

Applying the New Burden of Proof: Lessons from the Canadian Experience

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Abstract

As a result of recent amendments to the UK Nationality and Borders Act asylum seekers will now have to establish certain facts to a balance of probabilities. This paper discusses the impact of those changes and drawing on the Canadian jurisprudence, which has applied the balance of probabilities standard to factual issues since 1989, distinguishes between those issues that have to be established to the higher balance of probabilities threshold and those for which the lower standard of risk, “the reasonable risk of persecution” should be used.

Keywords balance of probabilities; burden of proof; standard of risk; reasonable risk of persecution

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Contents

1.	Introduction	3
2.	Fact-finding in Refugee Determination	4
2.1	Burden of proof	5
2.2	Standard of proof versus standard of risk	5

1. Introduction

The UK Nationality and Borders Act 2022 has recently been amended to include a clause which sets out the burden of proof to be applied when assessing the facts that form the basis for a claim for refugee protection. The statute now requires that the asylum seeker establish the facts relevant to the assessment of their risk to a balance of probabilities and that these facts are then to be applied to the assessment of the future risk of persecution.¹ Clause 32 requires that tribunals apply the Balance of Probabilities to:

(a) whether the asylum seeker has a characteristic which could cause them to fear persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion (or has such a characteristic attributed to them by an actor of persecution), and

(b) whether the asylum seeker does in fact fear such persecution in their country of nationality (or in a case where they do not have a nationality, the country of their former habitual residence) as a result of that characteristic.

The same clause requires that decision makers to apply the reasonable likelihood test to the question of

(a) they would be persecuted as a result of the characteristic mentioned in subsection (2)(a), and

(b) they would not be protected as mentioned in section 34.²

Determining when to apply the balance of probabilities and when to apply the reasonable likelihood test in these circumstances is not always straightforward. In Canada tribunals have been applying the balance of probabilities test to the facts underlying the claim while applying the reasonable likelihood test to the risk of persecution since 1989 when the Federal Court of Appeal decided *Adjei v MEI*.³ In *Adjei* the Federal Court of Appeal determined that the asylum seeker had to establish the facts of his case to a balance of probabilities but that the tribunal then had to determine where there was more than a mere possibility of a risk of persecution.

Lessons learned from the Canadian experience over the past thirty years particularly related to the interplay between the balance of probabilities and the reasonable likelihood test may be of assistance to practitioners in the UK who are now faced with this new legislated requirement.

¹ Section 32 Interpretation of the Convention Article 1(A)(2): well-founded fear

(1) In deciding for the purposes of Article 1(A)(2) of the Refugee Convention whether an asylum seeker's fear of persecution is well-founded, the following approach is to be taken.

(2) The decision-maker must first determine, on the balance of probabilities—(a) whether the asylum seeker has a characteristic which could cause them to fear persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion (or has such a characteristic attributed to them by an actor of persecution), and (b) whether the asylum seeker does in fact fear such persecution in their country of nationality (or in a case where they do not have a nationality, the country of their former habitual residence) as a result of that characteristic.

(3) Subsection (4) applies if the decision-maker finds that—(a) the asylum seeker has a characteristic mentioned in subsection (2)(a) (or has such a characteristic attributed to them), and (b) the asylum seeker fears persecution as mentioned in subsection (2)(b).

(4) The decision-maker must determine whether there is a reasonable likelihood that, if the asylum seeker were returned to their country of nationality (or in a case where they do not have a nationality, the country of their former habitual residence)—(a) they would be persecuted as a result of the characteristic mentioned in subsection (2)(a), and (b) they would not be protected as mentioned in section 34. (5) The determination under subsection (4) must also include a consideration of the matter mentioned in section 35 (internal relocation).

² The balance of probabilities test is not extended to issues related to internal relocation set out in clause 3 save and except to the extent that the factors subject to the balance of probabilities test set out in clause 32 would also be relevant to issues of internal relocation.

³ *Adjei v MEI* 1989 2 FC 680. Here the Court noted: "It was common ground that the objective test is not so stringent as to require a probability of persecution. In other words, although an applicant must establish his case on a balance of probabilities, he does not nevertheless have to prove that persecution would be more likely than not."

2. Fact-finding in Refugee Determination⁴

In order to determine whether or not a claimant is entitled to recognition as a refugee, the tribunal must make a determination as to the facts of the case and apply those facts to the definition of a Convention Refugee. The factual issues that need to be determined by the tribunal relate to the past and also to the future risk.

Facts related to the persons past might be:

- 1) identity
- 2) profile (i.e. religious, political, sexual orientation or ethnic background)
- 3) past persecution. If the person suffered past persecution could that person give rise to the application of the compelling grounds exception?
- 4) did the person seek the protection of the state?
- 5) has there been a change in circumstances in the country of persecution since the person fled such that the person no longer has a well founded fear of persecution?
- 6) has there been a change in circumstances in the country of persecution or in the claimant's profile so that the person now has a well founded fear of persecution?
- 7) did the person commit a war crime, crime against humanity or a serious non political crime?
- 8) did the person have the rights of a citizen in a third country?
- 9) if the person is stateless what were their countries of former habitual residence.
- 10) Does the person fear persecution in their country of nationality or former habitual residence?

Facts that are relevant to the assessment of future risk might be:

- 11) Country conditions at the time of the determination of the claim;
- 12) Is there a place in the country where there the person can relocate?
- 13) Is it reasonable that the person seek to relocate internally today?
- 14) Is state protection available to the claimant today??
- 15) is the risk that the claimant fears a personalized or generalized risk?

The claimant's identity is a crucial element of any claim as the tribunal must determine the claimant's identity and nationality in order to be able to assess the country of reference to determine whether they face a risk upon return. In the case of decisions by a tribunal as to whether or not a person meets the definition of a Convention Refugee the tribunal must make a determination about the particular profile and experiences of the claimant⁵ and the country conditions that are relevant to the determination of whether or not the person faces a risk in the country of reference.

Their past experiences are relevant because, if they have been the victims of persecution in the past, this may well give rise to an inference that they would suffer persecution in the future.⁶ The tribunal must consider the claimant's testimony, the testimony of any other witnesses and the documentary evidence so as to make findings of fact relevant to the claimant's past experiences and profile. At the same time,

⁴ Hilary Evans Cameron's *Refugee Law's Fact-Finding Crisis* Cambridge University Press 2018 provides a compelling analysis of the challenges facing tribunals when they make findings of fact in the refugee context.

⁵ See *Sandoval v MCI* 2018 FC 1110 see *Boroumond v MCI* 2007 FC 1219 at par 63

⁶ See *Fernandopulle v MCI* 2005 FCA 91 where the Court rejected the argument that past persecution created a rebuttable presumption that a fear is well founded noting: Proof of past persecution for one of the listed reasons may support a finding of fact that the claimant has a well-founded fear of persecution in the future, but it will not necessarily do so. If, for example, there is evidence that country conditions have changed since the persecution occurred, that evidence must be evaluated to determine whether the fear remains well founded.

the tribunal must also evaluate the country conditions so as to be able to assess the likelihood that the claimant will suffer persecution, torture or other forms of cruel and unusual treatment.

In the refugee determination process the fact-finding process is fraught with difficulties. Claimants come from different cultures and this makes the task of evaluating credibility extremely difficult. In most cases claimants will not be able to obtain documents which corroborate essential aspects of their claim. Claimants often require an interpreter. The tribunal must rely on the proficiency of the interpreter when assessing the credibility of the evidence. Mistakes in interpretation are all too common and these may have a material impact on the tribunal's evaluation of the evidence. Even if the interpretation is accurate, the tribunal loses the impact of hearing the claimant express themselves in their own words, relying on the interpreter to provide the nuances that may impact the tribunal's assessment of the claimant's honesty. Claimants are often victims of trauma and this will often have an impact on their ability to recall and recount events. Moreover, it will often be difficult to evaluate the plausibility of the evidence because the claims involve societies with different values and customs.

Yet, notwithstanding all of these challenges, tribunals are required to make factual determinations when evaluating claims for protection and the onus is on claimants to establish their claims to a balance of probabilities. Understanding which facts must be established to this higher threshold is crucial to ensuring that claimants are treated fairly.⁷

2.1 Burden of proof

The burden of proof refers to which party holds the evidentiary burden to establish the facts that are needed to satisfy the tribunal to make a positive determination. In refugee matters, the initial burden that they meet the definition of a Convention Refugee rests with the refugee claimant. In cases where the claimant alleges that they cannot obtain state protection the claimant has the evidentiary burden of establishing that state protection is not available.⁸

2.2 Standard of proof versus standard of risk

The standard of proof refers to the evidentiary standard that is applied by the tribunal when they determine the facts. In Canada, the standard to be applied to the findings of fact made by the tribunal deciding claims for refugee status is the balance of probabilities. However, the balance of probabilities standard applies only to the factual determinations. Once the tribunal makes the findings of fact it must apply these factual conclusions to the evidentiary standard relevant to the issue before it. In cases where the tribunal is determining whether the person is a Convention Refugee the tribunal must apply a lower standard to the assessment of risk and must determine whether there is more than a mere possibility of persecution.⁹ As such the tribunal must apply the facts to determine whether this risk threshold is met.

In *Gomez Dominguez v Canada (Citizenship and Immigration)*¹⁰ the Court explained this distinction between the standard of proof and the standard of risk in the following terms:

18 Delineating the scope of application of each of these concepts is not an easy task. See, for example, *Alam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 4, paragraphs 5-8; *Ramanathy v Canada (Citizenship and Immigration)*, 2014 FC 511, paragraphs 15-17. Putting too much emphasis on proof on a balance of probabilities may tend to obscure the fact that asylum claimants are not required to demonstrate that they will probably be persecuted: Hilary Evans Cameron, *Refugee Law's Fact-Finding Crisis: Truth, Risk, and the Wrong Mistake*, (Cambridge, UK:

⁷ In addition, in Canada the Courts have accepted relying on the UNHCR handbook that claimants should be given the benefit of the doubt. That notion will be developed in another paper which will be prepared in the coming months. See *Chan v MEI* 1995 3 SCR 593 at par 145

⁸ *Flores Carillio v MCI* 2008 FCA 94

⁹ See *Adjei v MEI* [1989] 2 F.C. 680 (C.A.).

¹⁰ 2020 FC 1098 In this case the Court did conclude that the tribunal erred by applying the balance of probabilities test to the standard of risk (see par 27)

Cambridge University Press, 2018). Nevertheless, in many claims, the primary issue is whether the events of which the applicant alleges to have been a victim actually took place. There is no doubt that such events must be proven on a balance of probabilities. The risk resulting from these facts, however, is assessed according to the less demanding test of serious possibility.

In *Pacificador v Canada (Citizenship and Immigration)*,¹¹ the Federal Court, provided a useful guideline as to the interplay between these two standards:

It is well established that the *standard of proof* a refugee claimant must satisfy to show an objective basis for a fear of persecution is a serious possibility or reasonable chance of persecution in the future. The facts grounding the claim, however, must be established on a balance of probabilities. In other words, one must distinguish between what happened in the past, to be established on the civil standard of the balance of probabilities, and what will happen in the future, to be determined on the basis of the reasonable chance yardstick.

The interplay between the standard of proof being applied to the factual findings and the serious risk threshold that applies when determining whether or not a person is a Convention Refugee requires the tribunal to make the factual findings necessary to its task to a balance of probabilities standard and then apply those facts to the serious risk threshold—which means that the tribunal must determine in applying the facts related to the claimant’s past experiences to the question of whether there is more than a mere possibility of persecution. The caselaw demonstrates that it is often difficult to draw the line between the two standards. In Canada, the standard of proof of a balance of probabilities applies to the factual findings related to the claimant’s past—

- A. identity,
- B. profile,
- C. history of past persecution.
- D. current country conditions.

The standard of risk applies to the tribunal’s ultimate assessment of the likelihood of persecution in the future—including an assessment of any potential internal relocation. Thus, in Canada the tribunal determines the claimant’s profile on a balance of probabilities and makes findings of fact as to the current country conditions to the same standard but then must determine whether based on these facts there is more than a mere possibility of persecution. Facts that are to be assessed to the lower standard are those relevant to the assessment of the possibility of future persecution and these would include how the asylum seeker is perceived by the authorities in their country; whether the authorities have the motivation in the future to seek them; whether they would be able to enter the country undetected or to travel to a potential area of internal relocation without risk.

An analysis of some decisions by the Federal Court will help illustrate this distinction. In *Sivagnanasundarampillai v. Canada (Minister of Citizenship and Immigration)*¹² the Court set aside a decision of the Refugee Protection Division. The Applicant a Tamil male from the North of Sri Lanka was detained by the Army. Subsequently he was followed by a white van. Fearing for his life the Applicant fled. The tribunal found the Applicant to be credible but concluded that the identity of the persons in the white van had not been established. It found “*that he is not, on a balance of probabilities, a person who would be perceived to be linked to any pro-LTTE factions by the Sri Lankan government and does not have good grounds to fear persecution as a failed asylum-seeker.*” The Court held that the tribunal had erred because “it was unclear whether the RPD assessed the evidence against the correct legal standard of a reasonable chance or more than a mere possibility of prospective risk of persecution.”¹³ Thus in this case the tribunal fell into error because it applied the balance of probabilities test to the question of how the

11 2007 FC 1050 at paragraph 74

12 2018 FC 1109

13 *Ibid* par 14

authorities *would perceive* the applicant in the future.

In *Dominguez v MCI*¹⁴ the Court set aside a decision holding that the tribunal had misapplied the standard of risk, applying the balance of probabilities standard to the question of whether or not the agents of persecution would be able to locate the applicant in the IFA. The Court noted:

27 The RAD committed a second error by applying the balance of probabilities standard to all of the issues in the case. In so doing, it failed to apply the standard of serious risk to the persecution to which Ms. Gomez would be exposed. As the Supreme Court of Canada noted in *Chan*, the standard of serious risk does not require that there be more than a 50% probability that the risk will materialize.

28 The RAD's error is reflected in the following excerpt from its reasons for decision:

After examining the evidence, I find that the RPD did not err in concluding that FARC dissidents do not have the capacity or motivation to find them in Cartagena, on a balance of probabilities.

29 A conclusion as to the capacity or motivation of agents of persecution, while it may depend on certain facts, is essentially a risk assessment. As Justice de Montigny pointed out in *Pacificador*, the decision maker then looks to the future. Future events are not proven but feared. This fear justifies refugee protection even if the probability of the event occurring is less than 50%.

Thus, the tribunal must carefully distinguish between the findings of fact as to past events that it must determine to a balance of probabilities and its findings as to future risk of persecution which must be assessed to a lower threshold. The standard to be applied to the latter is more than a mere possibility.

Clause 32 of the Nationality and Borders Act 2022 requires tribunals in the UK who assess refugee claims to apply the balance of probabilities standard to the following factual issues:

a) whether the asylum seeker has a characteristic which could cause them to fear persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion (or has such a characteristic attributed to them by an actor of persecution), and (b) whether the asylum seeker does in fact fear such persecution in their country of nationality (or in a case where they do not have a nationality, the country of their former habitual residence) as a result of that characteristic.

This provision is somewhat narrower than that applied in Canadian law which requires that the balance of probabilities standard be applied to all of the factual considerations related to the refugee claimants past history and not just to the asylum seekers characteristics and whether or not the asylum seeker has a subjective fear of persecution. Carefully delineating the scope of those factual issues which must be determined to the balance of probabilities is crucial. Consider the facts that are usually in play in a claim for asylum are:

- 1) identity
- 2) profile (i.e. religious, political, sexual orientation or ethnic background)
- 3) past persecution. If the person suffered past persecution could that person give rise to the application of the compelling grounds exception?
- 4) did the person seek the protection of the state?
- 5) has there been a change in circumstances in the country of persecution since the person fled such that the person no longer has a well founded fear of persecution?
- 6) has there been a change in circumstances in the country of persecution or in the claimant's profile so that the person now has a well founded fear of persecution?
- 7) did the person commit a war crime, crime against humanity or a serious non political crime?

8) did the person have the rights of a citizen in a third country?

9) if the person is stateless what were their countries of former habitual residence.

10) does the person fear persecution in their country of nationality or former habitual residence?

Pursuant to clause 32, issues related to the asylum seekers profile and their subjective fear of persecution will require proof to a balance of probabilities. However, factual issues related to whether the claimant has suffered past persecution; whether they sought the protection of the state and country conditions will not require the same evidentiary burden. Distinguishing between those factual issues that are covered by the higher evidentiary threshold set out in clause 32 and those that are not will be an important task for counsel who represent asylum seekers in the United Kingdom.

Even though the Canadian jurisprudence casts a wider net than that covered by clause 32, the Canadian experience does, provide guidance as to how the standard of proof and standard of risk are to be applied together. Decision makers must be careful to distinguish between the factual issues that relate to the claimant's past experiences which must be established to a balance of probabilities from those that relate to concerns over future risk where the claimant need only establish that there is more than a mere possibility of future risk. As the Court noted in *Dominguez* "future events are not proven, but feared."