UNHCR, 2010) at 2, online: <[www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html](http://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html)>; *Universal Declaration of Human Rights*, 10 December 1948, UN GA Res 217 A(III) art 14.

10. *Refugee Convention*, *supra* note 2, art 1(A)(2).

11. Melanie Randall, “Particularized Social Groups and Categorical Imperatives in Refugee Law: State Failures to Recognize Gender and the Legal Reception of Gender Persecution Claims in Canada, the United Kingdom, and the United States” (2015) 23:4 *Am UJ Gender Soc Pol’y & L* 529 at 531 [Randall, “Particularized Social Groups”].

12. Arbel, *supra* note 4 at 734, n 7.

13. *Immigration and Refugee Protection Act*, SC 2001, c 27, s 96 [IRPA].

In addition to the above analysis, a decision maker will consider article 1(F) (the “exclusion clause”) of the *Refugee Convention*, which bars certain categories of individuals from refugee protection on the basis that the commission of certain acts “prevents access to the protections which would otherwise be afforded.”<sup>14</sup> Specifically, article 1(F)(b) stipulates that an individual who has committed “a serious non-political crime” outside the country of refuge is not entitled to the protections associated with being a legal refugee.<sup>15</sup> It reflects the larger idea that “certain persons do not *deserve* protection as refugees by reason of serious transgressions committed, in principle, prior to seeking asylum.”<sup>16</sup> The exclusion clause is incorporated directly into Canadian law through section 98 of the *IRPA*—for Canadian purposes, a person excluded by article 1(F) is “not a Convention refugee or a person in need of protection.”<sup>17</sup> Such an individual is also barred from obtaining permanent resident status, though they may apply for protection in the event of a removal order.<sup>18</sup>

The exclusion clause is not intended to rule out those who are guilty of minor infractions. Whether a crime is sufficiently serious to fall within the purview of article 1(F)(b) is “determined in accordance with international norms, domestic legislation, and case law.”<sup>19</sup> Specifically, in the context of the *IRPA*, “serious crime” is understood to mean an indictable offence under the *Criminal Code* that, if committed in Canada, would constitute an offence punishable by a maximum term of imprisonment of at least ten years.<sup>20</sup> Lesser penalties may qualify depending on the circumstances and nature of the crime committed. Examples of “serious crimes” in the 1(F)(b) context include murder,<sup>21</sup> drug

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14. Jennifer Bond, “Excluding Justice: The Dangerous Intersection between Refugee Claims, Criminal Law, and ‘Guilty’ Asylum Seekers” (2012) 24:1 Intl J Refugee L 37 at 39.

15. *Refugee Convention*, *supra* note 2, art 1(F)(b).

16. Michael Kingsley Nyinah, “Exclusion Under Article 1F: Some Reflections on Context, Principles and Practice” (2000) 12 Intl J Refugee L 295 at 297.

17. *IRPA*, *supra* note 13, s 98; *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 at para 2, [2009] 4 FCR 164 [*Jayasekara*].

18. *Jayasekara*, *supra* note 17 at para 3.

19. James Billingsley, “No Second Chances: The Default Exclusion of Refugee Claimants on Grounds of Serious Criminality: A Case Comment on *Febles v Canada*” (2015) 20 Appeal 99 at 101.

20. *IRPA*, *supra* note 13, s 101(2)(b).

21. *Feimi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 262, [2013] 4 FCR 345; *AC v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1500, 243 FTR 194.

trafficking,<sup>22</sup> sexual assault,<sup>23</sup> bombing,<sup>24</sup> kidnapping,<sup>25</sup> armed robbery,<sup>26</sup> and terrorist acts.<sup>27</sup> Some economic crimes (*e.g.*, smuggling, embezzlement, fraud) can also be crimes under article 1(F)(b).<sup>28</sup>

In *Jayasekara v Canada*, the Federal Court of Appeal held that interpreting the seriousness of a crime in the context of 1(F)(b) requires an evaluation of “the elements of the crime, the mode of prosecution, the penalty prescribed, the facts and the mitigating and aggravating circumstances underlying the conviction.”<sup>29</sup> More recently, in *Febles v Canada*, the Supreme Court of Canada (SCC) upheld the view that a crime will be considered serious where a maximum sentence of ten years or more could have been imposed, though it did state that a claimant whose crime would fall at the less serious end of the range in Canada should not be presumptively excluded and that “the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner.”<sup>30</sup>

Significantly, in determining the seriousness of a crime for the purposes of 1(F)(b) in Canadian law, there is no balancing with factors extraneous to the facts and circumstances underlying the conviction, such as the risk of persecution in the state of origin.<sup>31</sup> This is a departure from the United Nations High Commissioner for Refugees (UNHCR) process, which advocates for a proportionality assessment weighing “the gravity of the offence for which the individual appears to be responsible against the possible consequences of the

22. *Jayasekara*, *supra* note 17; *Martinez Cuero v Canada (Minister of Citizenship and Immigration)*, 2012 FC 191, 405 FTR 132; *Poggio Guerrero v Canada (Minister of Citizenship and Immigration)*, 2010 FC 384, 223 ACWS (3d) 181.

23. *Shamlou v Canada (Minister of Citizenship and Immigration)* (1995), 103 FTR 241, 59 ACWS (3d) 494.

24. *Gil v Canada (Minister of Employment and Immigration)*, [1995] 1 FC 508, 119 DLR (4th) 497 (CA).

25. *Taleb v Canada (Minister of Citizenship and Immigration)*, 90 ACWS (3d) 447, 1999 CarswellNat 1492 (FCTD).

26. *Ospina Velasquez v Canada (Minister of Citizenship and Immigration)*, 2013 FC 273, 429 FTR 143; *Sharma v Canada (Minister of Citizenship and Immigration)*, 2003 FTR 24, 121 ACWS (3d) 925.

27. *Zrig v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178, [2003] 3 FC 761.

28. See *e.g.* *Xie v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250, [2005] 1 FCR 304; *Lai v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125, 253 DLR (4th) 606; *Zeng v Canada (Minister of Citizenship and Immigration)*, 2008 FC 956, 333 FTR 84; *Iliev v Canada (Minister of Citizenship and Immigration)*, 2005 FC 395, 138 ACWS (3d) 344.

29. *Jayasekara*, *supra* note 17 at para 44.

30. *Febles v Canada (Minister of Citizenship and Immigration)*, 2014 SCC 68 at para 62, [2014] 3 SCR 431 [*Febles*].

31. *Jayasekara*, *supra* note 17 at para 44.

person being excluded, notably including the degree of persecution feared.”<sup>32</sup> In *Febles*, the SCC confirmed that “the seriousness of the crime [should not] be balanced against factors extraneous to the crime such as present or future danger to the host society or post-crime rehabilitation or expiation.”<sup>33</sup> Thus, the decision maker should not consider (as the UNHCR encourages<sup>34</sup>) whether a person who has committed a crime within the scope of article 1(F)(b) is *deserving* of refugee protection, having regard to the seriousness of the offence, post-offence activities, and other factors.

The abduction of a child has—unsurprisingly—been found in the past to be a serious non-political crime within the scope of 1(F)(b). The IRB publishes a public document entitled *Interpretation of the Convention Refugee Definition in the Case Law*, which lays out guidelines for the application of article 1(F)(b), including guidelines for determining whether a crime is “serious.”<sup>35</sup> Citing *Kovacs v Canada*, it states that “[i]nternational kidnapping of a child may constitute a serious non-political crime.”<sup>36</sup> Canadian law concerning the abduction of children is found in sections 280 to 286 of the *Criminal Code*. Specifically, section 283 (the section I found cited in the cases reviewed for this article) provides that abduction by a parent or guardian is an offence leading to a term of imprisonment of up to ten years.<sup>37</sup> However, it is important to note that sections 282 and 283 are hybrid offences. The Crown could elect to proceed by either indictment or summary conviction. If indictable, a conviction under these provisions attracts a sentence not exceeding ten years, as prescribed in section 282(1)(a) or section 283(1)(a).<sup>38</sup> There is no minimum sentence where the Crown elects to proceed by summary conviction.<sup>39</sup> In such a circumstance, section 787 of the *Criminal Code* applies so as to limit the maximum sentence to six months of imprisonment,

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32. United Nations High Commissioner for Refugees (UNHCR), *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (Geneva: UNHCR, 2003) at para 78 [*Background Note*].

33. *Febles*, *supra* note 30 at para 60. See Billingsley, *supra* note 19.

34. *Background Note*, *supra* note 32 at para 34.

35. Immigration and Refugee Board, *Interpretation of the Convention Refugee Definition in the Case Law* (Ottawa: IRB, 2018), online: <[www.irb-cisr.gc.ca/en/legal-policy/legal-concepts/Pages/RefDef.aspx](http://www.irb-cisr.gc.ca/en/legal-policy/legal-concepts/Pages/RefDef.aspx)>.

36. *Ibid*, s 11.3.1.

37. *Criminal Code*, RSC 1985, c C-46, s 283 [*Criminal Code*].

38. *Ibid*, ss 282(1)(a), 283(1)(a); *AB v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1385 at para 74, [2017] 4 FCR 3 [*AB v Canada*].

39. *Criminal Code*, *supra* note 37, ss 282(1)(b), 283(a)(b); *AB v Canada*, *supra* note 38 at para 74.

a fine of five thousand dollars, or both.<sup>40</sup> Per *Jayasekara*, the choice of mode or prosecution can be relevant to the court's analysis of seriousness where, as here, there is a "substantial difference" between the prescribed penalties for summary and indictable offences.<sup>41</sup>

While the presumption of the seriousness of a crime may be rebutted by the factors taken into account under the *Jayasekara* analysis, defences are also available. For example, no one shall be found guilty of the taking of a young person if the court is satisfied that the taking was necessary in order "to protect the young person from danger of imminent harm or if the person charged with the offence was escaping from danger of imminent harm."<sup>42</sup>

## B. CANADA'S INNOVATION: THE GENDER GUIDELINES

That current-day women seeking sanctuary in Canada can base their refugee claims on domestic violence perpetrated by non-state actors is a function of the *Gender Guidelines*.<sup>43</sup> Initially released by the IRB in 1993, the *Gender Guidelines* link gender to the definition of a refugee and lay out a framework for the assessment of a refugee claim in a gender-sensitive manner (though they did not, as many refugee advocates desired, add gender as an explicit ground).<sup>44</sup> Canada was the first state signatory to the *Refugee Convention* to address the *Convention's* failure to account for gender when defining who was entitled to refugee protections.<sup>45</sup>

The *Gender Guidelines* are significant to the topic of this paper—refugee claims brought by women who escape domestic violence with their children—because they affect how decision makers should be treating these women's claims. While the *Gender Guidelines* do not independently have the force of legislation, the IRB requires its members to furnish written reasons for decisions that reject the principles in the *Gender Guidelines*.<sup>46</sup> Failure to consider the *Gender Guidelines*

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40. *Criminal Code*, *supra* note 36, s 787; *AB v Canada*, *supra* note 38 at para 74.

41. *Jayasekara*, *supra* note 17 at para 46.

42. *Criminal Code*, *supra* note 37, s 285.

43. *Gender Guidelines*, *supra* note 7; Arbel, *supra* note 4 at 731.

44. Sherene Razack, "Domestic Violence as Gender Persecution: Policing the Borders of Nation, Race, and Gender" (1995) 8 CJWL 45 at 61; Randall, "Particularized Social Groups," *supra* note 11.

45. Shauna Labman & Catherine Dauvergne, "Evaluating Canada's approach to gender-related persecution: Revisiting and re-embracing 'refugee women and the imperative of categories'" in Arbel, Dauvergne & Milbank, *supra* note 5 at 264.

46. Arbel, *supra* note 4 at 734-35.

is a palpable error,<sup>47</sup> and while the *Gender Guidelines* “need not be specifically mentioned in a decision ... it must be apparent from the decision that it was considered.”<sup>48</sup> Consideration of the *Gender Guidelines* is reviewed on a standard of reasonableness.<sup>49</sup> Elements of the *Gender Guidelines* have been incorporated into the jurisprudence around refugee claims and are widely referenced in claims involving domestic violence.

The *Gender Guidelines* affect how IRB decision makers should take gender into account as they follow the steps of the refugee claim assessment.<sup>50</sup> The *Gender Guidelines* recognize that “[t]he circumstances which give rise to women’s fear of persecution are often unique to women.”<sup>51</sup> They direct decision makers to consider “the social, cultural, religious, and economic context in which the claimant finds herself” when assessing the feared harm and deciding whether it is “objectively unreasonable for the claimant not to have sought the protection of the state.”<sup>52</sup>

The *Gender Guidelines* also address gender-specific evidentiary concerns and the distinct difficulties women may face at a refugee hearing.<sup>53</sup> They note that “[w]omen refugee claimants face special problems in demonstrating that their claims are credible and trustworthy.”<sup>54</sup> Examples given include: “[w]omen from societies where the preservation of one’s virginity or marital dignity is the cultural norm may be reluctant to disclose their experiences of sexual violence”; “[w]omen refugee claimants who have suffered sexual violence may exhibit a pattern of symptoms referred to as Rape Trauma Syndrome”; and “women who have been subjected to domestic violence may exhibit a pattern of symptoms referred to as Battered Woman Syndrome and may also be reluctant to testify.”<sup>55</sup>

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47. *Njeri v Canada (Minister of Citizenship and Immigration)*, 2009 FC 291 at para 16, 176 ACWS (3d) 505; *Aissa v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1156 at para 35, 253 ACWS (3d) 175.

48. *Aissa*, *supra* note 47 at para 61.

49. *Correa Juarez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 890 at para 12, 193 ACWS (3d) 957.

50. Razack, *supra* note 44 at 63.

51. *Gender Guidelines*, *supra* note 7, s B.

52. *Ibid*, s C.

53. Razack, *supra* note 44 at 61.

54. *Gender Guidelines*, *supra* note 7, s D.

55. *Ibid*.

### C. THE HAGUE CONVENTION IN CANADIAN LAW

The *Hague Convention* aims to protect children from harms resulting from their wrongful removal across borders by providing a procedure to bring about their prompt return to the state (country) of their habitual residence.<sup>56</sup> Parental child abduction occurs when one parent takes a child across national borders and retains the child without the consent of the other parent.<sup>57</sup> There are currently ninety-nine contracting states to the *Hague Convention*,<sup>58</sup> each of whom is required to designate a “Central Authority” to act as a contact person, fact finder, and decision maker on *Hague Convention* applications.<sup>59</sup> In Canada, *Hague Convention* applications are heard in provincial courts.

The *Hague Convention* establishes a procedural mechanism implemented by the Central Authority that determines if the child should be returned to his or her habitual country of residence for the resolution of custodial arrangements between the two parents. An applicant for the return of a child must establish that the removal or retention of a child: (i) is in breach of rights of custody under the law of the state in which the child was habitually resident immediately before the removal or retention and (ii) that those rights were actually exercised at the time of removal or retention.<sup>60</sup>

Notwithstanding this, the authority of the state is not bound to order the return of the child if the party who opposes its return establishes either that:

the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or [that] there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.<sup>61</sup>

The *Hague Convention* inherently presumes that the wrongful removal is not in the interests of the child. This is in line with other international treaties, such as the *United Nations Convention on the Rights of the Child* (UNCRC), which states that “States Parties shall respect the right of the child who is separated from

56. *Hague Convention*, *supra* note 3, preamble.

57. *Ibid*, art 4.

58. Hague Conference on Private International Law, “Status Table: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction” (last updated 2 December 2017), online: <[www.hcch.net/en/instruments/conventions/status-table/?cid=24](http://www.hcch.net/en/instruments/conventions/status-table/?cid=24)>. As of October 12, 2018, there were ninety-nine contracting states.

59. *Hague Convention*, *supra* note 3, c II.

60. *Ibid*, art 3.

61. *Ibid*, art 13.

one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."<sup>62</sup> Moreover, because the *Hague Convention* considers the swift return of the child to be in the child's best interests, states are instructed to "act expeditiously."<sup>63</sup> This was recently confirmed in a rare SCC statement on the *Hague Convention*, in which the Court sent a clear signal that applications should be judge-led, not party-driven.<sup>64</sup> The Court went so far as to encourage other Canadian courts to take steps to ensure *Hague Convention* proceedings are flagged and decided using the "most expeditious procedures available."<sup>65</sup> For example, article 11 allows an applicant to request a statement of reasons for the delay if an authority does not reach a decision within six weeks from the date the proceedings commence.<sup>66</sup> Such expediency is in direct contrast to the timeline for refugee claims, which can take years to resolve.

## II. METHODOLOGY AND LIMITATIONS

Having charted the legal context for this article, in this part, I lay out the analytical context by explaining the methodology used to approach this issue by means of publicly available Federal Court and IRB decisions. I also address the limitations inherent in the small sample available.

### A. METHODOLOGY

In my review of the literature, I was not able to find academic literature that looked at the issue of exclusion from refugee status of women who had fled domestic violence and were excluded on the basis of child abduction.<sup>67</sup> Moreover, I did not find any studies that investigated exclusion on the basis of the serious non-political crime of child abduction in Canada.

Ideally, to better understand this issue, I would empirically investigate how decision makers were addressing the 1(F)(b) exclusion on the basis of child abduction in the context of domestic violence. This would entail looking at how the *Gender Guidelines* were understood and applied in such cases, if and

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62. *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 art 9(3) (entered into force 2 September 1990).

63. *Hague Convention*, *supra* note 3, art 11.

64. *Office of the Children's Lawyer v Balev*, 2018 SCC 16 at para 89, [2018] 1 SCR 398.

65. *Ibid.*

66. *Hague Convention*, *supra* note 3, art 11.

67. As previously stated, an article addressing this topic was published while this article was in its final stages of editing. Hayman, *supra* note 6.

how interactions with *Hague Convention* applications were addressed, the effect of variables such as country of origin or type of persecution, and, ultimately, whether there was inconsistent decision making. However, due to the small volume of publicly available cases, this is not possible.

The study was limited to cases occurring during the seventeen-year period from 1 January 2000 to 31 December 2017. Notably, this study includes cases occurring both before and after the 15 December 2012 legislative changes. The legal databases used for this study were the Canadian Legal Information Institute (CanLII), WestLaw, and Quicklaw databases of English-language decisions by the Refugee Protection Division (RPD), Refugee Appeal Division (RAD), and Federal Court decisions. The search terms were designed to yield IRB and Federal Court decisions in which the issue of exclusion pursuant to 1(F)(b) was raised in the context of child abduction for women. It included search terms such as “1(F)(b),” “exclusion,” “abduction,” and “woman.”

Once compiled, I conducted an initial review to identify cases where decisions were available at multiple decision-making levels and to screen out cases that did not fit the focus of the study (such as those involving male refugee claimants or refugee claims based on fears of abduction). I ultimately identified fourteen relevant cases, with seventeen total decisions (see Table 1) where the issue of exclusion under 1(F)(b) on the basis of child abduction was raised for women who based their refugee claim on domestic violence. I identified seven additional cases from the same time period where the 1(F)(b) exclusion was raised on the basis that the claimant had committed the serious non-political crime of child abduction, but where the claim was based on grounds other than domestic violence.<sup>68</sup> Countries of origin comprised Mexico, Hungary, Venezuela, Germany, Peru, Cameroon, Nigeria, Guyana, Algeria, the USA, Honduras, China, and Pakistan.

This small number is perhaps unsurprising given that the IRB publishes very few of its decisions.<sup>69</sup> It follows that this small number likely does not accurately reflect the frequency with which the issue is being raised in IRB decision making.

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68. *Re MVL*, [2000] CRDD No 35 (QL); *Re UCR*, [2001] CRDD No 94 (QL); TB1-19163, [2015] RPDD No 290 (QL); TB5-08633, [2015] RPDD No 150 (QL); TB4-09799, [2015] RPDD No 281 (QL); TB5-05541, [2015] RADD No 802 (QL); *AB v Canada*, *supra* note 38. I also found one case where the 1(F)(b) exclusion was raised by a male refugee claimant, though this was not within my search parameters. See *Re YLH*, [2006] RPDD No 238 (QL) [*Re YLH*].

69. Arbel, *supra* note 4 at 746.

TABLE 1

Year	RPD	RAD	Federal Court
2002	<i>Re XEB</i> <sup>*70</sup>		
2003	<i>Re SAE</i> <sup>†71</sup>		
2004	<i>Kovacs v Canada</i> <sup>72</sup>		
2005	<i>Paris Montoya v Canada</i> <sup>73</sup>		<i>Kovacs v Canada</i> <sup>74</sup> <i>Montoya v Canada</i> <sup>75</sup>
2011	<i>Re X</i> (TA7-10286) <sup>76</sup>		
2012	<i>Re X</i> (TB1-14175) <sup>^77</sup>		
2013		<i>Re X</i> (TB3-04775) <sup>78</sup>	
2014		<i>Re X</i> (TB4-01471) <sup>79</sup> <i>Re X</i> (TB3-09317) <sup>†80</sup>	<i>Aissa v Canada</i> <sup>^81</sup>
2015	<i>Re X</i> (TB2-09187) <sup>82</sup> <i>Re X</i> (TB4-01282) <sup>83</sup> <i>Re X</i> (TB4-12679) <sup>84</sup>		<i>Puerto Rodriguez v Canada</i> <sup>85</sup>
2016		<i>Re X</i> (TB4-00407) <sup>86</sup>	
TOTAL	9	4	4

\* Domestic violence forming basis of claim alleged against claimant's former, not current, spouse.

† Minister withdrew position on issue of 1(F)(b) exclusion on the basis of the crime of child abduction.

^1(F)(b) not explicitly mentioned; however, the decision maker raised the issue of the claimant's alleged child abduction.

70. *Re XEB*, [2002] RPDD No 230 (QL) [*Re XEB*].

71. *Re SAE*, [2003] RPDD No 13 (QL) [*Re SAE*].

72. *Kovacs v Canada* (RPD), *supra* note 1.

73. *Paris Montoya v Canada* (Minister of Citizenship and Immigration), [2005] RPDD No 320 (QL) [*Paris Montoya v Canada* (RPD)].

74. *Kovacs v Canada*, *supra* note 1.

75. *Montoya v Canada* (Minister of Citizenship and Immigration), 2005 FC 1674, 294 FTR 41 [*Montoya v Canada*].

76. TA7-10286, [2011] RPDD No 501 (QL) [TA7-10286].

77. TB1-14175, [2012] RPDD No 520 (QL) [TB1-14175].

78. TB3-04775, [2013] RADD No 411 (QL) [TB3-04775].

79. TB4-01471, [2014] RADD No 1045 (QL) [TB4-01471].

80. TB3-09317, [2014] RADD No 677 (QL) [TB3-09317].

81. *Aissa*, *supra* note 47.

82. TB2-09187, [2015] RPDD No 4 (QL) [TB2-09187].

83. TB4-01282, [2015] RPDD No 279 (QL) [TB4-01282].

84. TB4-12679, [2015] RPDD No 117 (QL) [TB4-12679].

85. *Puerto Rodriguez v Canada* (Minister of Citizenship and Immigration), 2015 FC 1360, 262 ACWS (3d) 188 [*Puerto Rodriguez v Canada*].

86. TB4-00407, [2016] RADD No 352 (QL) [TB4-00407].

## B. LIMITATIONS

Given the small size of this sample, an empirical analysis is not feasible. As such, my aim is to illustrate troubling trends, assumptions made by decision makers, and key themes in this context, with the goal of bringing them to light in order that they may be explored further in future research.

There is one additional limitation that stems from the lack of published decisions. Not only may use of the 1(F)(b) exclusion on the basis of child abduction be occurring at a greater rate than is reflected in this sample, but it is possible that more women are successful at rebutting this charge than is seen here. In the selected sample, nearly every time the 1(F)(b) exclusion was raised, the claimant was excluded on that basis. However, given that positive RPD decisions were not accompanied by written reasons for much of the period of the study, it is possible that this does not actually reflect the success rate of the 1(F)(b) exclusion analysis.

## III. EXCLUSIONS, INTERSECTIONS, AND IMPOSSIBLE SITUATIONS

I now turn to a consideration of the themes, patterns, and inconsistencies emerging from this small body of case law. In doing so, I draw upon the existing literature on domestic violence, refugee claims, and the *Hague Convention* discussed above. I discuss how decision makers have used the *Gender Guidelines*, conducted credibility assessments, and addressed interplay between *Hague Convention* applications and refugee claims. Finally, I analyze the lack of consistency in the jurisprudence and the ramifications of this for women in this precarious situation.

### A. THE CHANGING USE OF THE HAGUE CONVENTION

The *Hague Convention* was originally enacted to address “a pattern of parental abduction across international borders to thwart or preempt custody arrangements in one country and seek a more advantageous setting for litigating custody issues in another.”<sup>87</sup> Drafters did not include reference to domestic violence against a spouse.<sup>88</sup> Rather, the abduction of a child was perceived to

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87. Shani M King, “The Hague Convention and Domestic Violence: Proposals for Balancing the Policies of Discouraging Child Abduction and Protection Children from Domestic Violence” (2013) 47:2 Family LQ 299 at 299.

88. Williams, *supra* note 5 at 44.

be in itself a form of domestic violence—one perpetrated on the part of the abducting, non-custodial father.<sup>89</sup>

The situation is very different today. Studies have found that “sixty-five percent to seventy percent of international family abductors were female, and usually mothers.”<sup>90</sup> Moreover, there is evidence that the majority of return cases are brought by men against women.<sup>91</sup> Tension exists between the goals of preventing international child abduction and the protection of women who flee situations of violence with their children, who are, in many instances, protecting their children from abuse.

This tension manifests in a number of ways. For the woman who has “abducted” her children away from a situation of domestic violence, a return order subjects her to the potential for “additional and greater violence.”<sup>92</sup> She faces the choice of letting the child or children return alone to a parent who has previously exhibited violence or returning with the child to confront the potential resumption of the abuse.<sup>93</sup> While the *Hague Convention* specifically provides that decisions made pursuant to it concerning a child’s return “shall not be taken to be a determination on the merits of any custody issue,”<sup>94</sup> this ignores the fact that the return of a child under certain circumstances could be a de facto custody decision if the woman is not able to return for her own safety.

In addition, as stated above, the *Hague Convention* mechanism is designed to enable the rapid return of the “abducted” child. It directs states to “use the most expeditious procedures available.”<sup>95</sup> For a woman who is the respondent to a *Hague* claim in the midst of a refugee claim, this emphasis on speed has significant repercussions. The issue of whether an order under the *Hague Convention* for the immediate return of a child can be made whilst there is a pending claim on the child’s behalf for status as a *Convention* refugee was considered in *Kovacs v Kovacs*.<sup>96</sup>

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89. *Ibid* at 42.

90. Julia Alanen, “When Human Rights Conflict: Mediating International Parental Kidnapping Disputes Involving the Domestic Violence Defense” (2008) 40:1 U Miami Inter-Am L Rev 49 at 53-54.

91. Nigel Lowe, “A Statistical Analysis of Applications Made in 2008 Under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part I*” (November 2011), online: <[www.hcch.net/en/publications-and-studies/details4/?pid=5421&dtid=32](http://www.hcch.net/en/publications-and-studies/details4/?pid=5421&dtid=32)>. Lowe reports that “69% of taking persons were mothers” and “28% of the taking persons were fathers.”

92. Williams, *supra* note 5 at 52.

93. *Ibid* at 58.

94. *Hague Convention*, *supra* note 3, art 19.

95. *Ibid*, art 2.

96. *Kovacs v Kovacs*, *supra* note 1.

This case concerned Miklosne Kovacs, who entered Canada on 29 March 2001 and claimed refugee protection for herself and her two minor children. The claim was based on fear of persecution by reason of physical and psychological abuse at the hands of the Ms. Kovacs's husband.<sup>97</sup> In quick succession, Mr. Kovacs was granted a divorce and custody of one of the children<sup>98</sup> by a Hungarian Court (June 2001) and subsequently commenced a *Hague Convention* application for the immediate return of his son, Gergo, in July 2001.<sup>99</sup>

The judge in *Kovacs v Kovacs*, summarizing the procedural timelines at that time, noted that *Hague* applications in the Ontario Superior Court of Justice can usually be completed in three to four months, while “[t]he refugee determination process to the completion of a hearing usually takes about a year.”<sup>100</sup> The court held that the *Hague Convention* was “not impaired, qualified or rendered inoperative by the [IRPA] under the doctrine of paramountcy.”<sup>101</sup> Thus, an order under the *Hague Convention* for the immediate return of a child is not delayed pending a decision of refugee status. Women who have fled domestic violence with their children can have their children forcibly removed to their abuser despite a pending refugee application on the grounds of that same domestic violence.

Moreover, information and findings in a *Hague Convention* application can be used in a subsequent refugee claim process. Ultimately, the court in *Kovacs v Kovacs* found that the removal and retention of Gergo was wrongful.<sup>102</sup> This finding was based primarily on the finding that the allegations of abuse were not credible—the court cited lack of medical evidence, police reports, and other physical evidence to substantiate the years of alleged severe physical abuse.<sup>103</sup> There was no discussion of the effects of trauma, social or cultural context, or gender-specific evidentiary concerns in the credibility assessment in the decision. The *Hague Convention* application ultimately failed not because of any concerns over domestic violence, but because of the criminal activities of Mr. Kovacs. The court held that “to accede to the applicant’s position on this application would now effectively mean that Gergo would be returned to a father

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97. *Ibid* at para 14.

98. The other child who entered Canada with Ms. Kovacs was a child of Ms. Kovacs's previous marriage and was not the subject of any claim by the applicant.

99. *Kovacs v Kovacs*, *supra* note 1 at paras 11-13.

100. *Ibid* at para 72.

101. *Ibid* at para 150.

102. *Ibid* at para 153.

103. *Ibid* at paras 170-83.

who is a fugitive from justice. He would, if returned to his father's care, be in an environment which would present a risk of psychological harm."<sup>104</sup>

Two years later, in 2004, the RPD determined that Ms. Kovacs and her children were neither *Convention* refugees nor persons in need of protection. Ms. Kovacs was excluded from refugee protection pursuant to article 1(F)(b) of the *Refugee Convention* on the basis that there were "serious reasons for considering" that she had committed the serious non-political crime of abducting her son.<sup>105</sup> In reaching this decision, the RPD relied on *Kovacs v Kovacs*, despite the fact that the court had only reached a finding that the removal and retention of Gergo was wrongful, not a finding that Ms. Kovacs had committed the crime of abduction.<sup>106</sup> The RPD's decision was upheld in 2005, where the Federal Court found that the RPD was entitled to take the findings of the court in *Kovacs v Kovacs* into account.<sup>107</sup> Per the Federal Court, the Ontario court's decision in the *Hague Convention* application was not binding, but was "relevant and important evidence that places the applicants' claim in context" and the Ontario Superior Court of Justice's findings should be taken into account where they are directly relevant to the facts before the IRB.<sup>108</sup> The Federal Court did specify that the IRB is still required to carry out its own analysis and "cannot be bound by the actions of the [Ontario Superior Court of Justice], particularly where the issues and questions are different."<sup>109</sup> This set a precedent that has been upheld in subsequent refugee cases where a prior *Hague Convention* application is in play, most notably in *AB v Canada*.<sup>110</sup>

Similarly to *Kovacs v Canada*, *AB v Canada* dealt with a refugee claim made by a Roma woman from Hungary who had travelled to Canada with her children. *AB v Canada* and its underlying RPD decision also considered the effects of the *Hague Convention* and a return order on a subsequent 1(F)(b) analysis. However, in *AB v Canada*, the principal applicant based her claim for protection on discrimination and persecution because of her Roma ethnicity,

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104. *Ibid* at para 235.

105. *Kovacs v Canada*, *supra* note 1 at para 2.

106. *Ibid* at paras 20-21.

107. *Ibid* at para 10. Specifically, the Federal Court held that, because the court in *Kovacs v Kovacs* was not required to address the issue of criminal abduction, the RPD did not err in relying on that decision despite the fact that Justice Ferrier did not make a specific finding that Gergo had been abducted by his mother (*ibid* at paras 20-21).

108. *Ibid*.

109. *Ibid*.

110. *Jesurasa v Canada (Minister of Citizenship and Immigration)*, [2005] RPDD No 279 (QL); *Re YLH*, *supra* note 68; *AB v Canada*, *supra* note 38.

rather than domestic violence.<sup>111</sup> The principal applicant entered Canada with her eldest child, who was the subject of contested custody proceedings in Hungary.<sup>112</sup> In December 2011, a Hungarian court ordered the child's return to her father's custody.<sup>113</sup> On 30 November 2012, the child's father obtained a *Hague Convention* return order from the Ontario Court of Justice.<sup>114</sup>

At the subsequent RPD proceedings, the applicant was excluded from refugee protections on the grounds that there were serious reasons for considering that she had committed a serious non-political crime pursuant to article 1(F)(b). The RPD member cited *Kovacs v Canada* for the proposition that the Ontario Court of Justice's *Hague Convention* decision was relevant to the exclusion analysis and quoted extensively from the Ontario Court of Justice's twenty-two-page decision in his reasons:

[The RPD member] appears to have determined that the applicable standard for determining if there were serious reasons for considering that the Applicant had committed a serious non-political crime outside Canada, prior to her admission to Canada as a refugee, was the fact of the existence of the Hague Convention and the evidence that confirmed that the Applicant had removed and wrongfully retained the child, who was subsequently returned to her father by way of the Hague Convention order of the [Ontario Court of Justice].<sup>115</sup>

In reviewing the RPD decision, the Federal Court concluded that the member's 1(F)(b) exclusion analysis was unreasonable on the grounds that: (i) he erred in failing to consider *Febles* and whether the ten-year sentencing presumption had been rebutted and (ii) that "his application of the *Jayasekara* factors was unreasonable."<sup>116</sup> The court found that *Jayasekara* did "not support the proposition that the existence of an international convention, such as the Hague Convention, is the sole factor or 'standard' against which seriousness must be assessed."<sup>117</sup>

Ultimately, the court found that while *Kovacs v Canada* recognizes the *Hague Convention* as a "factor to be considered in determining if child abduction is a serious crime for the purposes of Article 1F(b)," it is not determinative. Per the court, "it does not support a contention that it is the only factor to be considered, that its existence creates a non-rebuttable presumption that child abduction is,

111. *AB v Canada*, *supra* note 38 at paras 12-13.

112. *Ibid* at para 10.

113. *Ibid*.

114. *Ibid* at para 11.

115. *Ibid* at para 71.

116. *Ibid* at para 57

117. *Ibid* at para 81.

in every case, serious in the context of an Article 1F(b) analysis, or, that it is the primary factor to be considered.”<sup>118</sup>

Other cases have taken place at the nexus of *Hague Convention* applications, domestic violence, and refugee claims, and fully considering those cases is beyond the scope of this article.<sup>119</sup> *Kovacs v Canada* is by no means a perfect model case—it predates the SCC’s decision in *Febles* and the IRB had significant credibility concerns with regard to Ms. Kovacs. However, *Kovacs v Canada* is significant, both for the precedent it set that *Hague Convention* decisions are relevant to the 1(F)(b) exclusion analysis and for the troubling history it relates: after four years and decisions from four separate courts and tribunals, the possibility that Ms. Kovacs was suffering from trauma that had affected her ability to give testimony or had other gender-specific evidentiary concerns never formed part of a credibility assessment. While the effects of *Kovacs v Canada* have been somewhat circumscribed by the Federal Court’s subsequent decision in *AB v Canada*, it still exposes dangerous and gendered undercurrents present in this area of law.

## B. IMPLEMENTATION AND INHERENT LIMITATIONS OF THE *GENDER GUIDELINES*

My discussion of the *Gender Guidelines* will proceed in three parts. I first consider academic research that has considered the effect of the *Gender Guidelines* on refugee claims in cases involving domestic violence. Next, I examine how the *Gender Guidelines* are being engaged in decisions where the issue of exclusion under 1(F)(b) was raised in the context of child abduction for women basing their refugee claim on domestic violence. Finally, I consider inherent limitations in the *Gender Guidelines* specific to this context.

It has been twenty-three years since the IRB released the *Gender Guidelines*. In that time, there has been very little information compiled and made public on their operation and effectiveness.<sup>120</sup> In an effort to fill this knowledge gap, recent studies have examined refugee determination cases involving domestic violence claims and the application of the *Gender Guidelines*.

A 2010 study by Constance MacIntosh analyzed all reported RPD decisions from 2004–2009 and judicial reviews from 2005–2009 in which a woman sought

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118. *Ibid* at para 87.

119. *Toiber v Toiber* (2006), 208 OAC 391, 146 ACWS (3d) 1015; *Kubera v Kubera*, 2010 BCCA 118, 3 BCLR (5th) 121; *Borisovs v Kubiles* (2013), 226 ACWS (3d) 465, 278 CRR (2d) 71 (Ont Ct J); *Suarez v Carranza* (2008), 172 ACWS (3d) 145, [2008] WDFL 4883 (BC SC).

120. MacIntosh, *supra* note 4 at 148, 151.

protection from spousal violence.<sup>121</sup> The study found that domestic violence was consistently recognized as a form of persecution that may form the basis of a claim for refugee protection.<sup>122</sup> However, of the 135 RPD decisions studied, 132 were rejected.<sup>123</sup> Denial was most frequently because the “claimant failed to convince the adjudicator that her home state could not protect her from the abuser” (64 per cent), followed by a finding that the claimant’s story of domestic violence was not credible (34 per cent), a finding that “the claimant had an internal flight alternative” (11 per cent), and a finding that “the claimant’s delay in seeking protection meant that they did not actually fear the alleged abuse” (12 per cent).<sup>124</sup> The study found that decision makers often did not engage in a substantive or contextual understanding of the evidence in evaluating state protection and that assessments of state protection by the RPD rarely followed the directives of the *Gender Guidelines*.<sup>125</sup>

Building on this research, Efrat Arbel, in a 2013 study, aimed to evaluate “whether the *Guidelines*’ goal of encouraging a gender-sensitive refugee-determination has been meaningfully realized in cases involving domestic violence.”<sup>126</sup> She surveyed 528 reported refugee determination cases involving claims of domestic violence.<sup>127</sup> Consistent with MacIntosh’s findings, Arbel also found that “adjudicators consistently recognized domestic violence as persecution for the purposes of the refugee analysis.”<sup>128</sup> Arbel’s research uncovered a low acceptance rate for the refugee claims: Within 528 cases reported, there was an acceptance rate of roughly 20 per cent.<sup>129</sup> Similar to MacIntosh, Arbel found that, in domestic violence cases, “adjudicators’ determinations generally hinged on the state-protection analysis.”<sup>130</sup> She found that “[m]ost of the unsuccessful cases were rejected on the grounds that the claimant could not prove a failure of state protection, did not advance sufficiently credible evidence, or lacked credibility.”<sup>131</sup>

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121. *Ibid* at 151.

122. *Ibid* at 153.

123. *Ibid* at 152.

124. *Ibid*.

125. *Ibid* at 153-54.

126. Arbel, *supra* note 4 at 731.

127. *Ibid* at 746.

128. *Ibid* at 753.

129. *Ibid* at 746.

130. *Ibid* at 756.

131. *Ibid* at 746.

In the cases reviewed for this article, the decision maker explicitly considered the *Gender Guidelines* roughly half of the time, though the frequency varied with the level of decision maker (see Table 2).

TABLE 2: GENDER GUIDELINES MENTIONED?

	Yes, in multiple paragraphs	Yes, in one discrete paragraph	No
Federal Court	<i>Aissa v Canada</i> <sup>132</sup>		<i>Kovacs v Canada</i> <sup>133</sup> <i>Montoya v Canada</i> <sup>134</sup> <i>Puerto Rodriguez v Canada</i> <sup>135</sup>
RAD		<i>Re X</i> (TB3-04775) <sup>136</sup>	<i>Re X</i> (TB4-01471) <sup>137</sup> <i>Re X</i> (TB3-09317) <sup>138</sup>
RPD	<i>Re XEB</i> <sup>139</sup>	<i>Kovacs v Canada</i> <sup>140</sup> <i>Re X</i> (TA7-10286) <sup>141</sup> <i>Re X</i> (TB1-14175) <sup>142</sup> <i>Re X</i> (TB2-09187) <sup>143</sup> <i>Re X</i> (TB4-12679) <sup>144</sup>	<i>Paris Montoya v Canada</i> <sup>145</sup> <i>Re SAE</i> <sup>146</sup> <i>Re X</i> (TB4-01282) <sup>147</sup>
TOTAL	3	6	8

Looking at engagement with the *Gender Guidelines*, a few patterns emerge. First, reference to the *Gender Guidelines* was frequently treated in a discrete paragraph, separate from the main progression of the decision maker's argument—a blanket paragraph generally recognizing the applicability of the *Gender Guidelines*. For example, the following passage from RPD TB1-14175 reads:

132. *Aissa*, *supra* note 47.

133. *Kovacs v Canada*, *supra* note 1.

134. *Montoya v Canada*, *supra* note 75.

135. *Puerto Rodriguez v Canada*, *supra* note 85.

136. TB3-04775, *supra* note 78.

137. TB4-01471, *supra* note 79.

138. TB3-09317, *supra* note 80.

139. *Re XEB*, *supra* note 70.

140. *Kovacs v Canada*, *supra* note 1.

141. TA7-10286, *supra* note 76.

142. TB1-14175, *supra* note 77.

143. TB2-09187, *supra* note 82.

144. TB4-12679, *supra* note 84.

145. *Paris Montoya v Canada* (RPD), *supra* note 73.

146. *Re SAE*, *supra* note 71.

147. TB4-01282, *supra* note 83.

In making the assessment in this case, I considered the Chairperson's *Gender Guidelines* to ensure that warranted accommodations were made in terms of questioning the female claimant, the overall hearing process and analysis of claims.<sup>148</sup>

Other decision makers give more information about how the *Gender Guidelines* informed their thinking. In RPD TB2-09187, the RPD stated:

The [*Guidelines*] were taken into account when considering the process of the hearing and the facts in this case. All relevant factors, such as the social and cultural context in which the claimant found herself, along with the issue of state protection and changing country conditions were examined with consideration of the [*Guidelines*]. Given the sensitive nature of the allegations, I am cognizant of the difficulties faced by the claimant in establishing her claim, including the challenge of remembering difficult and emotionally charged events, and as a result, addressed the claimant with heightened sensitivity and avoided unnecessary detail when asking questions.<sup>149</sup>

From these descriptions, it is difficult to know how and to what extent the decision maker engaged with the *Gender Guidelines*. This echoes the findings of Shauna Labman and Catherine Dauvergne in their analysis of how the *Gender Guidelines* were raised on judicial review at the Federal Court of Canada.<sup>150</sup> They found that Federal Court judges often turned to one of two common patterns in tackling the *Gender Guidelines*: (i) the idea that the *Gender Guidelines* are not a “cure-all” for credibility or evidentiary deficiencies, and (ii) the idea that the IRB must pay more than “lip-service” to the *Gender Guidelines* in assessing a claim. Labman and Dauvergne state that:

It is often hard to gauge with unsuccessful judicial reviews whether the appellant has simply thrown in the Gender Guidelines arguments as a last-ditch, catch-all appeal or whether the complexity of the gender arguments are appreciated by certain judges and lost on others. Most likely, both realities are at play.<sup>151</sup>

Other issues were also present in the cases surveyed. For example, despite the *Gender Guidelines*' instructions that decision makers should consider human rights instruments and norms, neither decision excerpted above mentions human rights instruments. This is consistent with Arbel's research, as she found that adjudicators seldom made reference to human rights in domestic violence cases.<sup>152</sup> The *Gender Guidelines* also dictate consideration of the “social, cultural, religious, and economic context” in deciding whether it is unreasonable for the

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148. TB1-14175, *supra* note 77 at para 3.

149. TB2-09187, *supra* note 82 at para 14.

150. Labman & Dauvergne, *supra* note 45.

151. *Ibid* at 270-71.

152. Arbel, *supra* note 4 at 753.

claimant not to have sought state protection.<sup>153</sup> In the two decisions excerpted above, the first (RPD TB1-14175) does not reference social, cultural, religious, or economic context beyond a brief mention of the existence of a national “Women’s Emergency Program” that seeks to “address the legal, psychological, social and medical problems facing victims of domestic violence.”<sup>154</sup> This reference comes in the section on state protection—there is no mention of contextual factors in the discussion of the claimant’s efforts to seek the protection of the state.<sup>155</sup> Similarly, in RPD TB2-09187, the consideration of religious, economic, and cultural factors is introduced in the section assessing the claimant’s internal flight option and potential barriers to relocation.<sup>156</sup> All of this is despite the fact that both decision makers purportedly considered the *Gender Guidelines* in their assessments. These omissions reflect the outcomes of MacIntosh’s research findings and fulfill Audrey Macklin’s prediction that:

By failing to consider the way gender affects both the availability of the internal flight alternative and the ability of sexually abused women to return to their communities, the *Guidelines* leave gaps that have the potential of being filled with sexist assumptions that ultimately subvert the spirit and intent of the *Guidelines*.<sup>157</sup>

I now turn to a discussion of some of the limitations inherent to the *Gender Guidelines* that play out in the situations examined in this article. First, the *Gender Guidelines* are limited by how they conceptualize domestic violence. There is no explicit recognition within the text of the *Gender Guidelines* that domestic violence can extend beyond physical abuse, though note 18 states that domestic violence “may involve mental and physical suffering.”<sup>158</sup> The *Gender Guidelines* do explicitly recognize in their text that “women who have been subjected to domestic violence may exhibit a pattern of symptoms referred to as Battered Woman Syndrome and may also be reluctant to testify.”<sup>159</sup>

Thus, there is no recognition of the coercive control model of violence—“a pattern of domination that includes tactics to isolate, degrade, exploit and control

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153. *Gender Guidelines*, *supra* note 7, s C.

154. TB1-14175, *supra* note 77 at para 44.

155. *Ibid* at paras 24-37.

156. TB2-09187, *supra* note 82 at para 78.

157. MacIntosh, *supra* note 4 at 151; Audrey Macklin, “Refugee Women and the Imperative of Categories” (1995) 17 Hum Rts Q 213 at 251.

158. *Gender Guidelines*, *supra* note 7, n 18.

159. *Ibid*, s D.

[women] as well as to frighten them or hurt them physically.”<sup>160</sup> While the recognition of mental suffering is a step in the right direction, it is not adequate to fully represent the experience of women in these situations nor the tactics that are used by abusers. The extent to which female refugee claimants experience coercive control is not known, nor is it known how a court would treat a claim brought solely on the basis of coercive control (with no elements of physical violence). All of the cases reviewed by MacDonald and Arbel involved some element of physical or sexual violence.<sup>161</sup> According to Stark, “[t]here is mounting evidence that the level of ‘control’ in abusive relationships is a better predictor than prior assaults of future sexual assault and of severe and fatal violence.”<sup>162</sup> By depicting domestic violence so narrowly, the *Gender Guidelines* establish incorrect criteria by which to assess women’s refugee claims based on domestic violence and risk excluding women at high risk of violence.

An example of the type of coercive control that is absent from the *Gender Guidelines* is found in *Aissa*:

Finally, it seems to me that one of the weakest aspects of the female applicant’s testimony was the control her husband exercised over her. On the one hand, the female applicant described her husband as an absentee man, a man who showed up at her home only two weekends per month, a man who wanted to get rid of her by sending her to Canada and who did not take care of his children. On the other hand, the female applicant stated that her husband exercised excessive control over her, that she could not listen to music, that she could not go out, that she had to wear a hijab, that she could not take her children to school or to the doctor. Even in an attempt to reconcile these different versions, I am of the view that the RPD’s decision is reasonable.<sup>163</sup>

This passage also underlines the fact that decision makers lack understanding of this pattern of abuse—a lack of understanding that could be addressed through an update of the *Gender Guidelines*. Indeed, Labman and Dauvergne identify a number of cases where the Federal Court expressed frustration with the IRB’s failure to appreciate the nature of domestic violence.<sup>164</sup> Ultimately, they conclude

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160. Evan Stark, “Re-Presenting Battered Women: Coercive Control and the Defense of Liberty” (Paper delivered at the International Conference on Violence Against Women: Complex Realities and New Issues in a Changing World, Montreal, 2012) online: <[www.stopvaw.org/uploads/evan\\_stark\\_article\\_final\\_100812.pdf](http://www.stopvaw.org/uploads/evan_stark_article_final_100812.pdf)>.

161. MacIntosh, *supra* note 4 at 151; Arbel, *supra* note 4 at 746.

162. Stark, *supra* note 160 at 4.

163. *Aissa*, *supra* note 47 at para 71.

164. Labman & Dauvergne, *supra* note 45 at 272-73.

that, even decades after their introduction, the *Gender Guidelines* “too often fail in their effort to guide gender-sensitive decision-making.”<sup>165</sup>

A second shortcoming of the *Gender Guidelines* is their categorical failure to address the 1(F)(b) exclusion. The goal of the *Gender Guidelines* is to promote a gender-sensitive determination of refugee status. By failing to address the exclusion clause, the *Gender Guidelines* fail to address a critical precursor to that determination and create a loophole through which a woman could be excluded from refugee status with no contextual or gender-sensitive analysis. While many of the decisions I looked at did consider the *Gender Guidelines*, this is a function of the fact that many of the decision makers went on to consider the inclusive refugee determination in addition to their exclusion analysis. Because of this overlap, adjudicators considered the *Gender Guidelines* in cases where the 1(F)(b) exclusion was an issue. However, they were under no legal obligation to do so. Therefore, there is no requirement to take a gender-sensitive approach to assessing defences, mitigating circumstances, or other factors around making a determination of a serious non-political crime, even when the crime in question is closely linked to a gender-related persecution, such as domestic violence. This is a serious flaw.

### C. CREDIBILITY ASSESSMENTS AND DOMESTIC VIOLENCE

In order for anyone to be successful in a refugee claim, they must give a plausible account of the persecution they are facing. In the case of women who have escaped with their children from situations of domestic violence, they must account for the violence and abuse that form the foundation of their claim. Where the issue of exclusion has been raised either by the decision-making body or the Minister, they must also account for what drove them to escape with their children.<sup>166</sup> In this analysis, decision makers often have little corroborating evidence to work with and must assess women’s credibility, which is “largely a subjective response, involving a reliance on assumptions about human behaviour, judgements, attitudes, and how a truthful account is presented.”<sup>167</sup> There is a significant body of literature around the myriad problems in credibility analysis, including, *inter alia*, problematic and stereotyping assumptions, language barriers, failure to

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165. *Ibid* at 282.

166. See Part II(D) for a discussion of inconsistencies in this regard.

167. Jane Herlihy, Kate Gleeson & Stuart Turner, “What Assumptions about Human Behaviour Underlie Asylum Judgments?” (2010) 22:3 *Intl J Refugee L* 351 at 351.

recognize and address the effects of trauma, and the vulnerability of memory.<sup>168</sup> Moreover, cultural and imperialist assumptions also govern the perspective of a woman refugee claimant's credibility, given the transnational context. Assessments are made within the "dominant cultural and imperialist perception that nations of the First World are humanitarian havens" to those seeking asylum.<sup>169</sup> As Razack has established, "[t]he case of gender-based persecution appears to go more smoothly when the cultural context can be 'anthropologized' – that is, presented as non-Western, inferior, and usually barbaric towards women."<sup>170</sup>

There are also issues specific to women and to social perceptions of domestic violence that can play a role in how a female refugee claimant's credibility is evaluated. One example is the fact that women are viewed critically if they do not leave the abusive relationship at what appears to the decision maker to have been the first available opportunity. For example, the court in *Aissa* questions:

Moreover, why did the female applicant return to her husband in 2010 when she was in Canada if, as she alleges, her husband was so abusive that she ran away from him? This behaviour cannot be reasonably explained.<sup>171</sup>

Similarly, the RPD's decision in RPD TB2-09187 makes the following analysis of the claimant's behaviour:

The claimant travelled to the US in XXXX 2009 [*sic*]. According to her testimony, she did not make a claim for protection while she was there. ... I find that the claimant's behaviour in not applying for asylum in the US is behaviour not consistent with someone genuinely fearing return to a place of persecution.<sup>172</sup>

In these examples, the women's behaviours are being evaluated through the perspective of the adjudicator. Women who continued to live in a place where they experienced abuse were seen to have undermined their claim and their credibility. To quote Herlihy, Gleeson, and Turner, "[c]redible individuals were

168. See *e.g. ibid*; Audrey Macklin, "Truth and Consequences: Credibility Determination in the Refugee Context" (Paper delivered at the Conference of the International Association of Refugee Law Judges, 1998), online <[www.refugeestudies.org/UNHCR/97%20-%20Truth%20and%20Consequences.%20Credibility%20Determination%20in%20Refugee%20Context.%20by%20Audrey%20Macklin.pdf](http://www.refugeestudies.org/UNHCR/97%20-%20Truth%20and%20Consequences.%20Credibility%20Determination%20in%20Refugee%20Context.%20by%20Audrey%20Macklin.pdf)>; Jane Herlihy, Laura Jobson & Stuart Turner, "Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum" (2012) 26 *Applied Cognitive Psychology* 661.

169. Melanie Randall, "Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution" (2002) 25 *Harv Women's LJ* 281 at 307-308 [Randall, "Refugee Law"].

170. Razack, *supra* note 44 at 84; Randall, "Refugee Law," *supra* note 169 at 308.

171. *Aissa*, *supra* note 47 at para 66.

172. TB2-09187, *supra* note 82 at para 63.

assumed to act in accordance with their fears – assumptions that people behave ‘rationally’ in the face of danger. This begs the question of whose rationality is being applied.”<sup>173</sup>

In recent decades, Canadian law has increasingly recognized that there is no standard response to violence or trauma and that it is inappropriate to use the fact that an individual has not adhered to our assumptions of how someone should act following a traumatic experience as evidence of a lack of credibility. With regard to domestic violence, a key point in the SCC’s groundbreaking discussion of battered women syndrome in *R v Lavallee* was that “it is difficult for the lay person to comprehend the battered wife syndrome” and that a common myth exists “that battered women are not really beaten as badly as they claim, otherwise they would have left the relationship.”<sup>174</sup>

Decision makers have also failed, on occasion, to grasp the nature of coercive control and the fact that it can be a predictor of “future sexual assaults and of severe and fatal violence.”<sup>175</sup> For example, in *Paris Montoya v Canada*, the claimant based her refugee claim in part on domestic violence, citing verbal and emotional mistreatment by her partner.<sup>176</sup> A psychological report filed stated that the claimant would be subjected to a risk of physical violence.<sup>177</sup> The RPD member found that this was contradictory, because the claimant had not previously experienced physical or sexual violence, finding:

[In] her narrative, as previously mentioned, she wrote that she had been mistreated; in her testimony, she stated that she had been the victim of verbal abuse, humiliations, etc. In her testimony, however, she does not state, for all practical purposes, that she was raped.

It should also be pointed out that the psychological report ... makes no mention of rape or of physical violence. Rather, the psychologist states that the claimant would be subjected to a risk of physical violence. It is true, as the claimant’s counsel points out, that the word ‘violence’ is not limited to physical violence, but I must consider why this aspect of the testimony is contradictory.<sup>178</sup>

The panel’s decision was found to be reasonable.<sup>179</sup>

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173. Herlihy, Gleeson & Turner, *supra* note 167 at 358.

174. *R v Lavallee*, [1990] 1 SCR 852 at 889, [1990] 4 WWR 1.

175. Stark, *supra* note 160 at 4.

176. *Paris Montoya v Canada* (RPD), *supra* note 73.

177. *Ibid* at para 29.

178. *Ibid* at paras 28-29.

179. *Montoya v Canada*, *supra* note 75 at para 31.

If a woman's credibility has been impugned, this can have serious consequences for her ability to gather persuasive medical evidence of the trauma and violence she has experienced. For example, again in RPD TB2-09187, it is stated that:

The claimant provided a number of medical and counselling reports as evidence for her claim. ... The doctor states the claimant satisfies diagnostic criteria for major disorder of moderate severity and chronic post-traumatic stress disorder. I accept the diagnosis. I note that the doctor's opinion is based on evidence provided to him by the claimant. Given that the claimant lacks credibility on several pivotal elements of her claim, I am unable to conclude that there is a causal relationship between the psychologist's findings and the facts found in the claimant's request for refugee protection. Therefore, I give this medical opinion little evidentiary weight.<sup>180</sup>

This decision maker's line of reasoning begs the question of what evidence the claimant could ever put forward that would be considered sufficiently persuasive in this situation.

#### D. DEFENCES, CRIMINAL PROCEEDINGS, AND OTHER CONSIDERATIONS

What prompts a consideration of the 1(F)(b) exclusion on the basis of the crime of child abduction? Immigration, Refugees and Citizenship Canada's "Enforcement Operational Bulletin No. 24" sets out the priorities, strategies, and procedures for Ministerial interventions in refugee protection determination processes.<sup>181</sup> ENF-24 dictates:

In cases where children accompanied by a single parent make a refugee protection claim—the other parent having remained in the country of nationality or being located elsewhere—it is important to establish whether the child was abducted or removed from custody in contravention of a custody order. ... To determine whether a child has been abducted or removed from the custody of a parent, and whether it is necessary to invoke exclusion under article 1F(b) of the Refugee Convention, officers must consider the following factors:

- the marital status of the parents;
- the age of majority in the country of nationality;
- the need to obtain the consent of both parents or of the legal guardian for the child to travel outside of the country of nationality;
- consent by the parent or guardian;

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180. TB2-09187, *supra* note 82 at para 60.

181. Immigration, Refugees and Citizenship Canada, "ENF 24: Ministerial interventions" (18 March 2016), online: <[www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf24-eng.pdf](http://www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf24-eng.pdf)>.

- a custody order in favour of the other parent;
- a credible defence (see section 285 of the *Criminal Code*), namely that the acts were necessary to protect the child from imminent danger or to allow the parent to flee imminent danger; and
- communication between the child and the other parent since the child's arrival in Canada.<sup>182</sup>

However, on some occasions, the IRB has raised the issue of exclusion on the basis of child abduction without prompting by the government. For example, in RPD TB1-14175, the RPD panel independently raised the issue of abduction as an “area of concern,” noting a discrepancy in the claimant’s testimony over whether she had the father’s authorization to leave with the minor claimant.<sup>183</sup> The decision in RPD TB1-14175 states that:

This discrepancy was not posed of the claimant and thus I am unable to draw any negative inference; however, I do note that Peru is a party to the 1980 Hague Convention on the Civil Aspects of International Child Abduction. There was no evidence to indicate that XXXX, the minor claimant’s father has been looking for the minor claimant, nor has there been any application made through the Hague Convention with regards to his daughter.<sup>184</sup>

In at least one case, the RPD made a finding of exclusion despite the fact that the Minister took the position at the close of the hearing that “the evidence supported a defence to the offence of child abduction and formally withdrew the Article 1F(b) allegation” (note that this was found to be acceptable on judicial review in the Federal Court).<sup>185</sup>

The above passage from RPD TB1-14175 also points to another pattern in the reviewed decisions. The decision maker in that case took into account the fact that there was no activity in the country of origin related to the supposed abduction. This reflects the fact that an applicant’s conviction in another jurisdiction could be considered sufficient evidence for exclusion, but is neither required nor automatically sufficient.<sup>186</sup> Decision makers exclude women under 1(F)(b) where there has not been a criminal conviction or even a criminal charge relating to the supposed abduction. One of the *Jayasekara* factors identified by the Federal Court of Appeal is the mode of prosecution, and decision makers sometimes consider whether a prosecution has been raised in the country of

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182. *Ibid* at 24.

183. TB1-14175, *supra* note 77 at para 23.

184. *Ibid*.

185. *Puerto Rodriguez v Canada*, *supra* note 85 at para 8.

186. *Background Note*, *supra* note 32 at para 108.

origin as part of this analysis.<sup>187</sup> However, not all post-*Jayasekara* decisions in the study included a consideration of the *Jayasekara* factors and sometimes the analysis was inadequate.

In RAD decision TB4-01471, the RPD (and later the RAD) found that the claimant was excluded under 1(F)(b), despite the fact that there had been no complaint from the father of the minor refugee claimants.<sup>188</sup> The RAD justified this finding that a criminal act had been committed on the evidence that “the claimant had testified before the RPD that her husband [was] not aware that she left Nigeria with the minor without his knowledge and that he [was] not aware that they [were] currently in Canada.”<sup>189</sup> This appears to be considered as sufficient evidence of a crime in and of itself. Unfortunately, the full RPD decision is not publicly available for this case. Consequently, it is not possible to know how the RPD dealt with any mitigating factors in this case or if it considered the fact that the woman may have left the country with her child as a matter of protection or self-preservation. It appears that the RPD had credibility concerns that led them to find that there was not sufficient “reliable or probative evidence to establish on a balance of probabilities that the claimant was a victim of domestic violence,” which likely played a role.<sup>190</sup> However, the fact remains that the claimant in this case was excluded from refugee status on the basis of the crime of child abduction, an offence (i) for which all of the evidentiary record was either in another country or dependent on the IRB’s credibility analysis, and (ii) that had never been reported or recognized by any other body or individual before the IRB.

Finally, in some cases, the decision maker uses the lack of criminal proceedings in the country of origin in an entirely opposite way—as evidence that the persecution feared by the woman is not credible. Consider the case of RAD MB3-03152, which had many of the same features as the decisions previously discussed—a woman who, with her two minor children, had left the Turks and Caicos Islands and feared that, upon her return, she would be “punished and beaten by her husband” and that he could try to take her children.<sup>191</sup> Again, the full RPD decision is not available; however, from the description in the RAD decision, it appears the issue of exclusion on the basis of child abduction was

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187. *Jayasekara*, *supra* note 17 at para 44.

188. TB4-01471, *supra* note 79 at para 10.

189. *Ibid* at para 30.

190. *Ibid* at para 41.

191. MB3-03152, [2014] RADD No 286 at para 5 (QL).

never raised.<sup>192</sup> Instead, the RPD found that the fear of losing custody “is not objectively substantiated” because “the principal claimant’s husband has taken no steps to alert the authorities of an international child abduction.”<sup>193</sup>

This is a perfect “catch-22” situation. Women whose former abusive partners are actively trying to regain control of the child (and are thereby trying to regain control of them) through *Hague Convention* applications and the commencement of criminal proceedings can be found to have committed a crime of child abduction. Women whose former abusive partners have not made an effort to regain control of the child can be found not to be facing a real threat of persecution. Either way, these women will not be successful in their claim for refugee status.

Once the elements of a child abduction have been established, IRB decision makers will—sometimes—take defences into account. The UNHCR acknowledges various criminal defenses, including duress, self-defence, and defence of other persons.<sup>194</sup> Such defences are limited to situations where the incriminating act “results from a threat of imminent death or serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat.”<sup>195</sup> In *Jayasekara*, the court recognized that a constraint short of duress may be a relevant mitigating factor in assessing the seriousness of the crime committed, alongside harm to the victim, use of a weapon, and other relevant factors.<sup>196</sup> Moreover, defences of duress and self-defence are recognized in Canada, and the *Criminal Code* contains statutory defences specific to the abduction of a young person.<sup>197</sup> Section 284 of the *Criminal Code* states that:

No one shall be found guilty of an offence under sections 281 to 283 if he establishes that the taking, enticing away, concealing, detaining, receiving or harbouring of any young person *was done with the consent of the parent, guardian or other person* having the lawful possession, care or charge of that young person.<sup>198</sup>

Section 285 of the *Criminal Code* states that:

No one shall be found guilty of an offence under sections 280 to 283 if the court is satisfied that the taking, enticing away, concealing, detaining, receiving or

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192. *Ibid* at paras 9-10.

193. *Ibid* at para 9.

194. *Background Note*, *supra* note 32 at paras 66, 69-71.

195. *Ibid* at para 69.

196. *Jayasekara*, *supra* note 17 at para 45.

197. *Criminal Code*, *supra* note 37, ss 284-86.

198. *Ibid*, s 284 [emphasis added].

harbouring of any young person was necessary to *protect the young person from danger of imminent harm* or if the person charged with the offence was *escaping from danger of imminent harm*.<sup>199</sup>

While section 285 appears at first glance to be an apt way to address the dilemma created by women who escape domestic violence with their children, there are troubling patterns in the section 285 jurisprudence. First, in the cases reviewed for this article, defences were not consistently considered by decision makers. Unsurprisingly, given the subject matter of the cases surveyed, the most commonly referenced defence was the “imminent harm” defence under section 285.<sup>200</sup> However, a number of cases failed to consider the availability of any defences at all.<sup>201</sup> I did not find any cases where duress or self-defence were discussed.

Second, the availability of these criminal defences depends on the decision maker’s understanding of the nature of domestic violence and judgment of the logic and appropriateness of the claimant’s actions. Many of the same concerns discussed in the above section on credibility apply. If the decision maker is not aware of and sensitive to the coercive control model of violence, the availability of these defences will be limited. Indeed, as Jennifer Bond states, feminist scholars have argued for decades that a requirement of close temporal proximity for the defence of self-defence fails to take into account the realities of domestic violence and unjustly restricts the application of the defence.<sup>202</sup>

For example, in one case involving a woman who allegedly fled with her child in order to protect him from her spouse, who presented a danger of imminent harm, the RPD panel took into account that the claimant had maintained contact with her husband in Honduras while she was residing in the United States.<sup>203</sup> Per the RPD decision:

The claimant explained that the minor claimant was “always asking to speak to his father” and that her husband always found a way to contact the claimant through the claimant’s mother who would give him the claimant’s phone number despite the claimant changing her phone number. ... The claimant explained that did not

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199. *Ibid*, s 285 [emphasis added].

200. TA7-10286, *supra* note 76; *Paris Montoya v Canada* (RPD), *supra* note 73; *Re XEB*, *supra* note 70; *Kovacs v Canada*, *supra* note 2; TB4-01282, *supra* note 83; *Puerto Rodriguez v Canada*, *supra* note 85; TB4-12679, *supra* note 84; TB4-00407, *supra* note 86.

201. *Aissa*, *supra* note 47; *Re SAE*, *supra* note 71; TB1-14175, *supra* note 77; TB3-04775, *supra* note 78; TB3-09317, *supra* note 80; TB4-01471, *supra* note 79.

202. Jennifer Bond, “The Defence of Duress in Canadian Refugee Law” (2016) 41 *Queen’s LJ* 409 at 449.

203. TB4-12679, *supra* note 84 at para 38.

make other living arrangements because she felt sure her husband would not show up at her mother's home, and because she was unable to work in addition to the fact that she gave her mother's address as the reference address to US immigration officials. *The panel finds the claimant has not provided a reasonable explanation for why did not make further efforts to cut off communication with her husband. ... The claimant also continued to provide her mother with her telephone number despite her mother forwarding the claimant's phone number to the claimant's husband. The claimant explained that it was because her husband was harassing her mother with numerous calls, yet the claimant did not explain to her mother the alleged danger the claimant faces from her husband because she did not have that level of trust with her mother to confide in such matters. The panel finds it is reasonable to expect that if the claimant was escaping from a danger of imminent harm from her husband, the claimant would attempt to immediately terminate communication with her husband to the extent possible within her means once she arrived in the United States and furthermore, to explain to her mother despite their lack of intimacy, that she faces a risk of harm in order to stop her mother from forwarding her telephone number.*<sup>204</sup>

The panel found that in "indirectly enabling" her husband with the means to seek and maintain communications with her and her child, the claimant's actions indicated that she was not escaping a danger of imminent harm.<sup>205</sup>

#### IV. CONCLUSIONS AND RECOMMENDATIONS

A woman should not be forced to choose between protecting her child and protecting herself. Moreover, even where there is no direct threat to a child, she should not be made to choose between her own safety and her connection to and contact with her child. Women refugee claimants who enter Canada with their children should be treated fairly. The circumstances around their choice to travel with their child should be assessed without reliance on gender and cultural stereotypes and with an appreciation of the special circumstances laid out in the *Gender Guidelines*. Possible defences and mitigating circumstances should be comprehensively canvassed by IRB decision makers. Findings made by courts with regard to *Hague Convention* return applications should be treated with caution by IRB decision makers tasked with refugee claims made by the same parties.

Without these steps, women who claim refugee status in Canada after fleeing with their children are faced with an exclusion trap created by domestic violence, Canada's definition of a refugee, and how adjudicators analyze these claims, including the seriousness of this "crime," the use of the *Gender*

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204. *Ibid* [emphasis added].

205. *Ibid*.

*Guidelines*, the recognition of defences, and, in some scenarios, the imposition of immediate return orders for return of children under the *Hague Convention*. These interlocking and intersecting systems fail these women and place them in an untenable position. Unfortunately, the number of women who are in these situations is not known. Access to comprehensive statistical data would make it possible to place the small sample of available decisions where IRB decision makers looked at the 1(F)(b) exclusion on the basis of child abduction into context and allow commentators to identify national, transnational, or historical trends. Taking a broader look at cases where women's refugee claim processes took place alongside *Hague Convention* return applications would also provide useful insight. Ultimately, it is imperative that we learn more about this situation so as to better support women who risk the failure of their refugee claim because of their entirely understandable choice to refuse to abandon their children in situations of abuse.