



## CREDIBILITY ASSESSMENT IN REFUGEE STATUS DETERMINATION

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**Abstract:** Refugee status determination (RSD) is often rendered unusually difficult due to a lack of available documentary evidence to either support or contradict asylum seekers' claims as to their experiences in their countries of origin (including their reasons for seeking asylum abroad). This field's reliance upon asylum seekers' own testimonies with regard to their experiences means that 'credibility assessment' is uniquely important. This article discusses three grounds upon which the credibility of asylum seekers is frequently impugned – internal inconsistencies, applicants' demeanour and presentation, and apparent implausibilities. In determining how much weight to give to each of these grounds, decision-makers responsible for RSD must give due regard to cultural and linguistic barriers, the psychological consequences of trauma, and the limits of their own experiences. This article draws upon the author's experiences as Consultant to an Australian law firm specialising in refugee law and practice.

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## I. INTRODUCTION

The *Convention Relating to the Status of Refugees*<sup>2</sup> of 1951, as amended by the *1967 Protocol Relating to the Status of Refugees*<sup>3</sup> (hereinafter, “the *Refugee Convention*”) defines a ‘refugee’ as any person who, “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”, cannot return to their country of nationality.<sup>4</sup> In assessing whether persons claiming protection under the *Refugee Convention* (for the purposes of this article, “asylum seekers”) are entitled to recognition as refugees (a process known as “refugee status determination” or “RSD”), decision-makers responsible for refugee status determination (“RSD officials”) must assess not only whether asylum seekers satisfy the definition of a ‘refugee’ under the *Refugee Convention*, but whether they are telling the truth about their claims – that is, whether they have provided a credible account of what they have experienced and what they fear will happen to them in future. Credibility assessment is a necessary part of any conceivable model of RSD, especially where applicants for protection lack documentary proof that their claimed experiences have in fact occurred.<sup>5</sup> This is a particularly common circumstance in RSD, a field in which “the range of verifiable evidence is much more limited than in most other types of administrative and judicial procedures”.<sup>6</sup>

Jones and Houle understate the matter in declaring that ‘RSD is not easy’<sup>7</sup>; in fact, RSD has been described as ‘one of the most complex adjudication functions in industrialized societies’.<sup>8</sup> In particular, determining the credibility of asylum seekers is notoriously fraught with difficulties – given the aforementioned frequent lack of documentary evidence, the common absence of testimonial evidence beyond what is offered by the asylum seeker themselves<sup>9</sup>, and the fact that even independent information such as that about the asylum seekers’ countries of origin as is available is usually insufficiently particularised to confirm whether

<sup>2</sup> Convention relating to the Status of Refugees, 189 UNTS 137 (adopted on 28-7-1951).

<sup>3</sup> Protocol relating to the Status of Refugees, 606 UNTS 267 (adopted on 4-10-1967).

<sup>4</sup> Art. 1-A(2), Convention relating to the Status of Refugees, 189 UNTS 137 (adopted on 28-7-1951).

<sup>5</sup> See UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1, para 196 (1979), revised edition (1992) (hereinafter “*Handbook*”).

<sup>6</sup> UN High Commissioner for Refugees, BEYOND PROOF: CREDIBILITY ASSESSMENT IN EU ASYLUM SYSTEMS: FULL REPORT 57 (2013).

<sup>7</sup> Martin Jones and France Houle, *Introduction: “Building a Better Refugee Status Determination System”*, 25(2) REFUGEE 3, 6 (2008).

<sup>8</sup> Cecile Rousseau et al, *The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board*, 15 JOURNAL OF REFUGEE STUDIES page 43 (2002).

<sup>9</sup> Martin Jones and France Houle, *Introduction: “Building a Better Refugee Status Determination System”*, 25(2) REFUGEE 10 (2008).

claimed events occurred or not.<sup>10</sup> (As the Hungarian Helsinki Committee's CREDO project on refugee credibility assessment pithily observes, "*country of origin information is not a lie detector*".<sup>11</sup>) In this context of scarce evidence, RSD officials have devised means to determine the credibility of asylum seekers through a scrutiny of the asylum seeker's testimony – yet these methods are prone to error, potentially relying upon or imposing unrealistic expectations as to memory, emotional responses and understanding of domestic immigration systems, or failing to account for diverse human experiences. In exercising discretion as to credibility (a form of fact-finding notoriously open to '*personal judgment that is inconsistent from one adjudicator to the next*'<sup>12</sup>), RSD officials must possess an acute understanding of the limits of their own perceptions and of the available information, and exercise reasonable and culturally-appropriate standards of assessment.

This article discusses the potential shortcomings of credibility tests commonly employed by RSD officials internationally, drawing upon comparative law, sociological studies and psychological research. In particular, it examines three common grounds upon which asylum seekers' claims are commonly rejected: internal inconsistencies; asylum seekers' demeanour and presentation; and apparent implausibilities. In response to each of these grounds, this article stresses the need for asylum seekers' claims to be judged in a range of appropriate contexts – especially in light of cultural, psychological and linguistic divides between RSD officials and individual asylum seekers. This article draws upon the author's experiences as Consultant to an Australian law firm specialising in refugee law and practice.

## II. CREDIBILITY ASSESSMENT, INCONSISTENCIES AND VAGUENESS

Findings that asylum seekers have exaggerated or fabricated their claims for protection may arise for many reasons. RSD officials may, for example, find that asylum seekers have provided inconsistent accounts (from interviewer to interviewer) of what has happened to them – whether in terms of the details of their claim (how many times they were attacked, how many attackers there were, dates and places) or in terms of the claim itself (with failure to raise a particular reason to fear harm at the earliest possible stage in the process taken as proof that it has been concocted as a show of desperation). Similarly, RSD officials may find that asylum seekers have been impermissibly vague in recounting particular incidents

<sup>10</sup> Jo Pettitt *et al*, *The Use of COI in the Refugee Status Determination Process in the UK: Looking Back, Reaching Forward*, 25(2) REFUGEE 182, 190 (2008). See *El Moraghy v. Ashcroft*, 331 F 3d 195 (2003) (US Court of Appeals for the First Circuit).

<sup>11</sup> Hungarian Helsinki Committee, CREDIBILITY ASSESSMENT IN ASYLUM PROCEDURES: A MULTIDISCIPLINARY TRAINING MODULE, 11 (2013).

<sup>12</sup> Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEORGETOWN IMMIGRATION LAW JOURNAL page 367 (2002-2003).

of trauma – for example, providing only very general descriptions of how events occurred and not providing further details upon prompting.

Findings of credibility on these grounds are problematic because (among other reasons) they tend to not account for the inevitable role of memory lapses (particularly in recounting events of trauma and torture), difficulties in translation (both linguistic and cultural) and unfamiliarity with the interview process (and what information asylum seekers are expected to provide) in shaping how answers are formulated. As Rosemary Byrne has noted, decision-makers have consistently afforded probative weight to ‘*consistent recall from serial interviews*’ despite scientific and medical skepticism as to the existence of any link between ‘*credibility and accurate recall of traumatic experiences*’.<sup>13</sup>

The UN High Commissioner for Refugees (UNHCR)’s guidelines on the assessment of asylum seekers’ claims (“the *Handbook*”) emphasises that decision-makers should assess applicants’ demeanour, the amount of detail they provide and the consistency of their claims with due regard to the circumstances from which they have emerged. As the *Handbook* notes, applicants who have emerged from fearing the authorities in their own country “*may ... be afraid to speak freely and give a full and accurate account of [their] case*”.<sup>14</sup> In Australia, the Refugee Review Tribunal has stressed that these experiences of trauma may influence the recall and presentation of even applicants who fear non-state actors: “[a] *person may have had traumatic experiences or be suffering from a disorder or illness which may affect his or her ability to give evidence, his or her memory or ability to observe and recall specific details or events*”, which may also contribute to “*mistrust in speaking freely to persons in positions of authority*”.<sup>15</sup> With regard to the latter, in particular, Gummow and Hayne, JJ. of the High Court of Australia have acknowledged that “*the fact that [an asylum seeker] does not complain of rape to the first immigration officer who speaks to her on arrival in this country... is anything but compelling evidence that no such assault occurred*”.<sup>16</sup>

Inconsistencies are a problematic indicator of whether asylum seekers’ accounts of their experiences are truthful, simply because the nature of such experiences (almost by definition, incidents of trauma and hardship) do not allow for consistent and accurate recall. Survivors of torture and trauma may suffer from loss of memory, disassociation and difficulty in concentrating, all of which

<sup>13</sup> Rosemary Byrne, *Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals*, 19 INTERNATIONAL JOURNAL OF REFUGEE LAW 609, 623 (2007).

<sup>14</sup> UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1, para 198 (1979), revised edition (1992) (hereinafter “*Handbook*”).

<sup>15</sup> Refugee Review Tribunal of Australia, GUIDANCE ON THE ASSESSMENT OF CREDIBILITY, para 4.3 (2012).

<sup>16</sup> *Abebe v. Commonwealth*, 197 CLR 510, para 190 (High Court of Australia, 1999).

compromises their ability to present a convincing narrative of their experiences (particularly within the often-traumatic format of an interview with a refugee status assessor).<sup>17</sup> As Steel, Frommer and Silove write, “[t]raumatized asylum seekers often are unable to present a coherent trauma narrative to the decision-maker”<sup>18</sup> simply by virtue of the long-term consequences of their experiences; for example, torture survivors’ elevated rates of “*depression, anxiety, sleep disturbance, nightmares, impaired concentration and memory [and] PTSD*”<sup>19</sup> present significant barriers to the consistent and coherent recounting of experiences of hardship. Significantly, traumatic experiences impact both upon applicants’ *willingness* to provide detailed accounts of their experiences (with varying openness to interviewers from instance to instance inevitably influencing the degree of detail provided) and their *ability* to do so. As Steel, Frommer and Silove note:

“Because traumatic memories are encoded while an individual is experiencing extreme anxiety, the normal processing and integration of these experiences is disrupted... Instead of being encoded into memory in an organized, coherent and integrated manner, traumatic experiences are often encoded in a disorganized and fragmented manner...”<sup>20</sup>

Beyond issues encountered in the encoding of memories, the nature of asylum seekers’ recall is similarly context-specific. Herlily, Scragg and Turner note that “*depressed patients are biased towards recalling negative personal memories in favour of positive ones*’, and may suffer from ‘*difficulties in retrieving specific autobiographical memories*’.”<sup>21</sup> As an example, they note that an asylum seeker’s description of his treatment varied from “*we were slapped around*” to (when recounting the incident in question on another occasion) “*we were badly beaten*”.<sup>22</sup> While a discrepancy of this kind may be mistaken by a decision-maker for an asylum seeker exaggerating their experiences (or even recounting a concocted

<sup>17</sup> Cecile Rousseau *et al*, *The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board*, 15 JOURNAL OF REFUGEE STUDIES 43, 49 (2002).

<sup>18</sup> Zachary Steel, Naomi Frommer and Derrick Silove, *Part I – The mental health impacts of migration: the law and its effects: Failing to understand: refugee determination and the traumatised applicant*, 27 INT’L J.L. & PSYCHIATRY 511, 517 (2004).

<sup>19</sup> Zachary Steel, Naomi Frommer and Derrick Silove, *Part I – The mental health impacts of migration: the law and its effects: Failing to understand: refugee determination and the traumatised applicant*, 27 INT’L J.L. & PSYCHIATRY 511, 515 (2004).

<sup>20</sup> Zachary Steel, Naomi Frommer and Derrick Silove, *Part I – The mental health impacts of migration: the law and its effects: Failing to understand: refugee determination and the traumatised applicant*, 27 INT’L J.L. & PSYCHIATRY 511, 517 (2004).

<sup>21</sup> Jane Herlily, Peter Scragg and Stuart Turner, *Discrepancies in autobiographical memories – implications for the assessment of asylum seekers: repeated interviews study*, 324 BRITISH MEDICAL JOURNAL 324, 325 (2002).

<sup>22</sup> Jane Herlily, Peter Scragg and Stuart Turner, *Discrepancies in autobiographical memories – implications for the assessment of asylum seekers: repeated interviews study*, 324 BRITISH MEDICAL JOURNAL 324, 327 (2002).

experience, and failing to remain consistent about imaginary details), Herlily, Scragg and Turner suggest that instead the asylum seeker “*may simply have been in a different mood state in each interview, thus giving different evaluations of his experience*”.<sup>23</sup>

The UNHCR have emphasised the need for decision-makers “*to have realistic expectations of what an applicant should know and remember*” in light of the natural limitations of human memory.<sup>24</sup> The degree of detail provided by asylum seekers – both in totality and between varying occasions – will depend upon a wide array of factors, and cannot be attributed to a desire to mislead or fabricate claims without further evidence to this effect. For example, memories which have been repeatedly recalled may be presented in more detail than those which have not, whereas separate incidents may become fused as “[b]lended or generic memories”.<sup>25</sup> (Juliet Cohen has similarly testified that “[p]articularly with repeated experiences, information specific to one episode tends to drop out while information common to other similar episodes is incorporated into the general schema and retained”, forming “*a kind of blended memory*”.<sup>26</sup>) The UNHCR further cautions that “[a] person’s recall of dates, frequency and duration is nearly always reconstructed from inference, estimation and guesswork”.<sup>27</sup> These problems of recall are, of course, not restricted to the particular circumstances of asylum seekers; as noted by Lee, Carr and Finkelstein, JJ. in *W375/01A*, “[a]s anyone with even a passing familiarity with litigation will know, to have to give a decision-maker three or more separate versions of the basis for a claim is an invidious position to find oneself in, even in the case of an honest witness... It is inevitable that each version will be slightly different, and may even be very different once the impact of [an] interpreter is taken into account”.<sup>28</sup>

In light of the above, it must be consistently borne in mind in assessing asylum seekers that inconsistent, late or vague claims are not necessarily untrue, and should not be judged to be false simply because they are inconsistent, late or vague. Given the extremely serious consequences that may transpire from a negative finding (including the potential exposure of an unsuccessful applicant to detention, torture or death), a finding that any asylum seeker is lying about an aspect of their claims must never be made lightly: it should only be reached

<sup>23</sup> Jane Herlily, Peter Scragg and Stuart Turner, *Discrepancies in autobiographical memories – implications for the assessment of asylum seekers: repeated interviews study*, 324 BRITISH MEDICAL JOURNAL 324, 327 (2002).

<sup>24</sup> UN High Commissioner for Refugees, BEYOND PROOF: CREDIBILITY ASSESSMENT IN EU ASYLUM SYSTEMS: FULL REPORT 57 (2013).

<sup>25</sup> UN High Commissioner for Refugees, BEYOND PROOF: CREDIBILITY ASSESSMENT IN EU ASYLUM SYSTEMS: FULL REPORT 58 (2013).

<sup>26</sup> Juliet Cohen, *Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers*, 13 INTERNATIONAL JOURNAL OF REFUGEE LAW 293, 295 (2001).

<sup>27</sup> UN High Commissioner for Refugees, BEYOND PROOF: CREDIBILITY ASSESSMENT IN EU ASYLUM SYSTEMS: FULL REPORT 154 (2013).

<sup>28</sup> *W375/01A v. Minister for Immigration and Multicultural Affairs*, FCAFC 89, para 15 (Federal Court of Australia, 2002).

where a far broader range of indicia point to this conclusion, and where other explanations for discrepancies are not satisfactory.

Even where an asylum seeker is found to have exaggerated an aspect of their claims (or to have provided accounts of mounting severity as they progress through the RSD process), this should not be regarded as fatal to the entirety of their claims. Gummow and Hayne, JJ. of the High Court of Australia concede (*in obiter*) that “*the fact that an applicant for refugee status may yield to temptation to embroider an account of his or her history is hardly surprising*”, given that “*an applicant for refugee status is, on one view of events, engaged in an often desperate battle for freedom, if not life itself*”.<sup>29</sup> Foster, J. of the Federal Court of Australia similarly observed that “[e]xaggeration or even fabrication of parts of a witness’s testimony does not exclude the possibility that there is a hard core of acceptable evidence within the body of the testimony”.<sup>30</sup> These Australian judicial observations have been independently confirmed by the International Association of Refugee Law Judges, which cautions that “[r]ejection of some evidence, material or peripheral, relating to past or present facts will not necessarily lead to a rejection of all of the claimant’s evidence” – with the difficulty of justifying such rejection increasingly depending upon the extent to which the claims found to be fabricated are ‘peripheral’ to the core of the applicant’s claims.<sup>31</sup> Even where *none* of an asylum seeker’s claimed experiences – beyond their identity as a member of a particular racial, religious, political, national or particular social group - are credible, they may nonetheless be eligible for protection on the basis of harm feared within the reasonably foreseeable future by reason of their protected traits under the *Refugee Convention*. As Michael Kagan puts it, “[a] person does not need to be credible to be a refugee”.<sup>32</sup> An undue emphasis upon whether asylum seekers are credible, truthful witnesses in their own cause may hence, in some cases, obscure the true nature of the RSD official’s adjudicative task: to determine whether an individual applicant is entitled to protection under the *Refugee Convention*.

### III. CREDIBILITY ASSESSMENT, DEMEANOUR AND INTERPRETATION

The ‘demeanour’ of an asylum seeker (including how they present themselves, relate their experiences, and respond to questioning) may be found by RSD officials to be inconsistent with their claimed identity or experiences. An asylum

<sup>29</sup> *Abebe v. Commonwealth*, 197 CLR 510, 577, 578 (High Court of Australia, 1999).

<sup>30</sup> *Guo v. Minister for Immigration and Ethnic Affairs*, FCA 1263, para 26 (Federal Court of Australia, 1996).

<sup>31</sup> International Association of Refugee Law Judges, ASSESSMENT OF CREDIBILITY IN REFUGEE AND SUBSIDIARY PROTECTION CLAIMS UNDER THE EU QUALIFICATION DIRECTIVE: JUDICIAL CRITERIA AND STANDARDS, 40 (2013).

<sup>32</sup> Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEORGETOWN IMMIGRATION LAW JOURNAL page 367 (2002-2003).

seeker's self-presentation and ability to answer questions may invite comment and criticism on multiple fronts; an asylum seeker who appears to 'avoid the question' or to provide rambling, irrelevant answers may be as easily suspected as an asylum seeker whose answers appear rehearsed and lacking in spontaneity, or who shows little emotion in recounting traumatic events. However, an applicant's demeanour is similarly an inexact guide to the truth of their claims to fear persecution. The International Association of Refugee Law Judges have bluntly asserted that "*using demeanour as a basis for credibility assessment should be avoided in virtually all situations*", to be used only "*in a context of evidenced understanding of the relevant culture, and in acknowledgment of culture as a repertoire of possible behaviours which are not binding on any individual*".<sup>33</sup>

It is in this respect, in particular, that "[d]iffering social and cultural mores between a refugee claimant, his or her country of origin and his or her country of asylum can produce obstacles to inquiry and misunderstanding".<sup>34</sup> The failure by asylum seekers to exhibit particular emotional responses when recounting their experiences (such as overt grief or hesitation) cannot necessarily be regarded as evidence that these experiences are fabricated. As Joanna Ruppel writes, "[t]he manner in which individuals respond to questions may... be influenced by culture".<sup>35</sup> What would be perceived in a Western context as an evasive or unduly taciturn response may be eminently justified by the cultural norms of the asylum seeker, particularly one who has learned in their country of origin to "*volunteer nothing to people in uniforms*" (or to otherwise distrust figures of authority, choosing not to show weakness or to "*give too much away*").<sup>36</sup> As Walter Kalin writes, individuals who have been forced to hide certain traits in their countries of origin "*have deeply internalised the values of secrecy and suspicion towards outsiders*"; such people "*have difficulty communicating openly and revealing themselves, their feelings, beliefs and experiences to everyone not belonging to their group because by doing so they violate basic norms of their subculture*"<sup>37</sup> (creating apparently evasive answers, presented in a manner which may signal untruthfulness in the cultural context of the RSD official).

Demeanour may furthermore prove deceptive where asylum seekers have suffered torture or trauma. A flat effect or seeming detachment from the events related may owe as much to conscious or unconscious disassociation, or even

<sup>33</sup> International Association of Refugee Law Judges, *ASSESSMENT OF CREDIBILITY IN REFUGEE AND SUBSIDIARY PROTECTION CLAIMS UNDER THE EU QUALIFICATION DIRECTIVE: JUDICIAL CRITERIA AND STANDARDS*, 41-42 (2013).

<sup>34</sup> Martin Jones and France Houle, *Introduction: Building a Better Refugee Status Determination System*, 25(2) *REFUGEE* 3, 7 (2008).

<sup>35</sup> Joanna Ruppel, *The Need for a Benefit of the Doubt Standard in Credibility Evaluation of Asylum Applications*, 23(1) *COLUMBIA HUMAN RIGHTS LAW REVIEW*, 13-14 (1991-1992).

<sup>36</sup> Joanna Ruppel, *The Need for a Benefit of the Doubt Standard in Credibility Evaluation of Asylum Applications*, 23(1) *COLUMBIA HUMAN RIGHTS LAW REVIEW*, 13-14 (1991-1992).

<sup>37</sup> Walter Kalin, *Troubled Communication: Cross-Cultural Misunderstandings in the Asylum Hearing*, 20 *INTERNATIONAL MIGRATION REVIEW*, 230, 232 (1986).



excessive rehearsal prior to presenting one's account of his or her experiences (in light of the dire consequences of failure), as to any attempt to mislead RSD officials. In interviewing applicants for asylum (especially those who have endured uniquely atrocious acts in their country of origin), RSD officials must be conscious of the role that their own actions, and their own demeanour, may play in shaping that of the asylum seeker, who may detect the scepticism (or even cynicism) of an RSD official (or otherwise deem the RSD official unwilling to share their experiences or to empathise with their plight) and hence prove "*reserved and hesitant in the manner in which they express themselves and thus... present a fragmented and confusing story*".<sup>38</sup>

RSD officials' inability to determine meaning through demeanour across cultural barriers is compounded by asylum seekers' reliance upon interpreters (in addition to the problems created by interpretation in assessing inconsistencies, as noted above). As Michael Barnett observes, "[w]hen evidence is channelled through an interpreter it is transformed by the interpreter's voice, dress, mannerisms, linguistic competence, age, race and gender"<sup>39</sup> – rendering assessments of 'demeanour' ultimately subject not only to the actions and self-presentation of the asylum seeker but to the characteristics of a third party. When communicating across cultural lines, asylum seekers may have difficulty clearly articulating concepts (creating artificially, or inadvertently, evasive answers); as Barnett notes, "[l]iteral word for word translations" may, where there is no precise or even similar equivalent to a given word in the RSD official's language, produce "*nonsensical utterances*".<sup>40</sup>

#### IV. CREDIBILITY ASSESSMENT AND PLAUSIBILITY

Asylum seekers' claims may be rejected because the accounts of their experiences fail to satisfy decision-makers' expectations as to how persecuted people 'ought' to behave or react. As Walter Kalin puts it, "[t]oo often officials assume that the way they think is also the way the asylum-seeker thinks".<sup>41</sup> RSD officials may challenge asylum seekers' claims to have performed particular actions or taken part in particular activities in their countries of origin (because of, amongst other reasons, the dangers involved in doing so), or critique apparently implausible escapes from custody or claimed courses of conduct on the part of agents of persecution. RSD officials may, for example, claim that it would not be plausible for insurgent or terrorist groups to allow individuals to live or to escape despite

<sup>38</sup> Walter Kalin, *Troubled Communication: Cross-Cultural Misunderstandings in the Asylum Hearing*, 20 INTERNATIONAL MIGRATION REVIEW, 230, 232 (1986).

<sup>39</sup> Michael Barnett, *Mind Your Language – Interpreters in Australian Immigration Proceedings*, 10 UNIVERSITY OF WESTERN SYDNEY LAW REVIEW 109, 111-112 (2006).

<sup>40</sup> Michael Barnett, *Mind Your Language – Interpreters in Australian Immigration Proceedings*, 10 UNIVERSITY OF WESTERN SYDNEY LAW REVIEW 109, 112 (2006).

<sup>41</sup> Walter Kalin, *Troubled Communication: Cross-Cultural Misunderstandings in the Asylum Hearing*, 20 INTERNATIONAL MIGRATION REVIEW, 230, 234 (1986).

repeated acts of opposition – despite the fact that, as noted by the US Court of Appeals for the Ninth Circuit in *Lopez-Reyes*, ‘conjecture’ as to what guerrillas would and would not do “*is not a substitute for substantial evidence*”.<sup>42</sup> As Mark Henderson has sardonically noted, where mere allegations of implausibility are levelled without evidence to support them, “*it can only be assumed that they are based either on what the [RSD official] would do if he were a prison guard, a guerrilla or a drugs baron, or on how he believes a reasonable prison guard, guerrilla or drugs baron would behave. How the [RSD official] works this out is never revealed.*”<sup>43</sup> In such cases, plausibility findings run the risk of merely amounting to “*the subjective view of the judge*”, reflecting “*the judge’s own personal theories of ‘truth’ and ‘risk’*” but little else.<sup>44</sup> Decision-makers’ instincts and ‘gut feelings’ are not an appropriate guide in refugee status determination.<sup>45</sup>

Given the general rule within administrative law that decision-makers should not make findings on the basis of no evidence – or based upon irrelevant considerations – findings of implausibility should only be made upon the satisfaction of a relatively high evidentiary threshold. In *W148/00A* (2001), Justice Lee of the Federal Court of Australia observed that a circumstance will be ‘implausible’ where it is “*beyond human experience of possible occurrences, that is to say, inherently unlikely*”.<sup>46</sup> The emphasis in this sentence must be upon *human* experience – not the experiences of a particular culture, nor the anticipated reactions of a particular decision-maker (who must, in conducting RSD, take into account the extent to which their background and outlook may differ quite dramatically from the asylum seeker being assessed). As noted by Neuberger, LJ. (with regard to the United Kingdom) in *HK* (2006), “*it is likely that the country which an asylum-seeker has left will be suffering from the sort of problems and dislocations with which the overwhelming majority of residents of this country will be wholly unfamiliar*”.<sup>47</sup>

In practice, plausibility can only be assessed through close attention to the asylum seeker’s context – both the national and cultural context from which they have fled and their personal and psychological traits.<sup>48</sup> In *Valtchev*, Muldoon, J.

<sup>42</sup> *Lopez-Reyes v. Immigration and Naturalisation Service*, 79 F 3d 908, para 5 (US Court of Appeals for the Ninth Circuit, 1996).

<sup>43</sup> Mark Henderson, BEST PRACTICE GUIDE TO ASYLUM AND HUMAN RIGHTS APPEALS 9 (2003).

<sup>44</sup> International Association of Refugee Law Judges, ASSESSMENT OF CREDIBILITY IN REFUGEE AND SUBSIDIARY PROTECTION CLAIMS UNDER THE EU QUALIFICATION DIRECTIVE: JUDICIAL CRITERIA AND STANDARDS, 34 (2013).

<sup>45</sup> *RKS v. Refugee Appeals Tribunal*, IEHC 436 (High Court of Ireland, 2004).

<sup>46</sup> *W148/00A v. Minister for Immigration and Multicultural Affairs*, FCA 679, para 21 (Federal Court of Australia, 2001).

<sup>47</sup> *HK v. Secy. of State for the Home Department*, EWCA Civ 1037, para 29 (Court of Appeal of England and Wales, 2006).

<sup>48</sup> International Association of Refugee Law Judges, ASSESSMENT OF CREDIBILITY IN REFUGEE AND SUBSIDIARY PROTECTION CLAIMS UNDER THE EU QUALIFICATION DIRECTIVE: JUDICIAL CRITERIA AND STANDARDS, 35 (2013); *HK v. Secy. of State for the Home Department*, EWCA Civ 1037, paras 27-28 (2006) (Court of Appeal of England and Wales).

of the Federal Court of Canada asserted that “actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant’s milieu.”<sup>49</sup> A similar theme was struck by Sir Thomas Bingham in 1985:

“[N]o judge worth his salt could possibly assume that men of different nationalities, educations, trades, experience, creeds and temperaments would act as he might think he would have done or even – which might be quite different – in accordance with his concept of what a reasonable man would have done.”<sup>50</sup>

These observations were approvingly cited by Keene, LJ. in the context of refugee status determination in *Y v. Secy. of State for the Home Department* (2006).<sup>51</sup>

In practice, however, this is what many decision-makers attempt; they decide that certain claimed events or actions are implausible without due regard to the role played by culture in shaping individuals’ actions, including the role of the decision-maker’s own culture in determining their construction of what is ‘plausible’. In the United Kingdom, the UNHCR has criticised decision makers for “attempting to guess the thought process of a third party” and applying a “narrow UK-perspective when assessing events alleged to have taken place in significantly different cultural, political and social contexts”.<sup>52</sup> Similar approaches have been condemned by the Federal Court in Australia, with Merkel, J. condemning the confidence with which some RSD officials “find themselves able to make adverse findings on credibility on the basis that the evidence given by claimants is ‘implausible’, ‘incredible’ or ‘concocted’” – in the absence of “clear and cogent evidence” to justify such findings.<sup>53</sup>

In place of these flawed approaches, decision-makers must ensure that asylum seekers’ claims are assessed (to determine whether they could plausibly have occurred) through a close examination of circumstances in the countries of origin in question, with due regard paid to the uncertainty, unpredictability and impunity which prevail in many source countries for refugees (particularly where the agents of persecution feared are non-state actors, who may act with a greater degree of arbitrariness and capriciousness than state officials). Even where accounts are so implausible that no conclusion can be drawn other than that

<sup>49</sup> *Valchev v. Canada (Minister of Citizenship and Immigration)*, FCT 776, para 7 (Federal Court of Canada, 2001).

<sup>50</sup> Sir Thomas Bingham, *The Judge as Juror: The Judicial Determination of Factual Issues*, 38(1) CURRENT LEGAL PROBLEMS 1, 14 (1985).

<sup>51</sup> EWCA Civ 1223, para 25 (Court of Appeal of England and Wales, 2006).

<sup>52</sup> Jo Pettitt et al, *The Use of COI in the Refugee Status Determination Process in the UK: Looking Back, Reaching Forward*, 25(2) REFUGEE 182, 184 (2008).

<sup>53</sup> *Thevendram v. Minister for Immigration and Multicultural Affairs*, FCA 1910, para 59 (Federal Court of Australia, 2000).

they are false, the International Association of Refugee Law Judges caution that “[d]ecisions based solely on implausibility are likely to be less persuasive than those based on a wider range of criteria”.<sup>54</sup>

## V. CONCLUSION

It is essential to conduct some form of credibility assessment in determining the outcome of asylum seekers’ claims. The alternative – of acceptance of any claim for protection under the *Refugee Convention* without any scrutiny as to whether such claims are based in real occurrences – is by any measure politically unsustainable, jeopardising the entire international regime for the protection of refugees. Furthermore, the degree of weight to be afforded to matters that go to applicants’ credibility in individual circumstances is difficult to mandate through statutes, precedents or policies; it will depend to a great extent upon the circumstances of individual cases.

Despite this, the need for sensitivity and understanding in determining asylum seekers’ claims under the *Refugee Convention* must always be paramount. Every claim for protection under the *Refugee Convention* must be assessed in light of its own circumstances (both those of the asylum seeker in question and those prevailing in the country from which they have fled), rather than by reference to the instincts and expectations of an RSD official whose everyday circumstances are potentially far removed from the lived experiences of a refugee.

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<sup>54</sup> International Association of Refugee Law Judges, ASSESSMENT OF CREDIBILITY IN REFUGEE AND SUBSIDIARY PROTECTION CLAIMS UNDER THE EU QUALIFICATION DIRECTIVE: JUDICIAL CRITERIA AND STANDARDS, 35 (2013).