

Reconsidering the Criteria for Assessing Well-Founded Fear in Refugee Law

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I. INTRODUCTION

THE 1951 *Convention Relating to the Status of Refugees*,¹ as supplemented by the 1967 Protocol,² defines the term “refugee” to mean a person who is outside his country of origin owing to a well-founded fear of persecution on account of his race, nationality, religion, membership in a particular social group, or political opinion.³ However, not everyone who alleges fear of serious harm amounting to persecution may be eligible for *Convention* refugee protection. In order to successfully claim *Convention* refugee status, a claimant must face a well-founded fear of persecution. This means that a refugee claimant must not only fear persecution, but that this must also be substantiated by reasonable and objective factors. Simply put, the risk of persecution that confronts a refugee claimant must be genuine in order for refugee protection to be warranted. In *Canada (A.G.) v. Ward*, the Supreme Court of Canada expressed the view that evidence of risk of serious harm coupled with the absence of state protection creates a rebuttable presumption of a well-founded fear of persecution.⁴

The “well-founded fear” standard requires that there be evidence of present or prospective risk of harm confronting the claimant in the country of origin at the time the person’s claim to refugee status is determined.⁵ In *Yusuf v. Canada (Minister of Employment and Immigration) (M.E.I.)*,⁶ Mr. Justice Hugessen noted that at the date of hearing there must be a reasonable and objectively foresee-

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¹ *Convention Relating to the Status of Refugees*, (1951), 189 U.N.T.S. 2545 [hereinafter *Convention*].

² Article 1 (2) of the *Protocol Relating to the Status of Refugees*, (1967), 606 U.N.T.S. 267.

³ *Supra* note 1 at Article 1 A (2).

⁴ [1993] 2 S.C.R. 689 at 722.

⁵ J.C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 69.

⁶ (1995), 179 N.R. 11 (Fed. C.A.).

able possibility that the claimant will be persecuted if she is returned to the country of origin.⁷ Yusuf's claim to refugee status was denied because she did not have a well-founded fear of persecution at the time her claim was determined. The Court pointed out that there had been a change in the political situation in Somalia, the country of origin, which made the applicant no longer at risk of persecution. Since refugee status is a temporary, surrogate measure, the assessment of risk at the date of the hearing is a means to prevent the granting of protection when it is not needed.

The objective of this article is to explore an appropriate standard for determining the genuineness of a claim to persecution which would promote a gender-inclusive *Convention* refugee framework. There are opposing positions on the appropriate test for ascertaining well-founded fear of persecution. The traditional position is that ascertaining well-founded fear of persecution involves a bifurcated test consisting of both a subjective and objective component. The single objective test maintains that the well-foundedness of a claim to refugee protection can be ascertained objectively. There are problems with each of the two positions, but the single objective test is logical and practical because it does not require a claimant to demonstrate that she subjectively fears objectively verifiable risk of persecution.

II. WELL-FOUNDED FEAR

A. Bipartite Versus a Single Objective Test

1. Traditional Bipartite Test

The traditional position as expressed by the United Nations High Commissioner for Refugees (UNHCR) states:

The term "well-founded fear" ... contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.⁸

This position has been confirmed in Canadian jurisprudence. In *Canada (A.G.) v. Ward*, the Supreme Court noted that "the test is bipartite: (1) the claimant must subjectively fear persecution; and (2) this fear must be well-founded in an objective sense."⁹ The Supreme Court of Canada in *Chan v.*

⁷ *Supra* note 6 at 12.

⁸ UNHCR, *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva: UNHCR, 1979) at para. 38 [hereinafter *UNHCR Handbook*]. See also G.S. Goodwin Gill, "The Principles of International Refugee Law" in S. Jeleff, ed., *Asylum* (Strasbourg: Council of Europe, 1995) at 24.

⁹ *Supra* note 4 at 723.

*Canada (M.E.I.)*¹⁰ was unanimous on this point. The Federal Court of Appeal had earlier elaborated on the content of the two-pronged test. In *Rajudeen v. Canada (M.E.I.)*,¹¹ Mr. Justice Heald observed that:

The subjective component relates to the existence of fear of persecution in the mind of the refugee. The objective component requires that the refugee's fear be evaluated objectively to determine if there is a valid basis for the fear.¹²

Thus, the Canadian position requires that to be eligible for refugee protection, a claimant's alleged fear of persecution must both be subjectively internalised and objectively justified by reference to prevailing conditions in the country of origin.

United States jurisprudence also demonstrates acceptance of the two-tier approach to ascertaining well-founded fear. Although the Supreme Court of the United States did not actually determine what constitutes well-founded fear in its landmark decision *Immigration and Naturalization Services (I.N.S.) v. Cardoza-Fonseca*,¹³ leaving it to be determined on a case by case basis, it did however state in *obiter* that a moderate interpretation of the well-founded standard would allow for a subjective belief accompanied by objective evidence.¹⁴ In his concurring judgement, Mr. Justice Blackmun also stated that the well-founded fear analysis consists of an examination of subjective fears of the applicant coupled with an examination of the objective nature of the reasons for the fear.¹⁵ To emphasise the role of the refugee claimant's state of mind in ascertaining genuine fear, the United States Supreme Court observed that the reference to "fear" in the well-founded fear standard obviously makes the determination turn to some extent on the subjective mental state of the claimant. The fact that the subjective fear must be grounded in objective realities does not change the obvious focus on the individual's subjective beliefs.¹⁶

In *Saleh v. United States Department of Justice*,¹⁷ the United States Court of Appeals had occasion to rule on the determination of well-founded fear. The Court took the position that well-founded fear involves both an objective and subjective fear:

¹⁰ (1995), 187 N.R. 321 (S.C.C.).

¹¹ (1985), 55 N.R. 129 (Fed. C.A.).

¹² *Ibid.* at 134. See also *Canada (M.E.I.) v. Saticum* (1989), 99 N.R. 171 at 173 (Fed. C.A.).

¹³ 107 S. Ct. 1207 (1987).

¹⁴ Per Mr. Justice Stevens, *ibid.* at 1217.

¹⁵ *Supra* note 13 at 1223.

¹⁶ *Ibid.* at 1213.

¹⁷ 962 F.2d 234 (2nd Cir. 1992).

A well-founded fear must be both subjectively and objectively reasonable. The applicant must show that he has a subjective fear of persecution and that the fear is grounded in objective facts.¹⁸

In *Arriaga-Barrientos v. I.N.S.*,¹⁹ the Court of Appeals confirmed that:

The subjective component requires that the [claimant's] fear is genuine. The objective component requires a showing, by credible, direct and specific evidence in the record, of facts that would support a reasonable fear of persecution.²⁰

The bifurcated test for assessing well-founded fear of persecution suggests that whereas refugee protection cannot be granted solely based on the claimant's perception of events, this should nevertheless be important evidence in establishing the genuineness of the risk of persecution. Sexton points out that:

The *Convention* definition does not merely require that the person claiming ... refugee status adduce objective evidence ... but that his or her reason for fearing persecution are justified. The *Convention*, thus, contemplates that states will give substantial ... weight to a claimant's own assessment of his or her situation when deciding whether that person is a refugee within the meaning of the *Convention*.²¹

2. Critique of the Traditional Position

The bipartite test for ascertaining well-founded fear of persecution is not universally accepted. For instance, Hathaway maintains that the traditional position is historically unfounded, illogical, dangerous, and yields no net benefit to refugees.²² He points out that an analysis of the drafting history of the *Refugee Convention* makes it clear that the term "fear" was used to denote a prospective assessment of risk and not an examination of the emotional state of mind of the claimant.²³ Hathaway notes that although reference to "fear" may mean a form of emotional response, it may also indicate an anticipatory assessment of risk. He argues that the second usage is consistent with the term employed in the original French text of the *Convention*, "craignant avec raison d'être persécutée." Hathaway further points out that requiring evidence of a subjectively internalised fear is illogical and can lead to absurd results because it results in differential treatments for persons identically situated, but whose individual temperaments or tolerance are different. Individuals identically situated may receive differential treatment based on how best each person carries herself or articulates her perception of the threat of persecution, regardless of convincing

¹⁸ *Supra* note 17 at 239.

¹⁹ 937 F.2d 411 (9th Cir. 1991).

²⁰ *Ibid.* at 413. See also *DeValle v. I.N.S.*, 901 F.2d 787, 790 (9th Cir. 1990).

²¹ R.C. Sexton, "Political Refugees, Non-Refoulement and State Practice: A Comparative Study" (1985) 18 *Vand. J. Transnat'l L.* 731 at 733-734.

²² *Supra* note 5 at 66-71.

²³ *Ibid.* at 66.

objective evidence pointing to a risk of persecution of such persons. This would mean that in a given circumstance, the stoic and intrepid may not be accorded refugee protection whereas the fearful will, because the former is not perceived to exhibit subjective fear of persecution arising from the objective circumstance.

Because evidence of objective risk is required in all cases, even compelling evidence of subjective fear does not result in refugee status where the objective case is weak. On the other hand, courts regularly refuse objectively strong cases if there is insufficient proof of subjective fear. In *Yusuf v. Canada (M.E.I.)*²⁴ the Federal Court of Appeal, drawing on Hathaway's reasoning, pointed out that the reliance on the traditional bipartite test would suggest that children and the mentally disabled cannot have a well-founded fear of persecution because they cannot internalise the harm feared even though there is a strong objective basis for fear of persecution. Similarly, this has potentially detrimental consequences for women from divergent cultures who may not "appear fearful" enough for refugee status decision-makers measuring emotional reaction against a Western male standard, and result in their exclusion from international protection even though they may have an objectively strong case. In the *Yusuf* case, Mr. Justice Hugessen rejected the traditional two-tier test, holding that the requirement of subjective fear will not stand in the way of recognising the refugee claim of a child. It is clear from this decision that the element of subjective fear should be dispensed with where insistence on it would result in the denial of protection in objectively well-founded claims. Thus, whereas refugee status cannot be granted for claims which are not objectively well-founded, protection may be warranted in cases which do not satisfy the subjective element. Granted this position, the requirement of subjective fear should not stand in the way of women unable to establish this element.

The bipartite test disregards the fact that a person may be genuinely at risk, but not be fearful or, at least, not be able to adequately demonstrate her fears. Such persons may be denied refugee protection based on the traditional test because they have not satisfied the subjective element, even though the objective evidence shows a real chance of persecution. Since subjective fear is difficult to establish, a subjective assessment of risk is ultimately ascertained through a particularised lens, i.e., that of the decision-maker, which is predominantly a Western standard. In other words, it is the decision maker who decides whether a particular claimant has demonstrated sufficient subjective fear of persecution. Undoubtedly, such an assessment may be influenced by the decision maker's own background and values.

In view of the varied backgrounds and cultures of refugee claimants, it may be difficult for them to satisfy the subjective element, based on distinct forms of expressing emotional reactions. In some societies, it is deemed inappropriate for a woman to express her feelings publicly, much less to authorities. A woman

²⁴ (1991), 133 N.R. 391 (Fed. C.A.).

with such a cultural background is unlikely to express subjective fear of objective risk. Consequently, women are unlikely to exhibit fear the same way as men. Since the particularised lens through which subjective fear is measured may not conform with women's definition of appropriate reaction to risk, they are more likely to be denied refugee protection because of lack of evidence that the claimant has sufficiently internalised the risk of persecution in a way required by the traditional test. The subjective assessment is therefore likely to create an insurmountable barrier, especially for women who may not be able to clearly articulate their feelings in order to satisfy the subjective element of the test, or those fleeing harms which are inconceivable in the asylum state.

Refugee claimants are generally required to describe the basis for their fear of persecution to refugee decision makers in order to determine whether they have a genuine claim to refugee protection. Women fleeing gender-related harms have often not been successful in communicating their subjective fear of persecution even in the face of strong objective indicators because they have difficulty relating their claims. In particular, female refugee claimants are often reluctant to disclose experiences of sexual violence to asylum decision makers who are predominantly men, because of the stigma attached to sexual violence, or due to trauma. Victims of sexual violence may show a pattern of symptoms known as Post Traumatic Stress Disorder or Rape Trauma Syndrome which affects their ability to testify. These symptoms may include persistent fear, a loss of self-confidence and self-esteem, difficulty in concentration, an attitude of self-blame, a pervasive feeling of loss of control, and memory loss or distortion.²⁵ In recognition of this fact, both the Executive Committee of the UNHCR²⁶ and the Canadian Immigration and Refugee Board²⁷ have noted that extreme sensitivity is to be employed in eliciting information from or assessing the credibility of female refugee claimants.²⁸

Other refugee women may refuse to give details of sexual abuses they have suffered for fear of retribution against their family members or rejection by their families and communities. Consequently, some refugee women may prefer to censor their testimony in order to avoid any possible repercussion. For the most part, refugee women may not be fluent in the official language of the host country and will therefore have to rely on interpreters in presenting their

²⁵ N. Kelly, "Guidelines For Women's Asylum Claims" (1994) 6 Int'l J. Refugee L. 517 at 533-544. UNHCR, *Guidelines on the Protection of Refugee Women*, UN Doc. EC/SCP/67 (22 July 1991) at 29.

²⁶ Guidelines for the Protection of Refugee Women, *ibid.* at 24, 27.

²⁷ Immigration and Refugee Board, *Women Refugee Claimants Fearing Gender-Related Persecution* (Ottawa: Queen's Printer, 1996) at 15.

²⁸ See also the recommendation by Amnesty International regarding interviews of female refugee claimants; Amnesty International, *Women in the Frontline: Human Rights Violations Against Women* (New York: Amnesty International Publications, 1991) at 54.

claims. Even when refugee women are willing to fully recount their experiences of violence, their testimony can nevertheless be distorted by interpreters who are often members of the claimant's community and may be inclined to censor the evidence presented.

The effects of the refugee claimant's past traumatic experiences and flight, as well as language barriers may have a negative impact on a claimant's ability to testify about her subjective fear. The formal nature of the refugee determination process may be a further source of intimidation to female refugee claimants and thereby impair their ability to speak about their experiences. Women whose need for refugee protection stems from, among other things, distrust of authorities to protect them from threats of harm, or those from cultures where it is considered a taboo to talk about events which have prompted their need for refugee status, as for example sexually-related abuse, may be apprehensive to testify about the traumatic experiences which constitute the basis for their claim to refugee status. More often than not, this may send wrong signals to decision makers regarding the genuineness of the applicant's fear of persecution and may invariably result in denial of refugee status.

Similarly, inaccurate perceptions of the foreign culture and politics may all affect the refugee claimant's ability to unequivocally express any subjective fear of persecution. Meanwhile, panel members have routinely negatively equated women's difficulties in describing their experiences of sexual violence with lack of credibility and adjudged their fear of persecution not to be genuine.²⁹

Another concern is that in societies where gender discrimination is systemic and sustained through the process of socialisation, women's exposure to formal education, and hence their ability to clearly articulate a subjective fear of persecution, may be very limited. The perception of women regarding their conditions, as well as their forms of resistance, may be non-traditional and therefore not be perceived as legitimate expressions of subjective fear. Insisting on the two-tier approach would mean that such women may be denied *Convention* refugee protection even in the face of compelling objective evidence because they would have failed to successfully establish the subjective component of the test. Only eloquent and articulate women, who are likely to be part of the elite, may be able to secure refugee protection while the majority of women may be denied refugee status because of their inability to express their subjective fear. Clearly, this approach advances neither the interests of most female refugee claimants, nor, consequently, a gender-inclusive refugee regime. Moving to a single objective test could benefit less eloquent and inarticulate women by not requiring them to recount painful details to establish their subjective fear. If

²⁹ Human Rights Watch, *The Human Rights Watch Global Report on Women's Human Rights* (New York: Human Rights Watch, 1995) at 106–107. See also J. Ruppel, "A Need for a Benefit of the Doubt Standard in Credibility Evaluation of Asylum Applicants" (1991) 23 *Colum. Hum. Rts. L. Rev.* 1 at 12.

there is sufficient objective evidence regarding the likelihood of risk to the claimant, either based on documentary evidence or the experience of others in a similar situation, this should be enough to allow the claim.

3. *Relative Advantages of a Single Objective Test*

Hathaway argues that the appropriate test for ascertaining the genuineness of a claim to refugee status ought to be objective. Such evidence can usually be obtained from human rights data on the country of origin. This position assumes that consistent and credible testimony of a claimant is not subjective, but objective evidence. Thus, in the absence of human rights data regarding the basis of a claimant's fear of persecution, the consistent and credible testimony of a claimant can constitute the objective foundation of her claim.

The notion of "well-founded" suggests an objective inquiry into the actual risk that confronts a refugee claimant.³⁰ A single objective assessment of risk finds support in the fact that a person might be granted *Convention* refugee status, even though she had not already been persecuted, but might be in jeopardy if returned to the home country. In such situations, the grant of refugee status would be determined by the objective conditions in the country of origin, rather than any past persecution. It would also prevent the tendency of decision-makers' over reliance on past experiences to establish a genuine fear of persecution. Since refugee status is a forward-looking solution, past persecution is not required to establish the need for protection, although it may be a good indication of why a person fears persecution.³¹

The single objective test is further supported by a linguistic analysis of the term "fear" as requiring an anticipatory appraisal of risk which does not necessarily signify subjective trembling.³² Thus, the essence of the "well-founded" requirement is meant to ensure that individuals who are found to be *Convention* refugees are those who face a prospective risk of persecution were they to be returned to the country of origin. The best indication for ascertaining the possibility of such future risk would be to look to the objective conditions in the country of origin giving rise to the fear of persecution. This approach facilitates reliance on general human rights data to establish the need for refugee protection and reduces the burden on particular claimants to adduce evidence pointing to subjective fear of persecution. Whereas the traditional bipartite test also relies on human rights data in determining when refugee protection is warranted, a claimant is also required to establish subjective fear in addition to the objective evidence. This could be a very difficult burden for some female claim-

³⁰ Hathaway, *supra* note 5 at 65.

³¹ *Ponniah v. Canada (M.E.I.)* (1991), 132 N.R. 32 at 34 (Fed. C.A.); also see *supra* note 8 at para. 45.

³² *Ponniah, ibid.* at 66–67. This line of argument is supported by D. Martin, "The Law of Refugee Status" (1993) 87 Am. J. Int'l L. 348 at 349.

ants to discharge. It is precisely for this reason, among others, that a single objective test is attractive from a gender perspective.

The view that proving well-founded fear of persecution involves only an objective assessment finds increasing support in European jurisprudence. In *R. v. Secretary of State for the Home Department, Ex parte Sivakumaran*,³³ the British House of Lords, drawing on the drafting history of the *Refugee Convention*, emphasised that the appropriate test for well-founded fear of persecution should be objective. In the judgment of the Court, Lord Keith noted that "the general purpose of the *Convention* is surely to afford protection ... and does not extend to allaying of fears not objectively justified, however reasonable these fears may appear from the point of view of the individual in question."³⁴ Clearly, the House of Lords ruled out an assessment of the state of mind of the refugee claimant *vis-a-vis* the alleged circumstances which prompted her flight in assessing the genuineness of her fear of persecution. This means that the refugee claimant's subjective perception of events, something which is difficult to prove, may be irrelevant in establishing well-founded fear of persecution.

The critical issue, as rightly pointed out by Lord Keith, is whether the claimant might be persecuted if returned to the country of origin and that this can only be determined objectively.³⁵ This position ensures that refugee protection is not extended to persons whose fear of persecution is not substantiated by objective conditions in the home country. It is usual for some people to perceive a certain state of affairs, in this context, the fear of persecution without any objective justification. Such persons are not deserving of refugee protection and there is no reason why they should be accorded such status simply because they think they will be persecuted upon return home. In a concurring judgment, Lord Goff reiterated the single objective position, stating that the *Convention* is intended to offer protection to persons whose fear of persecution is in reality well-founded and not just to assuage fear, however reasonably entertained.³⁶

The *Sivakumaran* case clearly rejected the traditional bipartite test enunciated by the UNHCR. While this was perceived by some refugee advocates as a defeat for refugee protection, this author sees it otherwise. Since subjective fear is difficult to ascertain, this requirement could work to the detriment of the stoic or those unable to express their fears in the same way as decision-makers may be accustomed to in their own societies. This situation is likely to arise in the claims of female applicants from different cultures. Thus, a single objective test, as opposed to the traditional two-pronged assessment, best promotes the purposes of the *Convention* refugee regime, as well as a gender-inclusive refugee

³³ [1988] 1 All E.R. 193 (H.L.).

³⁴ *Ibid.* at 196.

³⁵ *Ibid.* at 196–197.

³⁶ *Ibid.* at 202.

protection system. Within this context, there is no need to justify fears entertained by a claimant insofar as there is objective evidence pointing to a risk of persecution. This ensures an element of uniformity in the system of refugee protection.

The single objective assessment of risk finds support in German jurisprudence. In a decision of the Administrative Court of Cologne,³⁷ the claimants (husband and wife) alleged fear of persecution based on the husband's political opposition to the government of the country of origin. Their fear of persecution was determined to be well-founded based on objective evidence which established the husband's involvement in general political opposition to the government and the fact that Zaire, the country of origin, was not ruled democratically and was not under the rule of law. The claimants were not required to prove how these facts actually played out in their minds. The political situation in Zaire, coupled with the male claimant's position as a critic of that regime were sufficient to establish their need for refugee protection without having to prove a subjective state of mind.

This approach to ascertaining well-founded fear has also been endorsed by the European Union. The *Joint Position* produced by member states of the European Union, among other things, recognised that the existence of a well-founded fear of persecution must be determined objectively based on the evidence presented by the refugee claimant.³⁸

The proposal for a universal reliance on a single objective test in determining the well-founded fear of persecution does not imply that the conceptualisation of this position cannot be problematic, especially for gender-related refugee claims. However, this test has fewer flaws compared with the traditional bipartite approach to determining genuine risk of persecution. As well, a reconceptualised approach to the single objective test holds better promises for a gender-inclusive refugee regime. How this may be achieved will be canvassed in the next section.

Evaluating objective fear is invariably based on the "reasonable person" standard, which is supposedly neutral. In *Matter of Mogharrabi*,³⁹ the United States Board of Immigration Appeals stated that a fear of persecution is well-founded if a reasonable person similarly situated would fear persecution. Again, this is ultimately a Western male standard. It does not include a woman's per-

³⁷ Federal Republic of Germany, 5K 13030/88, 5K 13017/88, (1990), I.J.R.L./0107; abstracted at (1992) 4 Int'l J. Refugee L.

³⁸ Council of Europe, Joint Position Defined by the Council on the Basis of Article K.3 of the Treaty on European Union on the Harmonised Application of the Definition of the Term "Refugee" in Article 1 of the Geneva Convention of 28 July 1951 Relating to the Status of Refugees, Section 3 (1996) (Brussels: Council of Europe, 1995) [hereinafter Joint European Position].

³⁹ (1987), Int. Dec. 3028-445 (B.I.A.).

ception of events, nor does it lend itself to an appreciation of cultural values and factors other than what pertain in the West. The subjective assessment of risk may therefore perpetuate the dominance of male paradigms in ascertaining genuine fear. It may also alienate women from non-Western cultures, resulting in a failure to adequately extend refugee protection to women, especially those fleeing gender-related persecution.

Relying solely on objective evidence to prove well-founded fear may entail the risk of not considering specific circumstances that affect women. It is a fact that the situation of women is not often documented in the usual sources which establish conditions of human rights violations in various countries. Thus, a single objective test may not be as readily met by women (particularly those fleeing gender-specific harms) as by men who are usually at odds with the state, simply because women lack objective evidence establishing the alleged condition of insecurity.

In view of the practical difficulties in adequately establishing evidence of a person's emotional state of mind, a single objective test is to be preferred if the refugee regime is to be truly gender-inclusive. There are relative advantages of the single objective standard because it presents fewer insurmountable barriers from the perspective of female refugee claimants. Although the way in which objective risk is assessed can be problematic for women, especially those fleeing privately-inflicted gendered violations of human rights, because of the lack of documentation and the prevalence of male standards, these problems can be overcome by a broader understanding of what constitutes objective evidence.

4. Toward a Broader Conceptualisation of the Single Objective Test

A realistic standard for ascertaining well-founded fear of persecution ought to be a broadened conceptualisation of the single objective standard. One possible argument against the use of a single objective test in determining well-founded fear of persecution is that it appears to suggest that refugee protection should be extended to a person once the objective risk of persecution has been established without probing how those conditions affect a particular claimant. Obviously, this would be contrary to the individual nature of refugee status. The single objective test does not render the particular circumstances of a claimant irrelevant. Hathaway's attack on the subjective element assumes that consistent, credible testimony of a claimant is objective evidence. Canadian jurisprudence supports this understanding of objective testimony.⁴⁰ In order for the *Convention* refugee regime to be truly gender-inclusive, what constitutes credible and consistent testimony ought not to be understood through the particularised lens of decision-makers which will ultimately be based on Western male standards. This is necessary to avoid the tendency to dismiss uncorroborated testimony of

⁴⁰ Hathaway, *supra* note 5 at 84.

female victims of abuse, who often confuse details of their experiences, as incredible.

It is usual for women exhibiting Rape Trauma Syndrome or Battered Women Syndrome to be either reluctant to testify or confuse details when presenting their evidence. To this end therefore, the UNHCR has encouraged states not to ask for details of sexual abuse in assessing the credibility of female applicants. The fact that some form of the alleged sexual abuse did occur should, in most cases, be sufficient to establish the genuineness of a woman's claim to refugee protection.⁴¹

The Canadian position recognises that a claimant's plausible, credible, and consistent testimony, in the absence of evidence to the contrary, is sufficient to establish the whole of the evidence of objective risk necessary to support a well-founded fear of persecution. In *Sathanandan v. Canada (M.E.I.)*,⁴² the applicant appealed a negative decision of the Immigration and Refugee Board (IRB) which dismissed the claimant's fear of forcible recruitment in Sri Lanka on the grounds that there was no documentary evidence to indicate the susceptibility of women to such harm. The Federal Court of Appeal confirmed the rule proposed in *Maldonado v. Canada (M.E.I.)*⁴³ that an applicant's sworn testimony, standing alone, creates a presumption of the truthfulness of those allegations, unless there be reason to doubt their truthfulness. Since the credibility of the claimant was not questioned, the Court held that:

The IRB was plainly mistaken in saying there was no indication of forcible recruitment of young females in the documentary evidence. It had no reason to doubt the truthfulness of her testimony.⁴⁴

In *Lachowski v. Canada (M.E.I.)*,⁴⁵ the Federal Court further elaborated on this principle. Mr. Justice Walsh noted that in the absence of inherent contradictions in a claimant's evidence, or a direct conflict with the documentary evidence, a claimant's uncontradicted evidence must be considered credible, and does not require corroboration, which would be difficult, if not impossible, to obtain. This ensures that a claimant's oral or written testimony is not treated simply as proving an erroneous subjective fear, but is instead seen as establishing the objective basis of a well-founded fear of persecution. As well, the position that such testimony need not be corroborated to be acceptable also promotes a gender-inclusive refugee regime because, for the most part, women fleeing privately-inflicted gender-related harms are not able to substantiate their

⁴¹ Guidelines on the Protection of Refugee Women, *supra* note 25 at para. 72.

⁴² (1991), 137 N.R. 13 (Fed. C.A.).

⁴³ [1980] 2 F.C. 302 at 305.

⁴⁴ *Supra* note 42 at 14.

⁴⁵ (1992), 59 F.T.R. 44.

evidence due to lack of documentation of harms occurring in the so-called "private sphere." Oftentimes, reports of human rights agencies in country reports regarding the human rights conditions in particular countries focus on violations in the public, male world. Thus, these documents may not necessarily include the extent to which women may risk violation of their human rights in the so-called "private realm," and therefore cannot be a basis for corroborating women's claim to fear persecution arising from privately-inflicted harms.

There appears to be a conflict in American case law with regard to the sufficiency of the claimant's testimony standing alone to establish objective evidence necessary to support a well-founded fear of persecution. In *Matter of Magharrabi*,⁴⁶ the United States Board of Immigration Appeals was of the view that the credible testimony of a claimant standing alone might suffice to establish the objective evidence necessary to substantiate the genuineness of fear, at least insofar as it is impracticable to provide documentary or other corroborating evidence. Unlike the Canadian position, this suggests that the primary basis for ascertaining objective evidence necessary to support well-founded fear is documentary or other corroborating evidence. However, the Board recognised that in some cases, the only evidence available may be the claimant's own testimony, in which case the claimant's uncorroborated testimony may be accepted as an alternative where it is credible, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of fear. By demanding that every effort should be made to obtain such corroborative evidence, the Board took a significantly less liberal position than have Canadian Courts.

The Board of Immigration Appeals has subsequently gone even further in insisting upon the importance of corroborating evidence. Qualifying its position articulated in *Matter of Mogharrabi*, the Board in *Matter of Dass*,⁴⁷ held that the general rule is that supporting evidence should be presented where available.

The more sweeping and general a claim, the clearer the need for an applicant to introduce supporting evidence or to explain its absence. Furthermore, there is a greater likelihood that corroborative evidence will be available if the claim is of long standing, [and] widespread persecution.⁴⁸

The Board further noted that "the unexplained absence of such information may well indicate an exaggerated or unfounded claims."⁴⁹ It appears that failure to explain the unavailability of corroborative evidence creates doubt regarding the credibility of the claimant. Naturally, this makes it preferable that a claimant can corroborate her testimony or at least be able to explain the absence of such evidence. The danger inherent in this position is that claimants who are

⁴⁶ *Supra* note 39 at 10.

⁴⁷ United States Board of Immigration Appeals (6 September 1989), Interim Dec: 3122.

⁴⁸ *Supra* note 47 at 4.

⁴⁹ *Ibid.* at 5.

unable to corroborate their testimony have a greater burden of proof which could ultimately be fatal to their claims.

The *Dass* decision ignores the difficulties that some refugee women may have in corroborating their testimony because human rights reports regarding the country of origin do not normally cover violations that women risk, particularly in the so-called private sphere. As well, even in the case of broadly based claims by women, such as those arising from the subordinate status of women in the country of origin, corroborative evidence may not be available because the harm in question is not perceived as threatening basic human rights of women. The emphasis on corroborating evidence sets the standard too high and is potentially dangerous for gender-related claims of women who, more often than not, are unable to substantiate their testimony and yet do not have any explanation for the absence of such supporting evidence. These cases seem to suggest that a claimant's uncorroborated testimony, even if completely credible, can establish the objective basis of a claim only as a last resort.

This position contradicts the decision in previous cases, such as *Bolanos-Hernandez v. I.N.S.*,⁵⁰ where the United States Court of Appeals held that a claimant is not required to present independent corroborative evidence of threats to her life in order to establish the objective basis of her claim, so long as her testimony was unrefuted and credible. Similarly, in *Doe v. I.N.S.*,⁵¹ the Court of Appeal for the Sixth Circuit emphasised a single objective test for ascertaining well-founded fear. The Court noted that such objective evidence can be inferred from the claimant's credible testimony. Regrettably, this decision has been criticised as permitting a purely "subjective" determination of well-founded fear contrary to the purpose of the refugee regime. Hayes has characterised uncorroborated credible evidence which was accepted by the Court to be sufficient to establish the objective basis for eligibility to refugee protection as merely subjective.⁵²

The United States Final Asylum Rules take the position that the standard of proof may be satisfied solely by the applicant's uncorroborated testimony where further corroboration is not reasonably available.⁵³ It appears there is support in the United States for a position comparable to that in Canada (9th Circuit and Final Rules), though there is some resistance by the Board of Immigration Appeals.

⁵⁰ 767 F.2d 1277 (9th Cir. 1984).

⁵¹ 867 F.2d 285 (6th Cir. 1989).

⁵² C. S. Hayes, "Well-Founded Fear of Persecution Established Solely by Subjective Proof" (1990) 14 *Suffolk Transnat'l L.J.* 314 at 321-322.

⁵³ See A. Helton, "Final Asylum Rules in the United States: New Opportunities and Challenges" (1990) 2:4 *Int'l J. Refugee L.* 642 at 644.

The Canadian position by which a claimant's credible and consistent testimony may be adequate to establish the objective basis of fear, promotes a gender-inclusive refugee definition and is to be preferred. The Canadian position represents a principled approach since it is common for the formal condition of women to be totally different from their *de facto* situation. Although most of the gender-discriminatory practices such as female genital mutilation, sati,⁵⁴ forced marriages, "honour" deaths, and others have been formally outlawed in some countries, these practices still persist. Similarly, although domestic violence may have been criminalised in many countries, women are still susceptible to abuse in the home with no hopes of vindication. Whether it is by the strength of tradition, police ineffectiveness or unwillingness to protect vulnerable women, a weak judiciary or simply the creation of a facade of protecting women's rights, women still live under the threat of these potentially harmful practices in many parts of the world. It will therefore be regrettable to deny refugee status to a woman because her credible testimony of a threat of harm is contradicted by documentary evidence of formal prohibitions. This approach ensures individual assessment of refugee claims of women which cannot be supported by documentary evidence on the country of origin. Unlike the U.S. position, Canadian jurisprudence does not require the claimant to either produce corroborating evidence or to explain its absence.

In *Chan v. Canada (M.E.I.)*,⁵⁵ the Supreme Court of Canada was unanimous on the fact that a refugee claimant is entitled to the benefit of the doubt insofar as her testimony is not contradicted by available evidence and known facts. This position is supported by the *UNHCR Handbook* which states that since it is rare for a refugee claimant to substantiate every part of her case, an applicant should be given the benefit of the doubt once her credibility has been established.⁵⁶ A claimant need not corroborate her credible and consistent testimony, but where there is evidence to the contrary, then she will be required to explain the contradictions. This should still be the case even when a claimant's testimony is contradicted by documentary evidence since this may not necessarily give the true picture of the situation of women in the country of origin.

In *Aguilera v. I.N.S.*⁵⁷ the Court of Appeals for the Ninth Circuit took the view that credible testimony of a claimant could be overruled by contradictory documentary evidence. Canadian jurisprudence takes a contrary view. In *Okyere-Akosah v. Canada (M.E.I.)*⁵⁸ the Federal Court of Appeal, in setting

⁵⁴ Ritual bride burning.

⁵⁵ *Supra* note 10 at 351, 390.

⁵⁶ *UNHCR Handbook*, *supra* note 8 at para. 203–204.

⁵⁷ 914 F.2d 1375, 1378 & 1383 (9th Cir. 1990).

⁵⁸ (6 May 1992), A-92–91 (Fed. C.A.).

aside a decision by the Immigration Review Board (IRB) which preferred documentary evidence to the oral testimony of the claimant, noted that:

Since there is a presumption as to the truth of the appellant's testimony, the Board is bound to state in clear and unmistakable terms why it preferred the documentary evidence over the appellant's testimonial evidence...⁵⁹

A claimant's testimony need not be flawless in order to satisfy the objective test. The *UNHCR Handbook* clearly states that untrue statements in and of themselves are not a reason for denying refugee status. Any such statement is to be evaluated in light of all the circumstances of the claimant's case.⁶⁰ The basic rule must therefore be allowed a margin of appreciation regarding any perceived flaws in a claimant's testimony insofar as these are peripheral and do not affect the overall credibility of the claimant, or the claimant offers reasonable explanation for any flaws in her testimony. In *Rajaratnam v. Canada (M.E.I.)*,⁶¹ Mr. Justice Stone noted that discrepancies in the evidence of a refugee claimant should lead to a denial of refugee status only where there are real internal inconsistencies in the testimony of the claimant which cannot reasonably be explained. This means that the benefit of the doubt goes to the claimant.

The *Rajaratnam* decision is consistent with the position of the European Union. The *Joint Position* defined by member countries states that:

[O]nce the credibility of the [claimant's] statement has been sufficiently established, it will not be necessary to seek detailed confirmation of the fact put forward, and the asylum seeker should, unless there are good reasons to the contrary, be given the benefit of the doubt.⁶²

This position is in line with the humanitarian aims of the *Convention* refugee regime. It is also consistent with the general principle that laws or policies which are designed to protect or benefit a particular class of persons, in this case, individuals confronted with the threat of harm for which they cannot expect effective national protection, should often be construed and applied liberally in favour of the vulnerable group.⁶³

It follows then that refugee status should not be denied simply because of inconsistencies, vagueness, or exaggerations in a claimant's testimony, insofar as there is credible objective evidence pointing to a risk of harm if returned to the country of origin. In particular, in view of the possible impairment of the ability

⁵⁹ *Supra* note 58.

⁶⁰ *UNHCR Handbook*, *supra* note 8 at para. 199.

⁶¹ (1991), 135 N.R. 300 at 302-307 (Fed. C.A.). See also *Djama v. Canada (M.E.I.)* (1992), A-738-901 (Fed. C.A.).

⁶² Joint European Position, *supra* note 38 at section 3. See also UNHCR, Information Note on Article 1 of the 1951 *Convention*, Section 10, UN Doc. (1995); and the *UNHCR Handbook*, *supra* note 8 at para. 196-197.

⁶³ See *Ruppel*, *supra* note 29 at 28-30.

of female applicants to be consistent due to trauma suffered, their claims should not be rejected because of minor inconsistencies or where they do not affect the substance of the claim.

In *Mahathmasseelan v. Canada (M.E.I.)*⁶⁴ the applicant, a Tamil woman, appealed a decision of the IRB rejecting her claim to refugee status on the basis of inconsistencies in her testimony regarding details such as the frequency with which she was required to report to the Indian Peace Keeping Force (IPKF) camp, the precise date of her arrest, the actual distance and even existence of the IPKF camp close to her home, and the frequency of the IPKF's visits to her home. The IRB, however, found the claimant to be credible. The Board believed that the claimant had been detained by the IPKF and had suffered sexual abuse while in its custody. The Board also found that the Indian army had visited the claimant's home regularly, but not with the frequency alleged by the claimant. The Federal Court of Appeal took the view that the inconsistencies, although significant, are not central to the applicant's claim. Even though there were some exaggerations in the claimant's testimony, these did not preclude the granting of refugee status because there was other objective evidence of a risk of persecution.

This position ensures that women fleeing gender-related persecution who, more than many other refugees, may have difficulties in unequivocally communicating the genuineness of their fear of persecution, or whose testimony contradicts the formally declared situation ought nevertheless to benefit from refugee protection where there are objective indicators pointing to the likelihood of fear of persecution. For example, such difficulties may arise from Post-Traumatic Stress Syndrome or memory lapses due to trauma. The United States Court of Appeals has recognised that the experience of fleeing persecution may create psychological pressures which can affect an applicant's behaviour and may even motivate an applicant to lie when confronted by governmental officials.⁶⁵ Similarly, in *Reyes v. Canada (M.E.I.)*⁶⁶ the Federal Court of Appeal held that the standard for ascertaining credibility should be lowered in the case of the claimant who manifested Post-Traumatic Stress Syndrome.

By the same token, refugee status ought not to be withheld simply because of inconsistent accounts of what a claimant has experienced if there is evidence pointing to a good chance of persecution should the claimant be returned to the

⁶⁴ (1991), 137 N.R. 1 (Fed. C.A.).

⁶⁵ See D. Anker & C. Blum, "New Trends in Asylum Jurisprudence: The Aftermath of the U.S. Supreme Court Decision in *Immigration and Naturalization Services (I.N.S.) v. Cardoza-Fonseca*" (1989) 1 Int'l J. Refugee L. 67 at 74-75.

⁶⁶ (1993), A-59-91 (Fed. C.A.). The Refugee Status Appeal Authority in New Zealand has recognised that inconsistencies in the testimony of a claimant who has been traumatised as result of persecution should not be fatal to her claim. See *Re S.C.D.C.* (9 June 1994), No. 1867/93 at 8 (R.S.A.A.).

country of origin. Trauma experienced by a woman as a result of abuse should be perceived as a reasonable explanation for flaws in her testimony. This position ensures that what is credible and consistent testimony is understood within the particular circumstance of each claimant. Thus, a woman who has been traumatised by physical and sexual abuse and is unable to recount specific details of her experiences either as a result of trauma or has chosen to forget the same as a survival strategy, ought to be adjudged to have a well-founded fear of persecution insofar as there is evidence of emotional disturbance from the abuse suffered and a likelihood of persecution upon return to the country of origin. Logically, a woman whose testimony appears credible but not necessarily consistent, should nevertheless be given the benefit of the doubt insofar as the overall evidence points to a likelihood of persecution upon return home. This position is in line with the proposal in the *UNHCR Handbook* that refugee claims of emotionally disturbed persons require different techniques of examination depending on the degree of trauma exhibited by the claimant.⁶⁷ This position, however, does not give women a license to secure refugee protection by making false claims.

It seems credible and consistent testimony of a claimant ought to be sufficient to establish the legitimacy of a claim to refugee protection. Testimony ought to be understood within the particular context of each claimant. Corroboration of such evidence should not be required once the credibility of a claimant has been established. In view of the trauma commonly suffered by female applicants, there should be toleration of minor inconsistencies in their testimony. Consequently, flaws in a claimant's testimony ought not be fatal to her claim.

B. The Threshold for Establishing Well-Founded Fear of Persecution

A claimant need not show that she will actually be persecuted if returned to the country of origin to prove well-founded fear of persecution. It suffices to establish that there is a genuine risk or real chance of persecution if she is returned to the country of origin. In *I.N.S. v. Cardoza-Fonseca*,⁶⁸ the United States Supreme Court stated that so long as an objective situation has been established by evidence, it need not be shown that the situation will probably result in persecution, but is enough that persecution is a reasonable possibility. Similarly, in *Adjei v. Canada (M.E.I.)*,⁶⁹ the Federal Court of Appeal stated that the standard of well-founded fear is not so stringent as to require a probability of persecution. An applicant does not have to prove that persecution is more likely than not to

⁶⁷ *UNHCR Handbook*, *supra* note 8 at para. 206–209.

⁶⁸ *Supra* note 13.

⁶⁹ [1989] 2 F.C. 680.

occur. Australian Courts have also adopted a similar view. In *Chan v. Minister for Immigration and Ethnic Affairs*,⁷⁰ the Australian High Court concluded that the standard of proof should be a real chance of persecution because it clearly conveys the notion of a substantial, as distinct from a remote, chance of persecution occurring.⁷¹

It follows then that while there need not be a probability that persecution will occur, there must be more than a minimal or mere possibility of the claimant being persecuted. In *Ponniiah v. Canada (M.E.I.)* Madam Justice Desjardin noted that:

Good grounds or reasonable grounds is defined as occupying the field between upper and lower limits. It is less than 50 percent chance but more than a minimal or mere possibility. There is no intermediate ground: what falls between the two limits is "good grounds." If the claimant ... may face slightly more than a mere possibility of persecution, he had crossed the lower limit and made his case of good grounds for fearing persecution.⁷²

The reasonable possibility standard means that a claimant need not be an actual victim of persecution in order to have a well-founded fear. Whereas past persecution *per se* is not the basis for according *Convention* refugee status, it may nevertheless be indicative of what is likely to befall a claimant upon her return home, and thereby substantiate a prospective fear of persecution.⁷³

Evidence that the claimant has suffered persecution in the past may be a sufficient but not a necessary means for establishing possibilities of prospective risk. The prevalence of violence against women in most countries makes it more likely that female claimants alleging fear of gender-related persecution would have experienced the harm feared in the past. Where there has been no change in the circumstances in which the harm was perpetrated, it will be reasonable to expect that the abuse is likely to continue, in which case, refugee protection may be appropriate. In other cases, evidence of past persecution may not be available because the need for protection emanates not from what has already happened but from what the woman fears will happen to her if she remains in the country of origin. Examples in this category include women who fear ostracism by the community or even death at the hands of relatives for having "destroyed the family honour," women fleeing to avoid having to undergo gender discriminatory practices such as sati⁷⁴, female genital mutilation, or simply women fleeing harms involving violation of their rights to physical integrity and

⁷⁰ (1989), (Aus. H.C.) [unreported].

⁷¹ See also A. Grahl-Madsen, *The Status of Refugees in International Law* (Leyden: A.W. Sijthoff, 1966) at 180.

⁷² (1991), 132 N.R. 32 at 34 (Fed. C.A.).

⁷³ See the *UNHCR Handbook*, *supra* note 8 at para. 45.

⁷⁴ *Supra* note 54.

security or life which are irreversible. To require evidence of past persecution in order to establish the genuineness of a fear of persecution is not only absurd, but may defeat the whole purpose of the need for protection since the harm from which a claimant would have sought protection may be fatal.

Regrettably, the Supreme Court of Canada appears to be signaling an inclination to revert to a more demanding standard of proof. In *A.G. v. Ward*, the Supreme Court of Canada appeared to be diverging from the reasonable chance test by positing a more difficult standard for establishing well-founded fear. The Court stated that "the heart of the inquiry ... is whether there is a *likelihood* of persecution [emphasis added]."⁷⁵ The majority decision in *Chan v. Canada (M.E.I.)*⁷⁶ explicitly cited, with approval, a relatively higher test for ascertaining well-founded fear along the lines adopted by the British House of Lords in the *Sivakumaran* decision. In *Ex parte Sivakumaran*, Lord Keith posits a more restrictive test for determining well-founded fear:

In my opinion the requirement that an applicant's fear of persecution should be well-founded means that there has to be demonstrated a reasonable degree of likelihood that he will be persecuted for a *Convention* reason if returned to his own country.⁷⁷

Although Lord Templeman⁷⁸ and Lord Goff⁷⁹ toned down the idea of "likelihood" in favour of a test which focuses on evidence of a "real and substantial danger of persecution," the overall House of Lords position appears to be more demanding than the reasonable possibility or chance test. The majority in the *Chan* decision took the view that the applicable test must, more appropriately, be a "serious possibility" of persecution.

While the precise impact of a shift from "a reasonable possibility" to "a serious possibility is" difficult to discern at this point, it may nevertheless suggest a worrisome trend. Admittedly, women alleging fear of persecution emanating from widespread and widely publicised abuse against women, such as sexual assault of women in the former Yugoslavia, will have little difficulty establishing that there is a serious possibility or likelihood of persecution. Yet this standard may impose a barrier for women whose fear of persecution stems from subtle and less publicised harms which do not affect large numbers of women. The fact that there is only a reasonable possibility of harm means that a particular woman faced with the threat of its occurrence ought not to have sought protection. In *Emnet v. Canada (M.E.I.)*⁸⁰ the claimant, an Ethiopian woman, had

⁷⁵ *Supra* note 4 at 722.

⁷⁶ *Supra* note 10 at 337.

⁷⁷ *Supra* note 33 at 197-198.

⁷⁸ *Supra* note 33 at 199.

⁷⁹ *Ibid.* at 202.

⁸⁰ (1993), F.C. 855 (F.C.T.D.).

served as chair of a local woman's association under the former Mengistu regime. In upholding the IRB's decision on the absence of an objective risk of harm, the Federal Court noted that the likelihood of persecution occurring had been reduced and therefore the applicant did not have a well-founded fear, stating, "most of the ten thousand persons arrested following the fall of the Mengistu government had been released [and that] only five hundred were held in detention for political reasons." The position of the Court seems to suggest that it is unwilling to view a one in twenty risks as sufficient to meet the threshold for well-founded fear.

The appropriate test ought to be the reasonable possibility or chance test, which recognises well-founded fear in the face of objective evidence showing good reasons for the applicant's fear of persecution. Adoption of the reasonable chance test is consistent with the commitment of the refugee *Convention* to accord surrogate protection based on objectively observable risks while ensuring that the threshold standard for well-founded fear is not too high.⁸¹ It also underscores the prospective nature of the risk to be protected by the refugee regime, in other words, martyrdom is not required. Thus understood, the objective test of a well-founded fear of persecution can effectively respond to the needs of women fleeing gender-related harms.

C. Ascertaining Well-Founded Fear Within the Context of Generalised Conditions

In view of the individualised focus of refugee protection, there has been a traditional predisposition to dismiss refugee claims founded solely on the generalised conditions in the country of origin. It has, therefore, often been contended that a claim is not well-founded where the claimant has not been specifically targeted or singled out for the harm feared. For instance, French practice supports a singling out approach for ascertaining well-founded fear. In *Santesteaban Goicoechea*,⁸² involving the claim of a Basque from Spain, the French Commission des Recours held that a well-founded fear of persecution should be anchored on personal experiences, and that the general situation in a country or region thereof is not enough to prove such a fear.

Jurisprudence of the European Court of Human Rights also seems to suggest that a "singling out" requirement exists for the determination of well-founded fear. In a case involving some young Tamil men, the Court was of the view that the evidence before it did not:

[E]stablish that the personal position of the applicants was any worse than the generality of other members of the Tamil community or other young male Tamils who were

⁸¹ See Hathaway, *supra* note 5 at 79–80.

⁸² I.J.R.L. /0060; (1990) 2:4 Int'l J. Refugee L. 652.

returning to their country [T]here existed no special distinguishing features in their cases ... to [suggest] that they would be treated in this way.⁸³

Women stand to lose the most from this position, since they are likely to be fleeing harms arising from generalised conditions.

A proper interpretation of the well-founded fear requirement should not require a woman to show that she has been singled out for persecution for her claim to be considered well-founded, but only that there is a genuine risk of either generalised or personalised persecution. There is jurisprudential support for this position. In *Salibian v. Canada (M.E.I.)*⁸⁴ the Federal Court of Appeal held that there is no need to show personal targeting in order to *claim Convention* refugee status. It is enough to establish well-founded fear if the harm feared is felt by the claimant, by a group with which the claimant is associated or even by all citizens for a *Convention* reason. Similarly, in *Rizkallah v. Canada (M.E.I.)*⁸⁵ the Federal Court of Appeal affirmed that a refugee claim should succeed whether the claimant is targeted for persecution personally or collectively.

This means that a claimant's fear of persecution need not be identifiable to her on the basis of an individualised set of facts. Her fear of persecution may arise from a general situation of oppression, violence, or a general subordination of women or a group in the country of origin. Courts in the Netherlands have held that extending refugee status to members of a particular social group suggests that refugee protection cannot be restricted to persons with individual cases.⁸⁶ The German Federal Constitutional Court has taken this analysis further by noting that where persecution is aimed at a group with a particular characteristic (for present purposes, women), there should be a presumption that each member of the group has a well-founded fear of persecution.⁸⁷

Consequently, a woman whose fear of persecution arises from generalised conditions need not establish that she is more at risk than any other woman in her country or community, but rather whether the broadly based condition of women which imparts upon her is sufficiently serious to substantiate a claim to refugee protection.⁸⁸ In its 1991 Report, the Working Group on Solutions and Protection reached a consensus on the fact that the *Convention* refugee regime

⁸³ *Vilvarajah*, (1991), Eur. Ct. H.R. Ser. A, No. 215 at para. 111–112.

⁸⁴ [1990] 3 F.C. 250.

⁸⁵ (1992), 156 N.R. 1 (Fed. C.A.). See also *Ragunathan v. Canada (M.E.I.)* (1993), 154 N.R. 229 (Fed. C.A.), in which the Federal Court of Appeal rejected the reasoning of the Immigration and Refugee Board that the risk faced by the applicant was equally shared by all Tamil males in Sri Lanka and was therefore insufficient to establish that his need for protection was well-founded.

⁸⁶ I.J.R.L./015; (1989) 1:3 Int'l J. Refugee L. 388.

⁸⁷ I.J.R.L./0103; (1992) 4:1 Int'l J. Refugee L. 99.

⁸⁸ Hathaway, *supra* note 5 at 97.

is important for protecting “persons fleeing a more generalised threat to their security.”⁸⁹ What a claimant has to establish in order to qualify for refugee protection is how these generalised conditions affect her own security and why she feels compelled to seek refugee protection. This is consistent with the claim that a refugee claimant need not have actually suffered persecution, but must only show a reasonable possibility of being persecuted.

A claimant may demonstrate a well-founded fear of persecution in the context of generalised conditions based not on her own personal experiences, but on evidence of harm to persons similarly situated. The majority decision in *Chan v. Canada (M.E.I.)*⁹⁰ confirmed that a claimant may be able to establish the genuineness of her fear of persecution by providing testimony with respect to similarly situated individuals. In *R. v. Secretary of State for the Home Department, Ex parte S.J.*,⁹¹ involving a Tamil refugee claimant from Sri Lanka, the court unequivocally held that an applicant need not show that she has been personally singled out for persecution. The Court noted that it is sufficient to prove well-founded fear by demonstrating that a refugee claimant belongs to a group which is subject to persecution.⁹² This position also finds support in the United States. The United States Final Asylum Rules maintain that proof of systematic persecution of groups excuses an individual from establishing that she would be singled out for persecution. It would suffice to establish well-founded fear if there exists a reasonable possibility that the group to which the applicant belongs faces the prospect of persecution.⁹³

Reliance on the evidence of similarly situated women to establish the genuineness of a woman’s claim to refugee status is not only desirable but of utmost importance if the *Convention* refugee regime is to be gender-inclusive. Official human rights records often present little documentary evidence on gender-related violations of human rights that women must contend with. The evidence of similarly situated women is the best indicator of what is likely to befall a particular woman upon return home, and there is therefore a greater need to rely on such evidence.⁹⁴

In view of the fact that gender-related refugee claims can arise in the context of generalised conditions of women in the country of origin, rejection of the “particularised evidence rule” is an important development towards a gender-inclusive refugee regime. Drawing on the jurisprudence in this regard, the *Immi-*

⁸⁹ UN Doc. EC/SCP/64 (1991) at 4.

⁹⁰ *Supra* note 10 at 346.

⁹¹ I.J.R.L./0079; (1991) 3:2 Int’l J. Refugee L. 336.

⁹² See also the *UNHCR Handbook*, *supra* note 8 at para. 43.

⁹³ See Helton, *supra* note 53 at 644.

⁹⁴ See revised *Gender Guidelines*, *supra* note 25 at 16.

gration and Refugee Board Gender Guidelines specifically calls on Board members not to reject a gender-related refugee claim solely on the ground that the claimant's fear of persecution may equally be faced by other women in the country of origin.⁹⁵ Thus, women fleeing threats of harm emanating from systematic or widespread discrimination can be determined to be genuinely at risk based on evidence that women similarly situated face a prospect of persecution. In *Re Aminata Diop* the applicant, in establishing that her claim to fear persecution arising from the practice of female circumcision was well-founded, pointed out that her friend had recently died as a result of injuries sustained during circumcision and that she feared that the same fate could befall her.⁹⁶

Once it is established that persons similarly situated as the claimant face a risk of harm in the country of origin, then in the absence of effective national protection, such persons may be adjudged to have a well-founded fear of persecution even though they have not personally experienced persecution in the past. The sheer numbers of persons subjected to the same or similar harm should not negate a woman's need for refugee protection. Insofar as a woman has experienced or fears violence amounting to a violation of her fundamental human dignity in the absence of effective national protection, she may be eligible for refugee protection regardless of the prevalence of the harm feared.⁹⁷ As Grahl-Madsen points out:

Once a person is subjected to a measure of gravity that we consider it "persecution", that person is "persecuted" in the sense of the *Convention*, irrespective of how many others are subjected to the same or similar measures.⁹⁸

III. CONCLUSION

THE REQUIREMENT that fear of persecution must be genuine can and should be ascertained objectively (most frequently by reference to human rights data). Yet since refugee protection is an individualised remedy, it is appropriate also to rely on a claimant's own credible and consistent testimony to determine the objective foundation of her claim. In view of the possibility of divergences between the *de facto* and the formally declared conditions of women, it is unreasonable to give heightened authority to documentary evidence that conflicts with credible testimony. The credibility of a claimant must be assessed against the back-

⁹⁵ *Supra* note 94 at 12.

⁹⁶ French Commission for Appeals of Refugees, recours No. 164.078 (September 1991).

⁹⁷ The fact that violence against women is universal is irrelevant to the determination that gender-specific crimes such as rape and domestic and sexual violence constitute persecution. See the Canadian guidelines issued by the Chairperson of the Immigration and Refugee Board, *Women Refugee Claimants Fearing Gender-Related Persecution* (Ottawa: Immigration and Refugee Board, 1993) at 7.

⁹⁸ Grahl-Madsen, *supra* note 69 at 213.

drop of her particular circumstances. This ensures that techniques employed by decision-makers in evaluating the testimony of women, especially those who have been traumatised by abuse in respect of which they seek refugee protection, will recognise the difficulties they face, unlike any other refugee, in establishing whether their claims are genuine.

Both the Executive Committee of the UNHCR and the Canadian Immigration and Refugee Board have recognised the peculiar difficulties faced by women in the assessment of credibility along traditional lines. They have also made suggestions as to how decision-makers may assess the credibility of female applicants who have suffered physical or sexual violence. Admittedly, these guidelines represent significant inroads into a gender-sensitive refugee protection system. However, they fail to recognise that the difficulties which confront female claimants go beyond the issue of credibility. So long as the traditional bipartite test continues to be applied in the assessment of the genuineness of a refugee claim, the credible testimony of women is likely to be perceived as no more than subjective evidence. In view of the lack of documentation of the actual conditions of women in most societies, the UNHCR and IRB Gender Guidelines would have come closer to advocating a truly gender-inclusive refugee protection framework if they had also taken the position that the credible evidence of female applicants, standing alone, ought not be considered as subjective evidence, but sufficient to constitute the objective basis for a claim to a well-founded fear of persecution.

The recognition that a person can have a well-founded fear in the context of generalised conditions ensures that women whose fear of persecution emanates from the general condition of discrimination against, and insecurity of women in the country of origin may be eligible for refugee protection even though they may not have been singled out for persecution. This is consistent with a reasonable possibility test for ascertaining the threshold for refugee protection.

