

Cambridge University Press  
978-1-108-42707-4 — Refugee Law's Fact-Finding Crisis  
Hilary Evans Cameron  
Frontmatter  
[More Information](#)

---

## REFUGEE LAW'S FACT-FINDING CRISIS

*Truth, Risk, and the Wrong Mistake*

At a time when many around the world are fleeing their homes, seeking refugee protection has become a game of chance. Partly to blame is the law that governs how refugee status decision-makers resolve their doubts. This long-neglected branch of refugee law has been growing in the dark, with little guidance from the Refugee Convention and little attention from scholars. By looking closely at the Canadian jurisprudence, Hilary Evans Cameron provides the first full account of what this law is trying to accomplish in a refugee hearing. She demonstrates how a hole in the law's normative foundations is contributing to the dysfunction of one of the world's most respected refugee determination systems, and may well be undermining refugee protection across the globe. The author uses her findings to propose a new legal model of refugee status decision-making.

Hilary Evans Cameron holds a doctorate in refugee law from the University of Toronto and is the Canadian Social Sciences and Humanities Research Council's 2017 Bora Laskin National Fellow in Human Rights Research. She is an instructor at Trinity College at the University of Toronto, a visiting associate at the University of Toronto's Centre for Ethics, an adjunct professor and postdoctoral fellow at Osgoode Hall Law School at York University, and a former refugee lawyer.

Cambridge University Press  
978-1-108-42707-4 — Refugee Law's Fact-Finding Crisis  
Hilary Evans Cameron  
Frontmatter  
[More Information](#)

---

# Refugee Law's Fact-Finding Crisis

TRUTH, RISK, AND THE WRONG MISTAKE

HILARY EVANS CAMERON

University of Toronto



CAMBRIDGE  
UNIVERSITY PRESS

Cambridge University Press  
 978-1-108-42707-4 — Refugee Law's Fact-Finding Crisis  
 Hilary Evans Cameron  
 Frontmatter  
[More Information](#)

## CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314-321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,  
 New Delhi – 110025, India

79 Anson Road, #06-04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

[www.cambridge.org](http://www.cambridge.org)

Information on this title: [www.cambridge.org/9781108427074](http://www.cambridge.org/9781108427074)

DOI: 10.1017/9781108551908

© Hilary Evans Cameron 2018

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2018

Printed in the United States of America by Sheridan Books, Inc.

*A catalogue record for this publication is available from the British Library.*

*Library of Congress Cataloging-in-Publication Data*

NAMES: Cameron, Hilary Evans, 1975– author.

TITLE: Refugee law's fact-finding crisis : truth, risk, and the wrong mistake / Hilary Evans Cameron.

DESCRIPTION: Cambridge [UK] ; New York, NY : Cambridge University Press, 2018.

IDENTIFIERS: LCCN 2017051168 | ISBN 9781108427074 (hardback)

SUBJECTS: LCSH: Refugees – Legal status, laws, etc. | BISAC: POLITICAL SCIENCE / Political Freedom & Security / Human Rights.

CLASSIFICATION: LCC K3230.R45 C36 2018 | DDC 342.08/2–dc23

LC record available at <https://lccn.loc.gov/2017051168>

ISBN 978-1-108-42707-4 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Cambridge University Press  
978-1-108-42707-4 — Refugee Law's Fact-Finding Crisis  
Hilary Evans Cameron  
Frontmatter  
[More Information](#)

---

*To my family, who made this book possible,  
and to Tigist, Maricruz, Angie, and all the others who made it necessary.*

Cambridge University Press  
978-1-108-42707-4 — Refugee Law's Fact-Finding Crisis  
Hilary Evans Cameron  
Frontmatter  
[More Information](#)

---

Contents

<i>Acknowledgements</i>	<i>page x</i>
<b>Introduction</b>	<b>1</b>
<b>PART I</b>	<b>5</b>
<b>1 The Wrong Mistake</b>	<b>7</b>
The Traditional Economic Approach	10
A Psychologically Founded Theory	11
A Comparative Study	14
The Wrong Mistake in the Criminal Law	15
The Wrong Mistake in the Civil Law	20
Conclusion	24
<b>PART II</b>	<b>25</b>
<b>2 Setting the Scene</b>	<b>27</b>
At the Refugee Board	29
At the Federal Court	38
The Case Study: Method and Findings	39
<b>3 The Wrong Mistake: Sending a Refugee Home</b>	<b>42</b>
Wrongly Disbelieving the Claimant	44
The Claimant's Testimony	44
The Claimant's Conduct	60
Troubles Getting Evidence	69
Overlooking Objective Danger	74
Denying Claims on Procedural Grounds	75
Conclusion	78

<b>4</b>	<b>Resolving Doubt in the Claimant's Favour</b>	<b>79</b>
	The Burden of Proof	79
	Standards of Proof	82
	The 'Well-foundedness' Threshold: How Much Risk	
	Is Risk Enough?	83
	The State Protection Threshold: How Much Protection	
	Is Enough Protection?	85
	Presumption of Truthfulness	87
	In Civil and Administrative Law Generally	88
	Within Refugee Law	90
	Conclusion	96
<b>5</b>	<b>The Wrong Mistake: Accepting an Unfounded Claim</b>	<b>98</b>
	Refugee Claimants Are Ordinary Litigants	98
	Acting Rationally and Responsibly within the	
	Hearing Process	102
	Acting Rationally and Responsibly outside of the	
	Hearing Process	112
	The Member Is an Ordinary Decision-Maker	118
	Judging Demeanour	120
	Judging Plausibility	121
	Conclusion	129
<b>6</b>	<b>Resolving Doubt at the Claimant's Expense</b>	<b>133</b>
	The Burden of Proof	133
	Standards of Proof	139
	The 'Well-foundedness' Threshold: How Much Risk	
	Is Risk Enough?	139
	The State Protection Threshold: How Much Protection Is	
	Enough Protection?	147
	Presumptions	151
	The Presumption of State Protection	151
	The Presumption of Truthfulness	154
	Conclusion	160
<b>7</b>	<b>In the Hearing Room</b>	<b>161</b>
	Conflicting Standards of Proof	162
	Permissible Inferences: Rational Action and Memory	166
	Conclusion	171



	<i>Contents</i>	ix
	<b>PART III</b>	173
8	<b>A Way Forward</b>	175
	The Wrong Mistake in International Refugee Law	175
	The Principle of <i>Non-refoulement</i>	180
	Refugee Status Determination Is Declaratory	181
	The Duty to Resolve Doubt in the Claimant's Favour	182
	The <i>Karanakaran</i> Approach	184
	Traditional Common Law Legal Theory: Truth-Seeking and Inductive Inference	185
	<i>Karanakaran</i> : Risk Assessment and Inference to the Best Explanation	187
	Abductive Reasoning	192
	Refugee Status Determination as an Abductive Risk Assessment	197
	Explanation in a Refugee Hearing: Theory and Counter-theory	199
	Josephson on 'the Best Explanation'	202
	Conclusion	210
	<i>Index</i>	212

## Acknowledgements

I had the tremendous good fortune to work with five exceptional scholars – and equally exceptional human beings – in writing the dissertation from which this book was developed.

Audrey Macklin's scholarship inspired me for many years before I had the privilege of working with her. Her paper on credibility assessment was a beacon in my wilderness when I was practicing refugee law. As a supervisor, Audrey was as warm, kind, and generous as she was thoughtful and insightful. There could be no better mentor.

Working with Markus Dubber and Mariana Valverde, who sat on my thesis committee, was a uniquely valuable and enjoyable experience. I could not be more grateful for their guidance, their patience and their good humour. Moreover, this book would never have been accepted for publication were it not for Markus' step-by-step assistance, including the best editorial feedback on an abysmal first draft of a book proposal, which I share here for the benefit of all: "More Hollywood film pitch, less space station technical operations manual."

I am ever grateful to David Dyzenhaus for his insights as my internal/external thesis reviewer, and for his ongoing encouragement, support, and inspiration. I would also like to thank him for having taken the time to supervise me in a directed reading course, during which I wrote a journal article that I draw on in this book – for when that article went to print, in a sleepless fog following my daughter's birth, I somehow forgot to acknowledge him, a failure about which he was very magnanimous!

James Hathaway made my dreams come true by agreeing to be my external reviewer. Discussing my dissertation with him was both an extraordinary opportunity and a sincere pleasure, and it changed the direction of this project in significant ways. I am particularly indebted to him for highlighting the importance for my analysis of the fact that refugee status is declaratory, which became a cornerstone of my argument in Chapter 8.

## *Acknowledgements*

xi

This book would never have been written were it not for two very dear friends. Carole Simone Dahan inspired me to follow her into refugee law, for she was the most passionate, hard-working, and effective advocate for vulnerable people that I had ever met. Peter Showler – wise, ever thoughtful, hugely compassionate – was a driving force behind my decision to enter academia, and cheered me on at every turn, in verse and in prose.

I am also greatly indebted to a community of thinkers whose ideas were essential to the development of this book's arguments. At the UNHCR Expert Round Table in Budapest, Martin Treadwell described a way of approaching refugee status decision-making that planted the seed that grew into the model that I propose in Chapter 8. The cognitive psychology research of Jane Herlihy, Stuart Turner, Pär Anders Granhag, and colleagues is a constant source of eye-opening insights and should be read by anyone interested in refugee status decision-making. I am very grateful to have heard a paper given by Chios Carmody at the Cognitive Sociology, Culture and International Law conference at the University of Copenhagen, which introduced me to the notion of abductive reasoning. This past year, I also had the privilege of working on a refugee law project with a joint team of students from Osgoode Hall Law School at York University, and from Trinity College's Ethics, Society and Law Program at the University of Toronto: Hebatullah Isa-Odidi, Elise Mercier, Nirvana Misir, Daisy Sun, Sheau Lih Vong; Jessica Brancati, Ryan Chan, Eman Cheema, Ben Fickling, Anton Grishyn, Helen Hayes, Helen Liu, Fatema Lotia, Hudson Manning, Sarah Marton, Joan Ohizua, Lisa Racioppa, Xhesika Resuli, and Kelsey Wiseman. These students volunteered many hours of their time to research and help prepare guidelines on credibility assessment for refugee status decision-makers, and their work, and our discussions, informed my thinking in important ways.

Generous friends and colleagues read all or portions of this book, or of the thesis on which it is based, and provided crucial feedback. Mairi Cowan has been my inspiration, and my local guide, from the first moment I dipped a toe into the waters of academia (and my learned source for all things Latin!). She is simply brilliant, endlessly gracious, and I am as in awe of her now as I was when I was ten and she was the coolest eleven-year-old I knew. May Friedman is deeply wise and deeply kind, and has an unparalleled gift for making sense of the world. I learn something important every time we talk. Alkis Kontos has taught me so much about how to think, and how to write, and how to enjoy both. Discussing refugee status decision-making with Sean Rehaag has been, and continues to be, exceptionally enlightening.

Hebatullah Isa-Odidi's help in editing, formatting and fact-checking this book's footnote references was life-saving. Any remaining errors are of course my own, and there would be very many more of them were it not for her meticulous work. I would also like to thank my tireless team at Cambridge University Press: John Berger, Becky Jackaman, Rogini Rajendiran, and Geraldine Mangley.

For their role in preserving authorial sanity, I am profoundly grateful to too many people to name, but would like to say a particular thank you to my beloved aunt, Joy Evans; my wonderful in-laws, Conor, Claire, Shay and Hannah O'Reilly; and dear friends: Martin Au, Sasha Baglay, Katarina Bulat, Hayley Easto, Corina Eberle, Gillian Elliott, Rosemary Fitzgerald, Bruce Fraser, Angus Grant, Sarah Gray, Jennifer Hyndman, Hannah Johannes, Christine Lund, Kristin Marshall, Emma Meyboom, Christopher Meyer, Christopher Munro, Emily Phin, Jessica Riley, Geri Sadoway, Maureen Smith-Gordon, Sule Tomkinson, Waikwa Wanyoike, and Ian Webster.

My parents, Joan Evans and Evan William Cameron, made this book possible by helping with all of the big things, all of the little things, and everything in between. Eight years of childcare from the best Nana who ever lived was as priceless a gift for the children as it was for me. Emmet, my partner and my love, contributed so much to the content of this book in our discussions over the years, and somehow found the energy, while saving lives in his day job, to support me and our family with patience, kindness, humour, and home-cooked meals.

And my Tobin and my Kella, you made this book possible in the most important ways imaginable: by making me laugh every day, and by managing not to spill anything on my computer.