Judicial Review of Refugee Determinations (II): Revisiting the Luck of the Draw

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Refugee determinations—that is, whether a refugee can immigrate to Canada—are high-stakes decisions. For claimants facing deportation, the decision may be the difference between life or death. However, if applicants wish to obtain judicial review of a decision made by the Immigration and Refugee Board, they must first seek leave from the Federal Court.

In 2012, the author published the results of his first quantitative empirical study of over 23,000 leave applications for judicial review of refugee determinations decided from 2005 to 2010. The result was nothing other than shocking: above all else, an applicant's likelihood of success rested on the luck of the draw, with the success rate ranging from 1% to 77% depending on the judge they received. Since the initial study was released, the Federal Court has adopted measures in an attempt to address variations in grant rates across judges. Drawing on data collected from over 33,000 online Federal Court dockets from 2008 to 2016, the author examines whether those measures have been successful and what further reforms should be pursued.

The new data shows that the Federal Court's reaction was insufficient. The author finds that decision-making in refugee law cases remains inconsistent and dependent on the individual judge presiding over the leave determination. To create a meaningful impact, the author recommends three solutions: first, that Parliament abolish or reform the leave requirement as it creates an arbitrary barrier to access fair judicial overview; second, that the Court ensures the merits judge is also the leave judge to reduce the amplification of negative consequence for those who suffer from the luck of the draw; and third, that individual judges adopt approaches at leave and on judicial review to reduce the luck of the draw, including using alternative judicial approaches.

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Introduction

In late 2011, I began circulating drafts of an article that was later published in the *Queen's Law Journal*, "Judicial Review of Refugee Determinations: The Luck of the Draw?"[1] The article set out the results of a quantitative empirical study of over 23,000 applications for leave to judicially review refugee determinations decided from 2005 to 2010 in the Canadian Federal Court. The study found that outcomes in these applications often hinged on which judge was assigned to decide whether to grant leave, with the leave grant rates of individual judges ranging from 1.36% to 77.97%.[2] The study concluded that the leave requirement imposed an "arbitrary limit on access to justice for refugees".[3]

Several institutions responded to the study. There was media attention,[4] including a call from *The Globe and Mail*'s Editorial Board for measures to be taken to reduce unfairness in the process.[5] As the Editorial Board put it,

> some variation is to be expected; however, when the disparities are this wide, justice becomes arbitrary. The court should consider what reforms it can implement to improve

1. See Sean Rehaag, "Judicial Review of Refugee Determinations: The Luck of the Draw?" (2012) 38:1 Queen's LJ 1 [Rehaag, "Luck of the Draw"].

2. See *ibid* at 25–26.

3. *Ibid* at 50.

4. See e.g. Don Butler, "Refugee Claims' Success Luck of the Draw; Study Uncovers 'Enormous Variation' in Rate Federal Court Judges Grant Reviews", *The Ottawa Citizen* (23 March 2012) A1.

5. See "Asylum Seekers and Strange Statistics", Editorial, *The Globe and Mail* (2 April 2012) A12.

> the court's transparency and consistency, and to restore the public's confidence.. . . Access to justice for refugee claimants should not resemble a lottery system.[6]

The Federal Court responded to the study by inviting me to discuss the research with several members of the Court.[7] In addition, Paul Crampton CJ—who was himself an outlier on the low end in terms of leave grant rates during the period of the study[8]—participated in a video interview with *The Lawyers Weekly*, discussing the results of the study at length.[9] In that interview, he noted that "the subjective nature of judging" means that "different judges are always going to look at similar problems somewhat differently".[10] However, he went on to acknowledge that high levels of variability in leave grant rates across judges is "an issue that we perceive as being a troublesome one because it does have a fairness dimension to it".[11] He then suggested that he would welcome input from stakeholders about what, if anything, could be done to address the issue.[12] He also indicated that he planned to hold a meeting of members of the Court to discuss the test for leave and the standard of review.[13] He emphasized that because judicial independence must be respected, this meeting would not be intended to force judges to apply the tests in particular ways.[14] Rather, he hoped that by sharing their perspectives with one another, judges would develop "enriched understanding of different ways of looking at issues", and that this would lead to "greater convergence".[15]

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6. *Ibid.*

7. See Sean Rehaag, "Preliminary Report: The Luck of the Draw? An Empirical Study of Judicial Review of Refugee Determinations in the Federal Court of Canada (2005–2010)" (Presentation delivered to members of the Federal Court of Canada, Ottawa, 20 January 2012) [unpublished].

8. See Rehaag, "Luck of the Draw", *supra* note 1 at 53.

9. See TheLawyersWeekly, "Federal Court CJ Paul Crampton Addresses Immigration Bar's Concerns" (22 April 2012), online (video): *YouTube* <www.youtube.com/watch?v=vnYxJ77Y4sk>.

10. *Ibid* at 00h:01m:31s.

11. *Ibid* at 00h:02m:29s.

12. See *ibid* at 00h:03m:20s.

13. See *ibid* at 00h:03m:30s.

14. See *ibid* at 00h:03m:40s.

15. *Ibid* at 00h:04m:29s. See also Cristin Schmitz, "Possible Changes to Refugee Appeal Rules: Immigration Lawyers Complain of Disparity in Granting of Reviews", *The Lawyers Weekly* 31:48 (27 April 2012), online: <advance.lexis.com/api/permalink/91dd6bcb-2924-42b4-a944-9b3769b0398c/?context=1505209> (QL).

Similar points about a planned meeting of the Court to discuss the leave test as a way to encourage "convergence" were made by the Chief Justice in a meeting of a Federal Court Bench and Bar Liaison Committee (Liaison Committee).[16] At another Liaison Committee meeting, the Chief Justice indicated that "the court is currently developing a list of factors for justices to consider in making leave decisions".[17] At the next meeting of the Liaison Committee, however, the Chief Justice noted that the Rules Committee of the Court had considered the proposal to create a list of factors in making leave decisions, but that some members of the Rules Committee felt that the Rules Committee lacked jurisdiction to do this.[18] At that same Liaison Committee meeting, it was noted that the Court had held the planned discussion about applying the leave test through an education session, and that one judge who served on the Liaison Committee found that session "very useful".[19]

The Federal Court's *Strategic Plan (2014-2019)* also responded to the variations in leave grant rates identified in the study:

> In late 2011, the Court became aware of the initial results of a study which indicates that there is a significant variation in the rate at which individual judges of the Court grant Leave for judicial review under the *Immigration and Refugee Protection Act*.
>
> Variation in judicial outcomes is a common feature of our system of law. However, the Court recognizes that there is a point at which the variation in judicial outcomes may raise questions of predictability, certainty and consistency.
>
> Since becoming aware of this issue, the Court has actively endeavoured to achieve a better understanding of it and the extent to which it may engage these types of questions. The

16. Federal Court Bench and Bar Liaison Committee (Immigration & Refugee Law), *Minutes of Meeting* (24 January 2012) at item 2(v), online (pdf): *Federal Court* <www.fct-cf.gc.ca/Content/assets/pdf/base/Minutes%20IMM%20Bar%20Liaison%20Committee%202012-01-24%20eng.pdf>.

17. Federal Court Bench and Bar Liaison Committee (Immigration & Refugee Law), *Minutes of Meeting* (4 May 2012) at item 4(v), online (pdf): *Federal Court* <www.fct-cf.gc.ca/Content/assets/pdf/base/Minutes%20IMM%20Bar%20Liaison%20Committee%202012-05-04%20eng.pdf> [May 4 Liaison Committee].

18. See Federal Court Bench and Bar Liaison Committee (Immigration & Refugee Law), *Minutes of Meeting* (11 January 2013) at item 4(v), online (pdf): *Federal Court* <www.fct-cf.gc.ca/ Content/assets/pdf/base/IMM%20Bar%2011-01-2013%20minutes%20ENG.pdf>.

19. *Ibid*.

> Court also continues to assess whether there may be steps that can be taken to address this issue in a manner that does not encroach upon the judicial independence of individual members of the Court.[20]

It has been over five years since the release of the study that prompted the Court's efforts to achieve "greater convergence" in leave grant rates. Now is, therefore, an opportune time to revisit the study by looking at more recent data, particularly given that the Federal Court's Chief Justice suggested that it is an "unanswered question" whether the results of the study would be the same if it were repeated "allowing time for the new measures implemented after the first study to be felt".[21] This article represents my attempt to answer this question. It draws on data from over 33,000 applications for judicial review involving refugee determinations filed from 2008 to 2016 to examine trends in outcomes and to explore whether the Court's efforts to reduce leave grant rate variations have been successful.

The article begins by describing the methodology used for the study. Next it sets out the results of the study. Finally, it concludes with recommendations for enhancing fairness in the judicial review process.

At the risk of ruining the suspense for the reader, the main conclusion of the study is that the luck of the draw remains a stubbornly persistent feature of the judicial review process. Notwithstanding efforts made by the Court in this area, from 2013 to 2016 one's chances of success in an application for judicial review of a negative refugee determination continued to hinge in large part on which judge was assigned to decide the case. This is unacceptable. Refugee determinations involve life and death questions. Judicial oversight of these determinations should be based on the facts of the case and on the law, not on arbitrary considerations such as who decides the case. Change is urgently needed.

A few points before getting to the current study.

For readers who are not familiar with judicial reviews (JRs) of refugee determinations, here is a brief overview of that process—though readers who would prefer a more fulsome account are encouraged to consult the earlier study, which discusses the process at length.[22] Refugee determinations are made by an independent quasi-judicial administrative tribunal, the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB). Some, but

20. Federal Court, *Strategic Plan (2014-2019)*, at part I(A)(v)(*a*)(3) online (pdf): *Federal Court* <www.fct-cf.gc.ca/content/assets/pdf/base/Strategic%20Plan%20(Final%20for%20posting%20with%20COA%20and%20accessibility)%20English.pdf>.

21. May 4 Liaison Committee, *supra* note 17 at item 4(v).

22. See Rehaag, "Luck of the Draw", *supra* note 1 at 3–13.

not all, RPD determinations are subject to an appeal to the IRB's Refugee Appeal Division (RAD). Both the government and the claimant can apply to the Federal Court for leave to judicially review the final IRB decision by filing a notice of application. The applicant must then perfect the application—that is, file all the relevant supporting documents, including a memorandum of argument. The respondent then has the option of filing opposing materials, including their own memorandum of argument, or they can choose either to not oppose or to actively consent to the application. If the respondent opposes the application, the applicant can file a reply or can choose to let the time for filing a reply expire. At that point, the application goes to a judge who reviews the paper file and decides whether to grant leave (i.e., the leave stage). The test for obtaining leave is whether the applicant has made a reasonably arguable case. There are no written reasons for leave decisions, and it is not possible to appeal a leave decision—meaning that if leave is denied that is the end of the matter. If leave is granted, a hearing is scheduled. When the hearing is scheduled, the applicant and respondent are entitled to file additional materials. Sometimes, at this stage, the respondent will consent to the application, and there will be a motion for judgment on consent. More often, the matter will proceed to an in-person hearing, where a judge will make a determination on the merits (i.e., the judicial review or JR stage). In making a decision at the JR stage, the JR judge will also decide whether to certify the case for appeal to the Federal Court of Appeal, with the applicable test being whether the case raises a serious issue of general importance. If the case is not certified, then no further appeals are available. If the case is certified, the losing party can choose to proceed to an appeal at the Federal Court of Appeal (and ultimately the Supreme Court of Canada, with leave from that Court). Finally, throughout the process, at both the leave stage and the JR stage, the applicant may choose to discontinue their application.

While the judicial review process and the test for leave (i.e., reasonably arguable case) are the same as they were at the time of the original study, it should be emphasized that the underlying refugee determination process underwent substantial revisions.[23] The new system took effect for all claims made on or after December 15, 2012, while claims made before that date were processed under the old system (i.e., legacy claims).

23. See *Balanced Refugee Reform Act*, SC 2010, c 8 [*BRRA*]; *Protecting Canada's Immigration System Act*, SC 2012, c 17.

There are many important changes under the new system.[24] In addition, the broader context within which refugee claims are considered has also changed since 2012. For the purposes of this article I will highlight five key changes.

First, one of the main objectives of the reforms was to speed up the refugee-determination system.[25] In the revised process, refugee hearings are supposed to be held within sixty days of the initial claim,[26] rather than more than a year (and sometimes several years) after the initial claim, as was the case under the old system.[27] Subsequent processes are also supposed to happen quickly, with the aim of ultimately removing unsuccessful claimants in a timely manner.[28] To speed up the process at the federal court level, the number of Federal Court judges was increased from thirty-three to thirty-seven.[29]

Second, a new cohort of civil servant decision-makers are responsible for making first instance decisions at the RPD.[30] These decision-makers replace the prior decision-makers who were Governor in Council appointees.[31]

Third, the new system includes an internal appeal on the merits at the RAD, which many, though not all, applicants can access (under the old system there was no appeal on the merits at the IRB).[32] Under the new system, applicants who can access the RAD appeal must do so before applying for judicial review.[33] Claimants who do not have access to the RAD appeal can still apply directly for judicial review—but unlike most applicants who can access the RAD, they

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24. See Angus Grant & Sean Rehaag, "Unappealing: An Assessment of the Limits on Appeal Rights in Canada's New Refugee Determination System" (2016) 49:1 UBC L Rev 203 (provides an outline of the revised system, as well as a quantitative analysis of outcomes in that system).

25. See Citizenship and Immigration Canada, "ARCHIVED – Backgrounder — Summary of Changes to Canada's Refugee System in the Protecting Canada's Immigration System Act" (last modified 16 February 2012), online: *Government of Canada* <www.canada.ca/en/immigration-refugees-citizenship/news/archives/backgrounders-2012/summary-changes-canada-refugee-system-protecting-canada-immigration-system-act.html>.

26. See *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 159.9 [*IRPR*].

27. See Citizenship and Immigration Canada, *supra* note 25.

28. See *ibid*.

29. See *Federal Courts Act*, RSC 1985, c F-7, s 5.1(1) as it appeared on 14 December 2012; *ibid*, as it appeared on 15 December 2012, as amended by *BRRA*, *supra* note 23, s 41.

30. See *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 169.1(1)–(2) [*IRPA*].

31. See Sean Rehaag, "Troubling Patterns in Canadian Refugee Adjudication" (2008) 39:2 Ottawa L Rev 335 at 339, 355–58 (provides a discussion of the prior Governor in Council appointment process and concerns about quality of appointments).

32. See *IRPA*, *supra* note 30, ss 110–11. See also Grant & Rehaag, *supra* note 24 (provides an empirical examination of the new RAD appeal).

33. See *IRPA*, *supra* note 30, s 72(2)(a).

do not benefit from automatic stays of removal pending the Federal Court's determination.[34]

Taken together, this means that, starting in late 2012, the Federal Court began seeing three distinct sets of applications for leave for judicial review involving refugee determinations: (a) legacy claim RPD decisions; (b) new system RAD appeals; and (c) new system RPD decisions for claimants without access to the RAD.

Fourth, the number of refugee claims made in Canada in the early years following the implementation of the new system were below historic norms. From 2008 to 2012, the average number of refugee claims referred to the IRB was approximately 27,000 per year.[35] In contrast, there were only 10,465 claims referred in 2013 and an average of approximately 16,000 per year from 2013 to 2016.[36] However, the number of claims has increased more recently, with 23,350 claims referred in 2016, 47,425 in 2017, and 55,388 in 2018.[37]

Fifth, success rates at the RPD under the revised system are higher than they were under the prior system. From 2008 to 2012, the average recognition rate

34. See *IRPR*, *supra* note 26, s 231.

35. See Sean Rehaag, Julianna Beaudoin & Jennifer Danch, "No Refuge: Hungarian Romani Refugee Claimants in Canada" (2015) 52:3 Osgoode Hall LJ 705 at 732.

36. See "Refugee Claims Statistics" (last modified 17 May 2019), online: *Immigration and Refugee Board of Canada* <www.irb-cisr.gc.ca/en/statistics/protection/Pages/index.aspx> [IRB, "Statistics"]. For the 2013 statistics, see "Refugee Protection Claims (New System) by Country of Alleged Persecution - 2013" (last modified 3 July 2018), online: *Immigration and Refugee Board of Canada* <www.irb-cisr.gc.ca/en/statistics/protection/Pages/RPDStat2013.aspx> [IRB, "Statistics" 2013]. For the 2014 statistics, see "Refugee Protection Claims (New System) by Country of Alleged Persecution - 2014" (last modified 3 July 2018), online: *Immigration and Refugee Board of Canada* <www.irb-cisr.gc.ca/en/statistics/protection/Pages/RPDStat2014.aspx> [IRB, "Statistics" 2014]. For the 2015 statistics, see "Refugee Protection Claims (New System) by Country of Alleged Persecution - 2015" (last modified 3 July 2018), online: *Immigration and Refugee Board of Canada* <www.irb-cisr.gc.ca/en/statistics/protection/Pages/RPDStat2015.aspx> [IRB, "Statistics" 2015]. For the 2016 statistics, see "Refugee Protection Claims (New System) by Country of Alleged Persecution - 2016" (last modified 3 July 2018), online: *Immigration and Refugee Board of Canada* <www.irb-cisr.gc.ca/en/statistics/protection/Pages/RPDStat2016.aspx> [IRB, "Statistics" 2016].

37. For the 2016 statistics, see IRB, "Statistics" 2016, *supra* note 36. For the 2017 statistics, see "Refugee Protection Claims (New System) by Country of Alleged Persecution - 2017" (last modified 3 July 2018), online: *Immigration and Refugee Board of Canada* <www.irb-cisr.gc.ca/en/statistics/protection/Pages/RPDStat2017.aspx>. For the 2018 statistics, see "Refugee Protection Claims (New System) by Country of Alleged Persecution - 2018" (last modified 15 February 2019), online: *Immigration and Refugee Board of Canada* <www.irb-cisr.gc.ca/en/statistics/protection/Pages/RPDStat2018.aspx>.

for cases decided on the merits at the RPD was 47.2%.[38] In contrast, from 2013 to 2016, the equivalent recognition rate under the new system was 65.9%.[39]

These changes raise many intriguing questions about patterns in Federal Court judicial reviews. For example, it would be interesting to examine differences in outcomes at the Federal Court for applications coming directly from the RPD and for applications that went through both RPD and RAD processes. It would also be interesting to consider patterns in outcomes from applications involving the new system on the one hand and the old system on the other hand—both of which ran concurrently while the IRB worked through the backlog of legacy claims. Similarly, it would be worth looking into the relation between success rates at first instance and success rates in subsequent processes, including judicial review, as well as looking at any possible connections between caseload volumes and success rates.

While these questions are certainly worth pursuing, they are beyond the scope of the current study, which is focused exclusively on variations in grant rates across individual judges. Though factors related to the revised system may well affect outcomes in particular cases, these factors cannot account for variations in grant rates across judges because judges are randomly assigned cases.[40] In other words, the study is interested not so much in why any specific case succeeds, which would require an examination of many factors. Rather, in a context where cases are randomly assigned to individual judges and where judges decide large numbers of cases, the study is interested only in whether variations in grant rates across judges persist despite efforts taken by the Court to reduce them.

Finally, it is worth noting that variations in judicial and tribunal outcomes in refugee claim adjudication have been the subject of extensive empirical research, both in Canada and elsewhere. Groundbreaking research involving massive datasets of United States' asylum system decisions, for example, has demonstrated dramatic variations in success rates across adjudicators at all levels of the system.[41] It would be interesting to explore in what specific respects these patterns are similar or different from the Canadian context. It would also be interesting to know whether other areas of judicial decision making in

38. See Rehaag, Beaudoin & Danch, *supra* note 35 at 732.

39. See IRB, "Statistics", *supra* note 36; IRB, "Statistics" 2013, *supra* note 36; IRB, "Statistics" 2014, *supra* note 36; IRB, "Statistics" 2015, *supra* note 36; IRB, "Statistics" 2016, *supra* note 36.

40. However, they may have indirect effects, such as where judges disagree about the law relating to some aspect of the revised system.

41. See Jaya Ramji-Nogales, Andrew I Schoenholtz & Philip G Schrag, *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (New York: New York University Press, 2009).

Canada—particularly high-volume decision making in areas with significant human rights implications—see similar levels of variance. The aims of the present paper, however, are more modest: to follow up on my prior research to see whether anything has changed since the Court's efforts to reduce variations in outcomes, and if not, then to consider practical policy options that might help achieve those aims.

With those points in mind, let us now turn to a discussion of the methodology of the current study.

I. Methodology

Federal Court refugee decision making is difficult to study using standard legal research methods. Most cases in this area are denied leave without written reasons for decisions that can be examined by legal scholars. To get around this problem, this study draws on information from online Federal Court dockets.

The Federal Court maintains a website with online dockets for all cases.[42] The dockets for each case have some information structured as fields containing specific data points, such as the court number, the style of cause, the proceeding category, and so on. The docket for each case also has a table with entries listing steps taken in the process, including what documents were filed and the date on which each step was taken. The information in this table is in natural language. Figure 1 sets out an example of a typical court docket.

Figure 1: Typical Court Docket (IMM-1-10)

Recorded entry(ies) for IMM-1-10

Court number information

Court Number :	IMM-1-10		
Style of Cause :	CHENG YAN LIU v. MCI		
Proceeding Category :	Immigration Leave & Judicial Review	**Nature :**	Imm - Appl. for leave & jud. review - IRB - Refugee
Type of Action :	Non-Action		

42. See "Court Files" (last visited 20 October 2019), online: *Federal Court* <www.fct-cf.gc.ca/en/court-files-and-decisions/court-files>. This can be used to retrieve the information used in Figure 1; search by the court number IMM-1-10.

7 records found for court number IMM-1-10

Doc	Date Filed	Office	Recorded Entry Summary
-	2010-04-26	Ottawa	(Final decision) Order rendered by The Honourable Mr. Justice Martineau at Ottawa on 26-APR-2010 dismissing the application for leave Decision endorsed on the record on doc. #1 received on 26-APR-2010 Considered by the Court without personal appearance entered in J. & O. Book, volume 477 page(s) 242 - 242 Certificate of the order sent to all parties Transmittal Letters placed on file.
-	2010-04-12	Ottawa	Communication to the Court from the Registry dated 12-APR-2010 re: application for leave – final disposition
5	2010-03-10	Toronto	Memorandum of argument on behalf of the respondent filed on 10-MAR-2010 with proof of service on the applicant
4	2010-02-08	Toronto	Application Record Number of copies received/prepared: 2 on behalf of Applicant with proof of service upon Respondent on 08-FEB-2010 filed on 08-FEB-2010
3	2010-01-13	Toronto	Notice of appearance on behalf of the respondent filed on 13-JAN-2010 with proof of service on the applicant the tribunal
2	2010-01-04	Toronto	Copy of Doc 1 with proof of service on the respondent on 04-JAN-2010 filed on 04-JAN-2010
1	2010-01-04	Toronto	Application for leave and judicial review against a decision IRB/RPD, 16-DEC-2009, TA9-06472 filed on 04-JAN-2010 Written reasons received by the Applicant Tariff fee of $50.00 received

For my first "Luck of the Draw" study, I wrote a computer program that collected structured data from the online dockets and imported that data into a database. Next, I worked with a team of law student research assistants who manually reviewed the natural language information from the table in each docket and coded the data points I was interested in. Because the study looked at over 23,000 applications, this process required hundreds of hours of research assistance and substantial time on my part to review the coding undertaken by research assistants for consistency.[43]

43. See Rehaag, "Luck of the Draw", *supra* note 1 at 21–23.

For the current study, I adopted a different approach. My initial plan was to write a computer program that would not only collect the structured data, but that would also parse the natural language from the tables in the dockets to gather the data points that I was interested in—thereby skipping the labour-intensive step of research assistants manually reviewing dockets. I expected that I could use the data I had already amassed for the first study to work out patterns in the natural language information from online dockets and use those patterns to design and then test the data parsing code against the manually collected dataset.

Fortuitously, just as I began working on the project, I was contacted by Sam Norris, then a doctoral researcher at Northwestern University's Department of Economics.[44] Norris was attempting an ambitious and methodologically robust statistical study of factors that influence outcomes in Federal Court immigration law judicial reviews from 1995 to 2012.[45] For that study, he had written code to parse data from online court dockets, much as I had planned to do. He kindly shared his code.[46]

The code Norris shared was written in Python,[47] which was a new programming language for me. However, I was impressed by the way the code resolved tricky problems that I had been struggling with. Rather than continuing with my own original coding (at that point I was working in the R statistical programming language),[48] I decided instead to revise the Python code that Norris had written.

The way the revised code works is that it first downloads all the Federal Court's immigration dockets for the years of interest and stores these as text files. Next, the code looks through each text file and collects the relevant structured data (e.g., immigration file number, style of cause, case type, date the application was filed). Then, following a set of rules that exploit patterns in how

44. See Electronic Correspondence from Sam Norris to Sean Rehaag (13 December 2016) [on file with author]. Norris is now an Assistant Professor at The University of Chicago Harris School of Public Policy. See "About Sam Norris" (last visited 28 September 2019), online: *The University of Chicago Harris Public Policy* <harris.uchicago.edu/directory/sam-norris>.

45. See Samuel Norris, "Examiner Inconsistency: Evidence from Refugee Appeals", (2019) The University of Chicago Working Paper No 2018-75, online (pdf): <www.samuel-norris.com/refugees_Norris.pdf?attredirects=0> [Norris, "Examiner Inconsistency"].

46. See Electronic Correspondence from Sam Norris to Sean Rehaag (10 August 2017) [on file with author].

47. See "Applications for Python" (last visited 3 October 2019), online: *Python* <www.python.org/about/apps>.

48. See "What is R" (last visited 28 September 2019), online: *The R Foundation* <www.r-project.org/about.html>.

the natural language information is typically entered in the docket tables, the code attempts to gather various data points. Thus, for example, to find the name of the deciding judge, the code looks for specific phrases (e.g., dismissing the application for leave) in docket locations (e.g., is the phrase in the last or second last entry?) and uses those rules to determine the docket entry that most likely represents the final decision. Then the code looks to see if any name from a list of judges who served on the Court during the period of interest is included in the docket entry that most likely represents the final decision. If there is a judge included, the code will collect their name as the judge responsible for the final decision. The code uses similar approaches for various data points and then saves the data points for each case in a text file that can be imported into a spreadsheet or statistical software for analysis.

I optimized the code for the specific context of judicial reviews of refugee adjudication and the data points I was interested in by looking at patterns in divergences between data obtained through the code and data put together by my research assistants for the first study. While the code was already impressively accurate, where I discovered regular errors, I enhanced precision either by adding new rules or by removing or revising rules that may have worked well in the general immigration context, which Norris was interested in, but that caused problems in the more restricted set of refugee law cases I was working on. In the end, through trial and error, I was able to improve the code's accuracy rate to over 99%. I then tested the code on an additional year of data that research assistants had previously manually gathered, and the accuracy rate for the code remained over 99%. Finally, I tested the data against a random sample of 200 cases from the remaining years that a research assistant manually gathered (oversampling 100 applications where leave was granted because such cases tend to be more complex and thus more likely to result in errors), and once again the accuracy rate was over 99%.

While the code was highly accurate, it should be noted that errors were not random. The code struggled with two types of problems. The first type of problem related to complex cases, such as cases with multiple procedural motions or where steps in the process were overturned (e.g., leave is denied, but there is a motion to reopen the leave determination). My research assistants were better at coding these cases because they were able to first understand what was going on in the case and then determine which parts of the docket contained the data points of interest—and even where they were unable to do this, they were at least able to flag the case for my review. The code, by contrast, treats such cases as usual and just looks for the regular patterns, sometimes confusing one of several steps in the process for the leave or judicial review outcome. The second type of problem related to information being entered in the docket in a novel way—whether due to typographic errors or just atypical ways of recording standard information. Human research assistants had no trouble coding such cases because they were able to work out from the context what the person entering information into the docket had intended. The code,

however, lacking this contextual understanding, was not able to accurately gather data for such cases.

Although the code struggled with complex and atypical dockets, the code never made the type of mistakes that human research assistants regularly made—mistakes that I had not known about until I compared the data research assistants put together with the data parsed by the code. The mistakes made by research assistants were generally typographic in nature. Thus, for example, research assistants might mistakenly enter the wrong file number and collect data from the wrong case. Or research assistants might make copy and paste errors, such as pasting the name of the leave judge in the field reserved for the judge who decided the application on the merits. Similarly, research assistants may have properly determined that an application was perfected, but mistakenly indicated in the relevant field that the case was not perfected by accident. These sorts of errors are difficult to spot, short of reviewing or double coding all cases—which would have significantly added to the already labour-intensive process. Naturally, the automated code never made mistakes of this kind.

All of that to say, then, that for this study, I used a computer program to collect and parse data from online dockets for all applications for leave to judicially review refugee determinations filed in the Federal Court from 2008 to 2016. While there are some errors in the resulting dataset, and while those errors are likely not random, the accuracy rates of the coding—determined through comparisons with manually gathered data—are very high.

The following data-points from that dataset were used for this study:

(1) File number
(2) Date filed
(3) Case nature
(4) Applicant type (government or claimant)
(5) Application perfected (yes or no)
(6) Application for leave opposed (yes or no)
(7) Leave outcome (granted, denied, or discontinued)
(8) Leave judge
(9) JR opposed (yes or no)
(10) JR outcome (granted, denied, or discontinued)
(11) JR judge

Using this dataset, I examined patterns in outcomes in Federal Court decisions in applications for judicial review involving refugee determinations. In doing so, I focused on comparing applications filed from 2008 to 2011 (the four-year period prior to the Federal Court's efforts to enhance consistency in response to the first study) with applications filed from 2013 to 2016 (the four-year period following the Court's initial efforts to respond to the first study).

II. Results of the Study

A. Overview of Dataset

The data used by this study covered 71,553 Federal Court applications for leave for judicial review in immigration cases filed between 2008 and 2016. Of those applications, 33,920 were categorized by the Court as involving refugee determinations made by the IRB.[49]

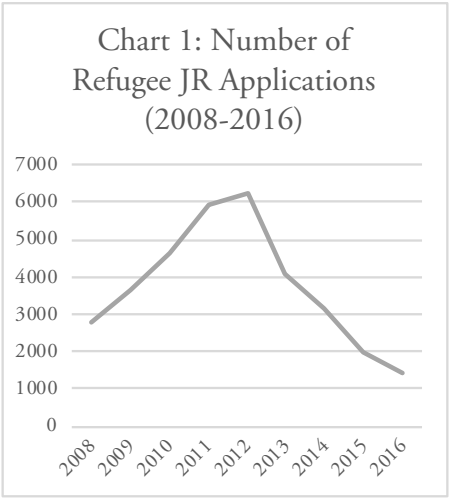


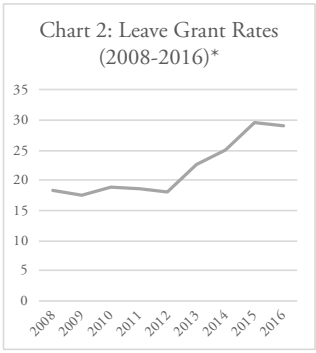
Chart 1 shows that the number of applications for leave to judicially review refugee determinations fluctuated over the period of the study, ranging from a high of around 6,200 applications in 2012 to a low of only around 1,400 in 2016. Since Canada's refugee-determination system was revised in late 2012, the trend has been consistent declines year after year. However, as noted above, more recent years (outside the period of this study) have seen increases in the number of refugee claims, and thus one would also expect an increase in the number of applications for judicial review.

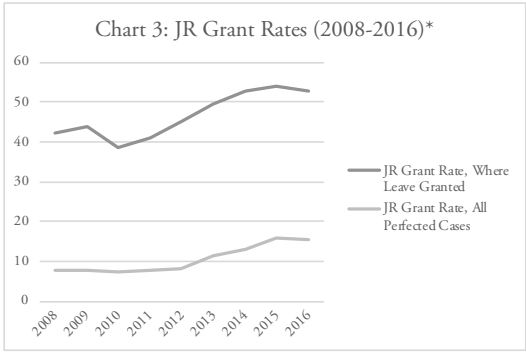
49. The data was collected from September 6 to 9, 2017, with data on cases filed in 2015 and 2016 collected again on December 29, 2017. No changes to Federal Court dockets made after September 9, 2017, for cases filed prior to 2015, and December 29, 2017, for cases filed in 2015 or 2016, are reflected in the data.

Table 1: Overview: Outcomes in Refugee JR Applications (2008-2016)

2008-2016							
Leave Outcomes							
Applicant	**Withdrawn**	**Denied (Unperfected)**	**Denied (Perfected)**	**Granted (Unopposed)**	**Granted (Opposed)**	**Total**	**Leave Grant Rate**
Claimant	867	5,892	21,359	758	4,813	33,689	16.5
Minister	68	2	30	14	117	231	56.7
Total	935	5,894	21,389	772	4,930	33,920	16.8
Judicial Review Outcomes, Where Leave Granted							
Applicant	**Withdrawn**	**Denied**	**Granted (Unopposed)**	**Granted (Opposed)**	**Total (Leave Granted)**	**JR Grant Rate (Leave Granted)**	**JR Grant Rate (All Cases)**
Claimant	228	2,772	820	1,751	5,571	46.1	7.6
Minister	14	53	3	61	131	48.9	27.7
Total	242	2,825	823	1,812	5,702	46.2	7.8
2008-2011							
Leave Outcomes							
Applicant	**Withdrawn**	**Denied (Unperfected)**	**Denied (Perfected)**	**Granted (Unopposed)**	**Granted (Opposed)**	**Total**	**Leave Grant Rate**
Claimant	389	3,538	10,622	252	2,144	16,945	14.1
Minister	27	1	6	6	36	76	55.3
Total	416	3,539	10,628	258	2,180	17,021	14.3
Judicial Review Outcomes, Where Leave Granted							
Applicant	**Withdrawn**	**Denied**	**Granted (Unopposed)**	**Granted (Opposed)**	**Total (Leave Granted)**	**JR Grant Rate (Leave Granted)**	**JR Grant Rate (All Cases)**
Claimant	91	1,321	226	758	2,396	41.1	5.8
Minister	5	17	1	19	42	47.6	26.3
Total	96	1,338	227	777	2,438	41.2	5.9
2013-2016							
Leave Outcomes							
Applicant	**Withdrawn**	**Denied (Unperfected)**	**Denied (Perfected)**	**Granted (Unopposed)**	**Granted (Opposed)**	**Total**	**Leave Grant Rate**
Claimant	328	1,271	6,671	383	1,899	10,552	21.6
Minister	32	1	20	7	59	119	55.5
Total	360	1,272	6,691	390	1,958	10,671	22.0
Judicial Review Outcomes, Where Leave Granted							
Applicant	**Withdrawn**	**Denied**	**Granted (Unopposed)**	**Granted (Opposed)**	**Total (Leave Granted)**	**JR Grant Rate (Leave Granted)**	**JR Grant Rate (All Cases)**
Claimant	112	984	492	694	2,282	52.0	11.2
Minister	9	24	2	31	66	50.0	27.7
Total	121	1,008	494	725	2,348	51.9	11.4

As indicated in Table 1, the vast majority (99.3%) of applications for leave involving refugee determinations from 2008 to 2016 were filed by unsuccessful claimants, with only 231 applications filed by the government. Applications secured leave 16.8% of the time—with the government much more likely to get leave (56.7%) than claimants (16.5%). Where leave was granted, applications ultimately succeeded on the merits in 46.2% of cases, with rates of success for the government (48.9%) being higher, but not that much higher, than rates of success for claimants (46.1%). Overall, of all applications filed, 7.8% ended up succeeding both at the leave and merits stages—again with the government being more successful (27.7%) than claimants (7.6%).





*Includes only applications filed by claimants, where the application is perfected and not withdrawn. Years reflect year applied.

Charts 2 and 3 show changes in grant rates over time during the period of the study. These charts are based on figures that only include applications for leave for judicial review involving refugee determinations where applications were brought by claimants, where applications were perfected, and where applications were not withdrawn or discontinued at the leave stage. The year recorded for each case is the year when the application was made.

As can be seen in Chart 2, leave grant rates were largely steady from 2008 to 2012. After that, leave grant rates increased, growing from 18.0% in 2012 to 29.1% in 2016.

Chart 3 shows that grant rates on the merits at the JR stage in cases where leave was granted have also fluctuated from year to year, with a trend of increased rates over time, from a low of 38.7% in 2010 to a high of 54.1% in 2015. When these rates are combined with the leave grant rates, the overall JR success rate was flat until 2012, when it began increasing, going from 8.1% in 2012 to 16.0% in 2015.

B. Outcomes for Individual Leave Judges

Tables 2 and 3 set out data on outcomes depending on who served as the leave judge, where a judge decided leave in thirty or more cases during the relevant periods. The tables exclude cases that were withdrawn, not perfected, or where the respondent consented to (or did not oppose) leave. Such cases were excluded because judges will typically decide these cases the same way, so they do not tell us very much about differences across judges. The tables also exclude cases brought by the government, as these cases are atypical.

As can be seen in these tables, there are massive variations in grant rates across leave judges, both in the 2008 to 2011 period (Table 2) and in the 2013 to 2016 period (Table 3).

From 2008 to 2011, leave grant rates varied from 1.5%, 2.4%, and 3.3% (Crampton, Near, and Lagacé JJ, respectively) on the low end, to 95.9%, 33.1%, and 31.2% (Campbell, Shore, and Russell JJ, respectively) on the high end. During the same period, overall JR grant rates also varied depending on who served as the leave judge, ranging from 0.7%, 1.1%, and 1.9% (Crampton, Near, and Teitelbaum JJ, respectively), to 33.8%, 15.8%, and 12.9% (Campbell, Russell, and Dawson JJ, respectively).

Table 2: Outcomes by Leave Judge (2008-2011), Organized by JR Grant Rate*

Leave Judge	Leave Decisions	Leave Granted	JR Granted	Leave Grant Rate (%)	JR Grant Rate, Where Leave Granted (%)	JR Grant Rate, All Leave Decisions (%)
Campbell	74	71	25	95.9	35.2	33.8
Russell	349	109	55	31.2	50.5	15.8
Dawson	62	13	8	21.0	61.5	12.9
Mactavish	389	106	44	27.2	41.5	11.3
Barnes	223	48	25	21.5	52.1	11.2
O'Keefe	206	52	22	25.2	42.3	10.7
Heneghan	226	53	24	23.5	45.3	10.6
Hansen	78	24	8	30.8	33.3	10.3
Mandamin	216	40	21	18.5	52.5	9.7
Blanchard	137	35	13	25.5	37.1	9.5
O'Reilly	216	40	18	18.5	45.0	8.3
Martineau	436	97	36	22.2	37.1	8.3
Zinn	332	68	26	20.5	38.2	7.8
Shore	1,267	419	99	33.1	23.6	7.8
Mosley	799	158	61	19.8	38.6	7.6

Mainville	102	24	7	23.5	29.2	6.9
Rennie	176	28	12	15.9	42.9	6.8
Phelan	252	51	17	20.2	33.3	6.7
Pinard	104	15	7	14.4	46.7	6.7
Gauthier	45	6	3	13.3	50.0	6.7
Hughes	131	19	8	14.5	42.1	6.1
Montigny	838	140	48	16.7	34.3	5.7
Bédard	328	48	18	14.6	37.5	5.5
Snider	515	46	25	8.9	54.3	4.9
Kelen	882	84	41	9.5	48.8	4.6
Lemieux	705	80	32	11.3	40.0	4.5
Scott	153	13	6	8.5	46.2	3.9
Lutfy	116	9	4	7.8	44.4	3.4
Lagacé	30	1	1	3.3	100.0	3.3
Tremblay-Lamer	344	41	11	11.9	26.8	3.2
Harrington	562	28	15	5.0	53.6	2.7
Boivin	435	37	11	8.5	29.7	2.5
Noël	397	32	9	8.1	28.1	2.3
Beaudry	444	41	10	9.2	24.4	2.3
Frenette	180	14	4	7.8	28.6	2.2
Layden-Stevenson	48	3	1	6.3	33.3	2.1
Teitelbaum	156	14	3	9.0	21.4	1.9
Near	461	11	5	2.4	45.5	1.1
Crampton	271	4	2	1.5	50.0	0.7
All Leave Judges	**12,766**	**2,144**	**792**	**16.8**	**36.9**	**6.2**

*Where leave judge decided 30 or more decisions. Only includes opposed perfected leave applications brought by refugee claimants where cases were not discontinued at the leave stage.

Similarly, from 2013 to 2016, leave grant rates varied from 5.3%, 6.9%, and 9.9% (Snider, Scott, and Boivin JJ, respectively) on the low end, to 49.2%, 45.6%, and 42.0% (Heneghan, Mandamin, and Russell JJ, respectively) on the high end. Overall JR grant rates across leave judges ranged from 1.8%, 2.6%, and 3.0% (Boivin, Snider, and Gascon JJ, respectively) to 22.8%, 20.0%, and 19.6% (Mandamin, Boswell, and O'Keefe JJ, respectively).

Table 3: Outcomes by Leave Judge (2013-2016), Organized by JR Grant Rate*

Leave Judge	Leave Decisions	Leave Granted	JR Granted	Leave Grant Rate (%)	JR Grant Rate, Where Leave Granted (%)	JR Grant Rate, All Leave Decisions (%)
Mandamin	57	26	13	45.6	50.0	22.8
Boswell	120	46	24	38.3	52.2	20.0
O'Keefe	97	38	19	39.2	50.0	19.6
Russell	286	120	54	42.0	45.0	18.9
Elliott	38	15	7	39.5	46.7	18.4
Heneghan	250	123	42	49.2	34.1	16.8
Southcott	63	21	10	33.3	47.6	15.9
Strickland	155	52	24	33.5	46.2	15.5
Manson	103	32	15	31.1	46.9	14.6
Zinn	145	46	21	31.7	45.7	14.5
Kane	202	65	29	32.2	44.6	14.4
Martineau	203	49	29	24.1	59.2	14.3
O'Reilly	176	47	25	26.7	53.2	14.2
Brown	74	20	10	27.0	50.0	13.5
Barnes	75	18	10	24.0	55.6	13.3
Diner	106	24	13	22.6	54.2	12.3
Gleason	197	47	24	23.9	51.1	12.2
Locke	33	12	4	36.4	33.3	12.1
Mactavish	425	77	51	18.1	66.2	12.0
Roy	340	83	37	24.4	44.6	10.9
Gleeson	65	13	7	20.0	53.8	10.8
Simpson	249	49	26	19.7	53.1	10.4
LeBlanc	99	26	10	26.3	38.5	10.1
Gagné	312	73	30	23.4	41.1	9.6
Roussel	75	21	7	28.0	33.3	9.3
Mosley	455	110	40	24.2	36.4	8.8
McVeigh	162	32	14	19.8	43.8	8.6
Fothergill	95	19	8	20.0	42.1	8.4
Montigny	353	60	28	17.0	46.7	7.9
Bédard	412	59	30	14.3	50.8	7.3
Shore	976	185	71	19.0	38.4	7.3

St-Louis	127	24	9	18.9	37.5	7.1
Phelan	114	16	8	14.0	50.0	7.0
Hughes	131	17	9	13.0	52.9	6.9
Bell	46	10	3	21.7	30.0	6.5
Harrington	259	32	15	12.4	46.9	5.8
Tremblay-Lamer	178	23	10	12.9	43.5	5.6
Noël	268	33	15	12.3	45.5	5.6
Crampton	40	8	2	20.0	25.0	5.0
McDonald	40	9	2	22.5	22.2	5.0
Beaudry	195	22	9	11.3	40.9	4.6
Annis	290	38	12	13.1	31.6	4.1
Scott	58	4	2	6.9	50.0	3.4
Gascon	67	7	2	10.4	28.6	3.0
Snider	38	2	1	5.3	50.0	2.6
Boivin	283	28	5	9.9	17.9	1.8
All Leave Judges	**8,570**	**1,899**	**849**	**22.2**	**44.7**	**9.9**

*Where leave judge decided 30 or more decisions. Only includes opposed perfected leave applications brought by refugee claimants where cases were not discontinued at the leave stage.

Chart 4: Leave Grant Rates, by Leave Judges* (2008-2011) (Excl. Campbell J)

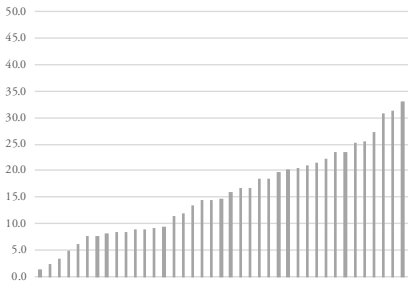
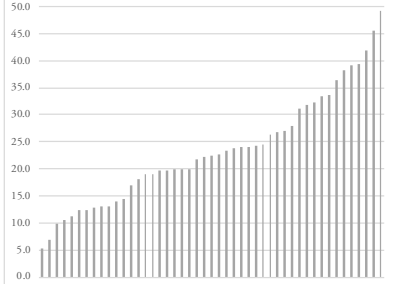
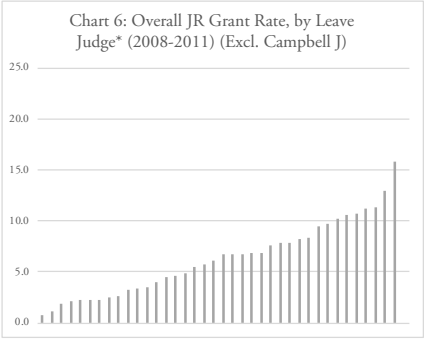
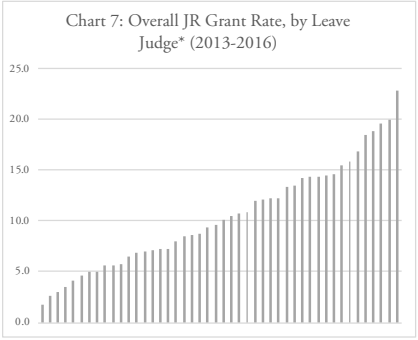


Chart 5: Leave Grant Rates, by Leave Judges* (2013-2016)



*Where leave judge decided 30 or more decisions. Only includes opposed perfected leave applications brought by refugee claimants where cases were not discontinued at the leave stage.





*Where leave judge decided 30 or more decisions. Only includes opposed perfected leave applications brought by refugee claimants where cases were not discontinued at the leave stage.

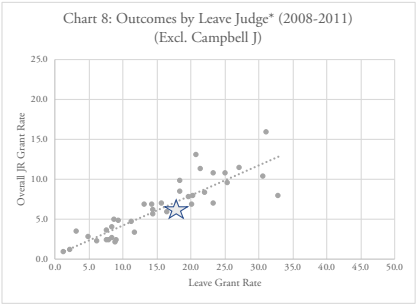
Charts 4 to 9 show the data from Tables 2 and 3 in formats that highlight the distributions of leave grant rates and overall JR grant rates, depending on who was assigned as the leave judge. The charts exclude Campbell J, which helps place the distributions from 2008 to 2011 and 2013 to 2016 on the same scale to facilitate comparisons because Campbell J is a significant outlier on the high end.

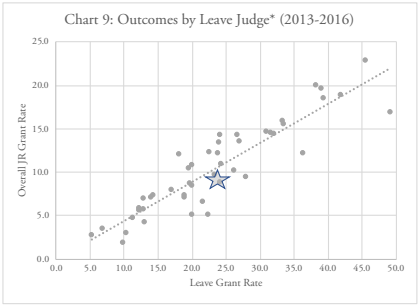
Charts 4 and 5 set out the distributions of leave grant rates across leave judges during the 2008 to 2011 and 2013 to 2016 periods, respectively. Two phenomena are striking in these charts.

First, leave grant rates increased between the two periods across many leave judges. For example, while there were fourteen judges with leave grant rates under 10% in 2008 to 2011, there were none in 2013 to 2016. Similarly, while there was only one judge with leave grant rates over 35% in 2008 to 2011 (Campbell J), there were seven in 2013 to 2016.

Second, these charts show that, setting aside Campbell J, variations in leave grant rates across many leave judges have persisted in the two periods under examination—with outcomes in leave applications continuing to vary substantially depending on who serves as the leave judge.

Similar observations can be made about Charts 5 and 6, which set out the distribution of rates of success overall for JR applications, depending on who served as the leave judge (excluding Campbell J). Again, we can see that overall success rates increased as between the 2008 to 2011 and the 2013 to 2016 periods across many leave judges, and that variations have persisted in overall JR success rates depending on who served as the leave judge. This is important because it shows that the judge overseeing the leave application not only affects whether applicants obtain leave, but also whether applicants succeed with their application overall. Moreover, the charts show that the variances in overall success rates are quite substantial across a wide range of leave judges.





*Where leave judge decided 30 or more decisions. Only includes opposed perfected leave applications brought by refugee claimants where cases were not discontinued at the leave stage. The star reflects the average leave grant rate and JR grant rate across leave judges during the relevant period.

Charts 8 and 9 combine Charts 4 to 7 to highlight how leave rates and overall JR rates for individual leave judges interact across the two periods under examination. Again, Campbell J is not included on these charts to make it easier to put the two periods under consideration on the same scale so as to facilitate comparisons.

A few points are worth highlighting regarding these charts.

First, there is a clear correlation between average leave grant rates and average overall JR grant rates. In both periods under examination, on average, as a judge's leave grant rate increases so too does the likelihood that the cases they decide at the leave stage will succeed overall. This is an important observation because it means that some cases that would likely succeed on the merits at the JR stage before most judges are not making it to the JR stage because they were assigned at the leave stage to a judge who is generally less willing to grant leave than their colleagues. In other words, it is not the case that there is a shared view on the Court about what constitutes a strong case on the merits. Leave judges are not simply diverging on how strong a case needs to be in order to justify leave, with some judges granting leave to a larger number of weaker cases that mostly fail at the JR stage. If that were the case, the trend line would be largely horizontal (i.e., there would be variations in leave grant rates, but overall JR grant rates would not vary substantially across leave judges).[50]

50. Another way of thinking about this point is to ask how many cases would be granted at the JR stage if there were no leave requirement and to compare that with the number of cases that in fact made it through both stages of the process. For the 2008 to 2011 period, we can approximate the first figure using Campbell J's practice of granting leave in almost all cases (95.9%), knowing that cases assigned to him at the leave stage ended up succeeding overall 33.8% of the time. If around one-third of cases would succeed on the merits if all cases

Second, these charts highlight changes in the distribution of leave grant rates and overall JR grant rates across leave judges between the two periods under study: the data points are more spread out, both horizontally (i.e., leave grant rates) and vertically (i.e., overall JR grant rates) in 2013 to 2016 (Chart 9) than in 2008 to 2011 (Chart 8). There are other differences between the two periods that are visible in these charts as well, such as a move away from a tightly clustered number of judges on the low end of both leave and overall JR grant rates in 2008 to 2011. The most important observation for present purposes, however, is that the charts do not show convergence in leave grant rates in the 2013 to 2016 period (excluding Campbell J). If anything, the opposite is true.[51]

Third, in both periods under examination, while there is a correlation between leave grant rates and overall JR grant rates depending on who served as the leave judge, the correlation is not perfect. As an example, consider that, from 2013 to 2016, Annis J granted leave in 13.1% of cases, and when he served as the leave judge 4.1% of cases succeeded overall. By contrast, during the same period, Mactavish J granted leave somewhat more frequently, 18.1% of the time. However, when she served as the leave judge, claimants were much more likely to succeed with their claims overall (12.0%) than when Annis J was the leave judge. Put differently, when Annis J granted leave from 2013 to 2016, 31.6% of the applications succeeded on the merits at the JR stage, whereas when Mactavish J granted leave, 66.2% of the applications succeeded on the merits. This means not only that Annis J was more likely to refuse leave than Mactavish J, but also that when Annis J granted leave he was more likely to do so for cases that were not viewed by his colleagues as well founded on the merits at the JR stage.

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proceeded to the JR stage (compared to 6.2% of cases that succeeded overall during this period with the leave requirement in place) that means that over 3,000 cases from 2008 to 2011 that would have succeeded on the merits instead failed because of the leave requirement.

51. Consider that the standard deviation in leave grant rates across judges (excluding Campbell J) from 2008 to 2011 was 8.4 and that the standard deviation for overall success rates across leave judges (excluding Campbell J) during the same period was 3.6. The equivalent figures for 2013 to 2016 were higher: 10.4 and 5.2, respectively. It is worth noting that standard deviation is highly sensitive to extreme outliers and that Campbell J is an extreme outlier in leave grant rates in 2008 to 2011 (95.9% compared to the 16.8% average), but that he did not decide enough cases (i.e., thirty or more) in 2013 to 2016 to be included in the calculations for that period (he only decided nine cases during this period with an 88.9% grant rate). Calculations that include him in the first period but remove him from the second period (due to the small number of cases he decided in the latter) would show some convergence in leave grant rates. With Campbell J included in the first period, the standard deviation for leave grant rates in the first period was 15.3 (compared to 10.4 in the second period where he is excluded) and the standard deviation for overall success rates across leave judges in the first period was 5.7 (compared to 5.2 in the

C. Outcomes for Individual Judicial Review Judges

Thus far, we have considered the impact that leave judges have had on outcomes at the leave and JR stage. As we will now see, there is also variation in grant rates at the JR stage depending on who serves as the JR judge.

Tables 4 and 5 show outcomes at the JR stage in cases where leave has been granted, depending on who serves as the JR judge. The tables exclude cases where the respondent consented to the application (because judges will typically decide such cases the same way) and cases where the government is the applicant (because such cases are atypical).

As can be seen in these tables, during both the 2008 to 2011 and the 2013 to 2016 periods, a claimant's chances of success varied greatly depending on who served as the JR judge. From 2008 to 2011, claimants were much better off at the JR stage with Campbell, Russell, or O'Keefe JJ (89.4%, 53.6%, 51.6%, respectively) than with Lagacé, Boivin, or Near JJ (9.4%, 14.1%, 15.0%, respectively). Similarly, from 2013 to 2016, claimants were much more likely to succeed at the JR stage with Campbell, O'Reilly, or Boswell JJ (95.1%, 69.8%, 60.0%, respectively) than with Annis, St. Louis, or Roy JJ (13.8%, 18.9%, 19.5%, respectively).

second period where he is excluded). What this means is that any convergence in grant rates between the two periods (as calculated using a metric that is highly sensitive to extreme outliers) would be attributable exclusively to the fact that a single extreme outlier judge from the first period did not decide a sufficient number of decisions to be included in the calculations for the second period. All of that to say, that when one excludes Campbell J from the calculations for both periods, there is no evidence of convergence in rates across judges.

Table 4: Outcomes by JR Judge (2008-2011), Organized by JR Grant Rate*

JR Judge	JR Decisions	JR Granted	JR Rate (%)
Campbell	94	84	89.4
Russell	112	60	53.6
O'Keefe	64	33	51.6
Mandamin	65	32	49.2
Mactavish	46	22	47.8
Rennie	66	31	47.0
Heneghan	41	18	43.9
Zinn	88	38	43.2
Mosley	55	23	41.8
Lemieux	36	15	41.7
Shore	96	39	40.6
Phelan	41	16	39.0
O'Reilly	71	26	36.6
Barnes	39	14	35.9
Hughes	64	21	32.8
Kelen	46	15	32.6
Scott	74	24	32.4
Martineau	50	16	32.0
Harrington	76	24	31.6
Snider	66	19	28.8
Beaudry	106	30	28.3
Tremblay-Lamer	31	8	25.8
Bédard	44	10	22.7
Montigny	71	16	22.5
Crampton	56	10	17.9
Pinard	79	14	17.7
Near	80	12	15.0
Boivin	71	10	14.1
Lagacé	32	3	9.4
All JR Judges	**2,079**	**758**	**36.5**

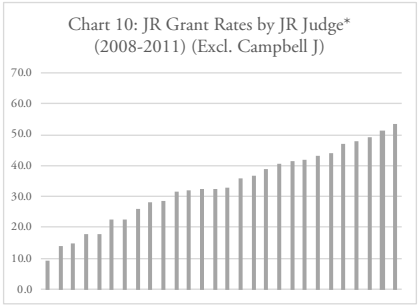
*Where JR judge decided 30 or more JR decisions. Only includes applications brought by refugee claimants where leave was granted, where the JR was opposed, and where cases were not discontinued.

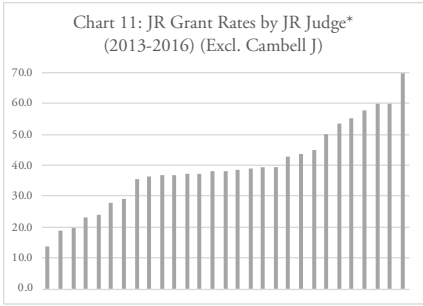
Table 5: Outcomes by JR Judge (2013-2016), Organized by JR Grant Rate*

JR Judge	JR Decisions	JR Granted	JR Rate (%)
Campbell	41	39	95.1
O'Reilly	43	30	69.8
Boswell	50	30	60.0
Russell	40	24	60.0
Zinn	45	26	57.8
Mactavish	38	21	55.3
Southcott	41	22	53.7
Brown	58	29	50.0
Bell	31	14	45.2
Heneghan	57	25	43.9
Fothergill	42	18	42.9
Simpson	43	17	39.5
McVeigh	51	20	39.2
Kane	46	18	39.1
Elliott	31	12	38.7
Diner	68	26	38.2
Gleeson	34	13	38.2
Strickland	51	19	37.3
Martineau	35	13	37.1
Hughes	49	18	36.7
Manson	49	18	36.7
Gagné	41	15	36.6
Shore	101	36	35.6
Tremblay-Lamer	31	9	29.0
LeBlanc	43	12	27.9
Locke	46	11	23.9
Noël	39	9	23.1
Roy	41	8	19.5
St-Louis	53	10	18.9
Annis	58	8	13.8
All JR Judges	**1,678**	**694**	**41.4**

*Where JR judge decided 30 or more JR decisions. Only includes applications brought by refugee claimants where leave was granted, where the JR was opposed, and where cases were not discontinued.

Charts 10 and 11 provide the same information in a format that highlights the distribution of JR grant rates (excluding Campbell J as he is an outlier on the high end). The charts show that, while during both periods there are many judges who cluster around the average JR grant rate, there are also many judges in both periods with substantially higher or lower JR grant rates than their colleagues.





*Where JR judge decided 30 or more JR decisions. Only includes applications brought by refugee claimants where leave was granted, where the JR was opposed, and where cases were not discontinued.

D. Conclusions from the Study

The data considered in this article shows that little has changed since the earlier "Luck of the Draw" study. Notwithstanding the Court's attempts to increase convergence in leave grant rates, from 2013 to 2016 a claimant's chances of success in securing leave and ultimately succeeding with their application for judicial review continued to depend a great deal on who was assigned as the leave judge. The ranges in grant rates across leave judges are substantial, with leave grant rates ranging from 5.3% to 49.2% and with overall success rates ranging from 1.8% to 22.8%. In other words, from 2013 to 2016, if a claimant was lucky with their leave judge assignment, they could be up to 11.1 times more likely to succeed with their application than if they were unlucky with leave judge assignment. And, perhaps most importantly, this is not a phenomenon restricted to a handful of outlier judges. Rather, leave grant rates vary across the board.

The same is true at the JR stage in cases where leave is granted. This study has shown that from 2013 to 2016 there continued to be a remarkable range in grant rates on the merits depending on who served as the JR judge, from 13.8% on the low end, to 95.1% on the high end—and even if Campbell J is set aside as an outlier on the high end, the range still runs from 13.8% to 69.8%.

In short, this study has found that refugee claimants whose applications for judicial review are denied continue to have good reason to wonder whether this was because of the facts of their case and the law, or whether they simply lost the luck of the draw.

III. Implications & Recommendations

Study after study has found that outcomes in applications for judicial review of refugee determinations appear to depend all too often on the luck of the draw, that is, on who happens to be assigned to decide cases.[52] The current study demonstrates that despite efforts made by the Court to enhance consistency across judges in recent years, troubling variations nonetheless persist. When this is combined with the incredibly high stakes involved in refugee adjudication—with lives hanging in the balance—it seems to me that the time for study and discussion has passed. It is time for meaningful action.

While action is urgently needed, it is also essential that any responses to inconsistencies respect judicial independence, particularly in refugee law, where judicial independence has sometimes come under attack by other branches of government for political reasons.[53] Consistency is an important aspiration, but it is only one of many values in a well-functioning legal system.

Moreover, in considering responses to inconsistent judicial decision making we must keep in mind that expecting all judges to decide all cases similarly is not only unrealistic, but also undesirable. We have human beings—rather than algorithms—as judges for a reason. We want adjudication to be sensitive to the unique circumstances of cases. We want the law to develop. We want new and diverse perspectives on the Court to affect judicial reasoning and outcomes.

The following recommendations aim to balance the need to ensure that refugee claimants have fair access to consistent judicial oversight on the one hand, and the need to respect judicial independence and the flexibility that individual judges must have to decide cases in light of the applicant's specific circumstances on the other hand.

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52. See e.g. Ian Greene & Paul Shaffer, "Leave to Appeal and Leave to Commence Judicial Review in Canada's Refugee-Determination System: Is the Process Fair?" (1992) 4:1 Intl J Refugee L 71; Mary C Hurley, "Principles, Practices, Fragile Promises: Judicial Review of Refugee Determination Decisions Before the Federal Court of Canada" (1996) 41:2 McGill LJ 317; Ian Greene et al, *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Toronto: James Lorimer & Company, 1998) at 19–21; Jon B Gould, Colleen Sheppard & Johannes Wheeldon, "A Refugee from Justice? Disparate Treatment in the Federal Court of Canada" (2010) 32:4 Law & Pol'y 454; Rehaag, "Luck of the Draw", *supra* note 1; Norris, "Examiner Inconsistency", *supra* note 45.

53. See Rehaag, "Luck of the Draw", *supra* note 1 at 32–34.

A. Recommendation for Parliament: Abolish or Reform the Leave Requirement

In my view this study and the many others that precede it offer strong evidence in favour of the argument that refugee claimants should have full access to the Federal Court without first needing to go through a leave requirement. This requirement has proven to be arbitrary, non-transparent, and not amenable to easy fixes within current institutional limits. If abolishing the leave requirement is not possible due to resource implications, then at a minimum, the leave requirement should be reformed to enhance fairness—for example, by having two judges independently review leave applications, with differences in opinion being resolved in favour of the applicants.[54]

Thus far, however, calls to abolish or reform the leave requirement have not been embraced by Parliament. This is likely due to the significant resource implications of doing away with the leave requirement or of ensuring that denials of leave only occur with the approval of more than one judge. Without substantial additional resources both for the Court and for other parts of the process (e.g., the Department of Justice Canada, legal aid) the system would be hard pressed to dramatically expand the number of judicial review hearings held in a timely manner. Similarly, requiring that files be reviewed by two judges before they are denied leave would mean that judicial resources allocated to leave decisions would almost double. I expect that there is little political appetite for an investment of these sorts of resources in the judicial review process—particularly in a context where the number of asylum seekers arriving in Canada has increased in recent years.[55]

It may well be, however, that constitutional litigation will force the matter. This study, and others like it, show that the leave requirement has proven to be applied unfairly over a long period of time, despite attempts by the Court to improve consistency. Section 7 of the *Canadian Charter of Rights and Freedoms* provides refugee claimants the right not to be deprived of life, liberty and security of the person, other than through processes that comply with the principles of fundamental justice.[56] By imposing an arbitrary barrier on access to judicial oversight in refugee adjudication, the leave requirement arguably violates that right and may therefore be vulnerable to a constitutional challenge.

54. See generally *ibid* at 34–41 (discussing possible reforms to the judicial review system in light of the luck of the draw, including having two judges review applications).

55. See the text accompanying note 37.

56. S 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11. See *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177 at 202, 17 DLR (4th) 422.

In the meantime, there are several other possible reforms that could be pursued that would, in my view, help improve—albeit with limitations—the existing system, without requiring legislative intervention or constitutional litigation.

B. Recommendation for the Court: Same Leave Judge as Merits Judge

In most applications for judicial review where leave is granted, a different judge decides the case on the merits at the JR stage than the judge who decided to grant leave. This is not due to concerns about having the same judge decide both stages of the application, because this does occur with some regularity without causing problems. Rather, cases are assigned randomly to judges separately for both stages in the process (taking into consideration the availability of judges at each stage) so the likelihood of being assigned the same judge for the leave and merits stage is quite low. According to the data used in this study, for example, from 2008 to 2016 in cases where leave was granted with opposition, the leave judge and the JR judge were the same 2.9% of the time.[57]

In this context, one problem with the existing system is that it is structured in a way that exacerbates the luck of the draw for applicants and improves the luck of the draw for respondents. Applicants need to win the luck of the draw twice—once at the leave stage and once at the merits stage—to succeed with their applications, whereas respondents only need to win the luck of the draw once at either stage to have applications dismissed. Because 99.3% of the time the applicant is a refugee claimant rather than the government, the luck of the draw is structured to favour the government rather than refugee claimants.

This is, in my view, the exact opposite of how the system should be designed.

As Hilary Evans Cameron has persuasively argued, if we know that a legal process includes a certain degree of uncertainty (in this case caused by the arbitrariness of outcomes hinging in part on who decides the case), and if we think that this uncertainty cannot be eliminated without giving up other important objectives (in this case judicial independence), then we need to decide what kind of errors we most want to avoid and design the process to minimize those errors.[58] We make this sort of choice in other legal processes

57. From 2008 to 2016, there were 4,362 applications where leave was granted despite the opposition of the respondent, excluding cases that were discontinued and excluding judgments on consent. Of these, 125—or 2.9%—had the same judge listed for the JR stage as the one listed at the leave stage. This is approximately what one would expect based on random assignment of judges given the number of judges on the court during this period (i.e., a full complement during this period ranged from thirty-three to thirty-seven). See the text accompanying note 29.

58. See Hilary Evans Cameron, *Refugee Law's Fact-Finding Crisis: Truth, Risk, and the Wrong Mistake* (Cambridge, UK: Cambridge University Press, 2018).

all the time. For example, criminal law includes processes (e.g., the standard of proof beyond reasonable doubt) to prioritize avoiding false convictions, even if that means increasing the chances of false acquittals.[59]

In the refugee law context, false negatives (i.e., a refugee not being recognized as such) have extremely serious consequences both for individuals (e.g., refugees may be deported to face persecution, torture or death) and for the state (e.g., deporting a person who meets the refugee definition breaches international law). As such, false negatives are the errors we should be most keen to avoid.[60]

The current system for deciding Federal Court applications for judicial review in refugee law cases, however, is better at avoiding false positives than false negatives. That is because, in the vast majority of cases, which are brought by refugee claimants, a single outlier judge can deny an application that most judges would grant (i.e., false negative), but two outlier judges must agree that a case is well founded in order to grant an application that most judges would refuse (i.e., false positive).

This could be partly corrected by requiring that the judge who decides cases on the merits be the same judge as the one who decides leave, which would stop amplifying the luck of the draw to the disadvantage of refugee claimants and to the advantage of the government.

In some ways, this change would also shift the nature of the leave requirement.

Right now, the leave requirement acts as a gatekeeper to having the matter decided on the merits before the Federal Court. As this study and others have shown, that gatekeeping function is being applied in an arbitrary manner.[61] Judges who are reluctant to grant leave are denying leave to cases that might otherwise have a good chance of succeeding.

If, by contrast, the leave judge and the merits judge were the same judge, the leave requirement would instead act as a tool for effectively allocating judicial resources. If a judge is of the view that a case has no reasonably arguable case and the same judge would ultimately hear that case, then there would be little value in holding a hearing, as the case would be destined to fail before that judge.

This would not, of course, eliminate the luck of the draw. Outcomes would continue to differ depending on which judge was assigned. It would also not eliminate some of the other problems with the leave requirement—including,

59. See *ibid* at 15–21.

60. See *ibid* at 175–211.

61. See Norris, "Examiner Inconsistency", *supra* note 45; Rehaag, "Luck of the Draw", *supra* note 1; Gould, Sheppard & Wheeldon, *supra* note 52; Greene & Shaffer, *supra* note 52.

for example, the lack of transparency caused by judges not giving reasons when they deny leave.[62]

No doubt there would also be some potentially significant administrative challenges. The system for scheduling hearings and assigning leave applications would need to be revised.[63] There would be complications in terms of availability of judges and how judges' schedules are managed. Processes would need to be created where something unexpected occurs and judges are no longer available.

But notwithstanding these limitations and challenges, this is a feasible change that would stop amplifying the luck of the draw to the disadvantage of claimants—and it is a change entirely within the control of the Court without requiring any legislative or regulatory measures. It does not in any way diminish respect for judicial independence. It could be implemented with relatively modest resource implications. Indeed, the change may even bring administrative efficiencies, because only one judge needs to review each file.

If the Court is serious about wanting to do something to address the luck of the draw, it seems to me that this reform should be embraced.

C. Recommendation for Judges: Alternative Judicial Approaches

In the event that the leave requirement is not abolished or reformed, and that the Court continues with its practice of generally assigning a different judge at the leave and JR stages, leave judges could attempt to take measures themselves to reduce the luck of the draw by carefully considering how they apply the test for leave. This is not a full solution, partly because it leaves things up to individual judges, some of whom will likely choose not to pursue this option. However, in the absence of institutional take-up regarding the other proposals, this could at least mitigate some of the harms caused by existing practices and this could give judges who are concerned about the variance something that they can do in response.

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62. See generally Rehaag, "Luck of the Draw", *supra* note 1 at 39–41 (discussion of some of these problems).

63. A process would need to be created, for example, to prevent skewed distributions of leave decisions across judges. This is important to avoid scenarios whereby judges who are more likely to deny leave decide substantially more leave applications than their more generous colleagues. The latter would likely occur if judges who are less likely than their colleagues to grant leave kept on deciding additional leave applications until they filled their available JR hearing spots, because it would take them more leave applications to fill the available spots than it would take their colleagues who are more likely to grant leave. Such a scenario should be avoided because it would amplify the luck of the draw to the disadvantage of applicants (i.e., applications would have a higher chance of being decided by a judge who is more likely than their colleagues to deny leave).

The test for leave is whether there is a reasonably arguable case.[64] One way of thinking about this test is whether, in the subjective view of the leave judge, the applicant has made out a reasonably arguable case. As this study and others before it demonstrate, however, this standard creates unfairness because judges do not agree on what constitutes a well-founded case on the merits (i.e., JR rates vary substantially across JR judges) let alone what constitutes a reasonably arguable case (i.e., leave rates vary substantially across leave judges).

A preferable approach, in my view, would be for the leave judge to consider not whether they think a reasonably arguable case has been made, but rather whether any of their colleagues—including those who are most permissive in granting leave—might be of the view that the applicant has made out a reasonably arguable case. Judges who adopt this approach would only deny leave in cases where that judge thinks that all other judges on the Court would agree that there is no reasonably arguable case. If the leave judge properly applies this approach, then leave will only be denied where there is no purpose to proceeding to a hearing because the case would eventually be denied on the merits by whichever judge was assigned at the JR stage.[65]

If judges adopt this approach there may still be problems related to the luck of the draw in leave determinations. It is possible, for example, that leave judges will differ in the degree to which they can accurately predict how their colleagues might view a case. In other words, some judges might not be skilled at looking at cases from the perspectives of their colleagues.

Nonetheless, this approach would significantly improve the luck of the draw by encouraging leave judges to be cautious about denying leave except in the clearest of circumstances. This would help reduce the likelihood of false

64. See *Bains v Minister of Employment and Immigration* (1990), 109 NR 239 at paras 1, 3, 47 Admin LR 317 (FCA). See also Rehaag, "Luck of the Draw", *supra* note 1 at 7–9.

65. Note that this approach is prefaced on mutual respect among judges on the Court. It assumes that, while judges may disagree (and even strongly disagree) with each other about how to best interpret the law, they nonetheless believe that their colleagues approach their decisions with a level of care, skill, and attentiveness to the rule of law, such that their views should be treated with respect. If the leave judge were to believe that no judge properly doing their job could possibly grant leave in a particular case while also believing that a particular colleague might nonetheless grant leave in the case because they do not do their job properly, then it may be appropriate for the deciding judge to deny leave. But under the approach I am proposing this would be subject to a very high standard. It would not be sufficient that the deciding judge thinks they clearly have the law right and that their colleague clearly misinterprets the law. Rather, what is required is that the deciding judge be prepared to say that their colleague shows such disregard for the law that it amounts to a breach of professional and ethical norms for judges, and thus that their views should not be shown any respect. In my view, this would be very rare indeed.

negatives, the problem that, as noted above, is the one that the system should be most keen to avoid.[66] It would also make the measures that the Court has adopted to try to address variability in leave grant rates more effective. If judges adopt this approach, the Court should continue to hold meetings where judges discuss their views about particular files. Such discussions would not be aimed at persuading each other that any particular judge is right about whether a reasonably arguable case is made out in particular files. Rather, all that the discussion needs to show is that there is disagreement on the Court about that question in particular files—in which case all judges would be encouraged to grant leave in those sorts of cases irrespective of their subjective assessments.

Judges could also benefit from a similar approach at the merits stage, where, as we have seen there continues to be substantial variation in grant rates across JR judges. In the face of such variation, judges could ask themselves not whether, in their subjective view, the application has been made out on a balance of probabilities (i.e., the civil standard that applies to determinations on the merits at the JR stage). Rather, judges could ask whether any of their colleagues could reasonably be persuaded that the application was made out on a balance of probabilities. Then, if the judge wants to nonetheless deny the application, that judge could explicitly acknowledge in their written reasons that they are taking an approach that differs from the one that some of their colleagues might take. In their written reasons they could also explain why they are taking a different approach. Then, they could certify the case for appeal so that the Federal Court of Appeal has an opportunity to resolve the disagreement.[67] This would continue to provide for judicial independence and allow divergent approaches to inform developments in the law, while also ensuring that judges are self-reflective and transparent about disagreement with their colleagues in a manner that facilitates further judicial oversight.

Conclusion

Federal Court decision making in refugee law cases is inconsistent, with outcomes in cases that involve life or death decisions turning all too often on the luck of the draw, that is, on who decides the case. This is unacceptable. While the Court has responded to an earlier study of this phenomenon by making

66. See Section III.*B*, *above*, for more on this topic.

67. Federal Court determinations on the merits in immigration and refugee law are only subject to appeal to the Federal Court of Appeal where the Federal Court judge issuing the decision "certifies that a serious question of general importance is involved and states the question". *IRPA*, *supra* note 30, s 74(d).

efforts to try to address inconsistent decision making through discussions among judges, the current study has shown that those measures have not had the desired impact.

In light of these findings, this article has offered recommendations for reform aimed at key actors in the system. First, Parliament could abolish or reform the leave requirement, which has proven to be an arbitrary barrier preventing refugee claimants from fairly accessing judicial oversight. Second, absent legislative changes, the Court could at least ensure that in cases where leave is granted, the judge granting leave is the same judge as the one who decides the case on the merits at the JR stage, which would stop amplifying the luck of the draw to the disadvantage of refugee claimants. Third, if both Parliament and the Court refuse to act, individual judges could nonetheless adopt approaches at both the leave and JR stages that would help reduce the luck of the draw.

The time for study is over. It is now time for action.