



Diasporas,
migration
& identities



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**THE TAKING AND MAKING OF ASYLUM CLAIMS: CREDIBILITY
ASSESSMENTS IN THE BRITISH ASYLUM COURTS**

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[DRAFT: PLEASE DO NOT QUOTE WITHOUT PERMISSION]

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When presenting their claims, most asylum applicants cannot produce documentary corroboration of their ill-treatment, and certainly cannot call as witnesses those who have persecuted them. Asylum decisions are therefore heavily dependent upon assessments of the credibility of their accounts, presented to the Home Office and the courts mainly in the forms of asylum interview transcripts and witness statements. The danger is, however, that such decisions may display prejudice or lack of understanding when the persons whose credibility is being assessed come from cultural backgrounds very different from that of the assessor, and may also be suffering varying degrees of trauma. This paper looks at the various contexts in which asylum applicants are required to narrate their stories of persecution, and at the constraints which may prevent those narratives from being effectively given or properly understood. It focuses on administrative and legal processes in the United Kingdom, but with the aim of raising more general questions about the assessment of credibility by officials and judges.

The legal process of claiming asylum in the UK

When someone applies for asylum in the UK, the decision whether or not to grant them refugee status or humanitarian protection is taken by the United Kingdom Border Agency (UKBA), a branch of the Home Office. Most applicants undergo an initial screening interview to establish their identity and collect basic personal information, but the initial decision on their claim is taken largely on the basis of an asylum interview conducted by an UKBA case-worker. Here it is important to distinguish between so-called ‘legacy cases’ which have been in the system for some years and which are dealt with by previous procedures, and the New Asylum Model (NAM), one key feature of which is that, in theory, the entire process from asylum interview to possible appeal before the Tribunal is dealt with by the same case-worker. There is yet a third process, the ‘detained fast track’, under which applicants are detained on arrival and decisions may be taken within a very few days.

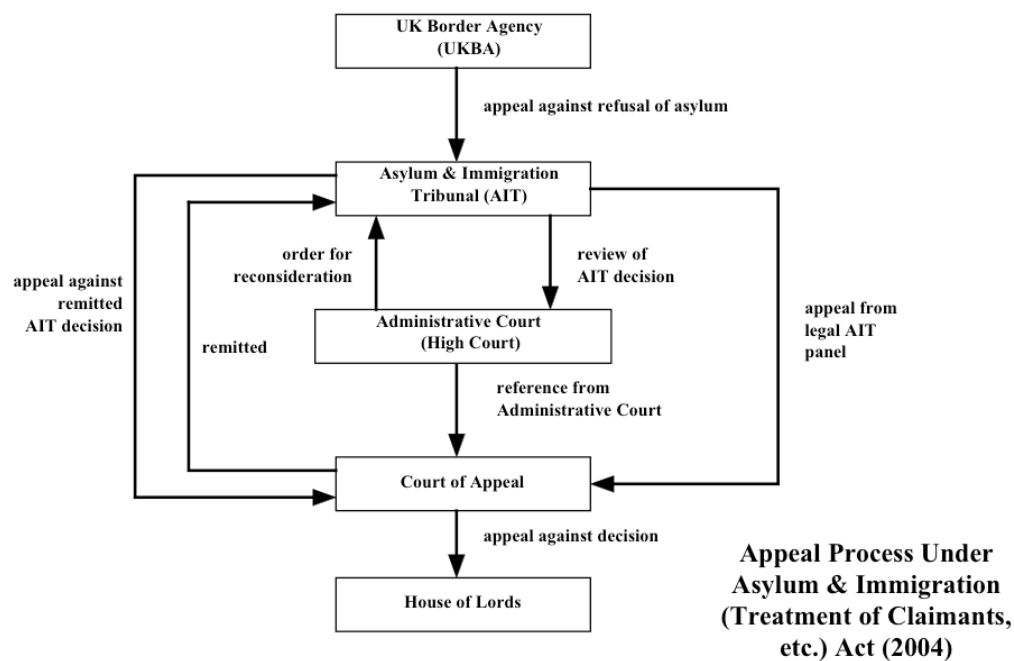
UKBA refuses the great majority of asylum applications, as the table below indicates. In that case, a Reasons for Refusal Letter (RFRL) is sent to the appellant, explaining the decision. Most refusals entail rights of appeal at public hearings, heard by Immigration Judges (IJs) from the Asylum & Immigration Tribunal (AIT). It is also possible for applicants to seek judicial review of Tribunal decisions, by the High Court (or the Court of Session in Scotland), and each year a few cases reach the Court

of Appeal or House of Lords. Since 2004, the possible pathways which appeals may follow through the courts have become quite complex (see diagram).

UK Asylum Applications 2004-2007

Outcomes of Asylum Claims	2004	2005	2006	2007
Asylum applications	33,960	25,710	23,610	23,430
Initial decisions	46,020	27,395	20,930	21,775
Granted Asylum	1,565 (3%)	1,940 (7%)	2,170 (10%)	3,545 (16%)
Humanitarian Protection/ Discretionary Leave	3,995 (9%)	2,800 (10%)	2,305 (11%)	2,200 (10%)
Refused	40,465 (88%)	22,655 (83%)	16,460 (79%)	16,030 (74%)
Withdrawn	2,205	2,545	1,780	1,230
Appeals determined by IAA/AIT	55,975	33,440	15,955	14,935
Appeals allowed	10,845 (19%)	5,605 (17%)	3,540 (22%)	3,385 (23%)
Appeals dismissed	43,760 (78%)	26,555 (79%)	11,595 (73%)	10,735 (72%)
Appeals withdrawn	1,370 (2%)	1,285 (4%)	820 (5%)	820 (5%)

Asylum Statistics 2007 (www.homeoffice.gov.uk/rds/pdfs08/hosb1108.pdf; accessed 17/03/2009)



Asylum hearing centres are slightly less intimidating versions of normal courts. The Immigration Judge (IJ) sits at a raised desk with the royal coat of arms on the wall behind. The asylum applicant sits beside the court interpreter at a table facing the IJ, and there are desks for the legal representatives, to left and right. Appellants are usually represented by barristers in England and solicitors in Scotland, while the Home Secretary is generally represented by a Home Office Presenting Officer (HOPO), a fairly junior civil servant).

The hearing begins with the appellant's examination-in-chief. Most appellants will have a SEF form, an asylum interview transcript, and a witness statement. Their counsel 'establishes' each in turn, confirming that their contents are true, and that the appellant wishes to submit them in evidence. The appellant is then cross-examined by the HOPO. This is the longest part of the hearing, because HOPOs deliberately return to the same issues several times in the hope of receiving inconsistent replies, which they can then use to cast doubt on the appellant's credibility.

Finally, the appellant's representative re-examines their client to clear up any loose ends. The representatives then address the court with their final submissions. HOPOs' submissions generally involve attacks on the appellant's credibility. They also cite 'objective evidence' about the situation in the appellant's country of origin, which is said to support UKBA's position. On the Home Office side, such evidence consists almost entirely of the country reports produced by the Home Office Country of Origin Information Service (COIS). The appellant's representative may cite this too, but may also have submitted medical reports, or reports by 'country experts' like me. Appellants' representatives begin by answering the credibility points, then offer rival interpretations of the objective evidence. IJs must then produce written determinations, including findings of fact on the appellant's story, an indication of the weight they give to each piece of evidence, and a credibility finding.

The importance of credibility

According to the Canadian Immigration and Refugee Board (IRB), three stages are involved in deciding asylum appeals: determining the credibility of the evidence; weighing that evidence to assess its probative value; and determining whether the

burden of proof has been met (IRB 1999b: ¶4.1).¹ Although these processes cannot be completely separate in practice, the distinctions are heuristically useful, and as the IRB formulation clearly shows, the assessment of credibility is the key initial step.

What, then, is meant by credibility? According to the UNHCR *Handbook*, the basic requirement is that the asylum seeker's account should be 'coherent and plausible' and 'not run counter to generally known facts' (UNHCR 1992: §204). For their part, the *Asylum Policy Instructions (APIs)* – the manual used by UKBA case workers – set out detailed procedures avowedly designed to minimise the role of subjectivity and 'unfounded assumptions' in case-workers' decision-making. They suggest that case-workers should first assess the internal and external credibility of the applicant's story, and then decide whether to give them the benefit of any doubt (www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/credibility.pdf?view=Binary; accessed 11/03/2008).

Internal credibility means that the applicant's evidence must be 'internally coherent and consistent with past written and verbal statements, and consistent with claims made by witnesses and/or dependants and with any documentary evidence submitted in support of the claim' (*ibid.*). In assessing this, case workers are told to take into account the level of detail provided by the applicant, and the degree of consistency in his or her account. The explicit assumptions made here are as follows:

It is reasonable to assume... that an applicant relating an experience that occurred to them will be more expressive and include [more] sensory details such as what they saw, heard, felt or thought about an event, than someone who has not had this experience. [...]

It is reasonable to assume that an applicant who has experienced an event will be able to recount the central elements in a broadly consistent manner. An applicant's inability to remain consistent throughout his written and oral accounts of past and current events may lead the decision maker not to believe the applicant's claim (*ibid.*).

It is however recognised that there may be mitigating circumstances, such as 'mental or emotional trauma, inarticulateness, fear, mistrust of authorities, feelings of shame, painful memories particularly those of a sexual nature' (*ibid.*).

¹ Even if credible, evidence may still be rejected as not relevant, i.e., 'not of assistance in coming to a logical conclusion regarding the issues to be determined' (IRB 1999a: ¶11.5).

External credibility refers to the need for the applicant's account to be 'consistent with generally known facts and country of origin information'. If a case-worker discovers that 'there is objective country information that clearly contradicts the material claimed fact(s), this is likely to result in a negative credibility finding' (*ibid.*). If the available country of origin information does not directly corroborate an applicant's story, but does not contradict it either, the applicant may be given the *benefit of the doubt* in accordance with Paragraph 339L of the *Immigration Rules*.² This can, however, only be granted in cases where 'the general credibility of the applicant' has been established' (*ibid.*), and in practice UKBA doubts the credibility of at least part of almost every applicant's story. Indeed, in the opinion of many asylum lawyers, UKBA's presumption is that all applications are 'bogus'.³

Even this brief account of attitudes to credibility illustrates that ideas of 'objectivity' are central to the legal analysis of asylum claims. It is important to note, however, that 'objectivity', like 'fact' and 'truth', is here defined according to legal convention. For scientists 'objective' and 'subjective' mean external and internal to the observer, respectively, whereas in legal usage 'objective' refers to the subjectivity of a Reasonable Man (Kandel 1992: 3). Likewise, 'truth' and 'fact' are defined pragmatically rather than metaphysically by lawyers: a 'fact' is a matter which has been proved to the required standard, whereas 'truth' is a statement made by a credible witness.

Principles of credibility assessment

Asylum cases very often depend upon uncorroborated evidence, and although it is established law that corroboration is not required in asylum cases (Deans 2000: 124; Henderson 2003: 192; Symes & Jorro 2003: 56), Home Office case-workers nearly

² Under Paragraph 339L, benefit of the doubt should be given when *all* the following conditions are met:

- the person has made a genuine effort to substantiate his asylum claim ...
- all material factors at the person's disposal have been submitted, and a satisfactory explanation regarding any lack of relevant material has been given
- the person's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the person's case
- the person has made an asylum claim ... at the earliest possible time, unless the person can demonstrate good reason for not having done so
- the general credibility of the applicant has been established

³ Embarrassingly, one official document illustrated 'asylum abuse' by referring to an applicant who told a 'series of lies' (Home Office 1998: 10). He was later granted refugee status by the House of Lords.

always behave as though it is. Because corroborative evidence is so often lacking, credibility assessments based on the internal coherence of the account, and its external consistency with ‘objective evidence’ are used throughout the decision-making process to filter out supposedly ‘bogus’ claimants (Weston 1998: 88). The danger, however, is that such decisions may display prejudice or misunderstanding when the person whose credibility is being assessed comes from a cultural background very different from the assessor (Bingham 1985: 14; Ruppel 1991: 5).

A useful general survey of the issues involved in assessing whether evidence is indeed ‘credible or trustworthy’ is provided by the Immigration and Refugee Board of Canada (IRB 1998: ¶1.1). It notes that such assessments are made more difficult by the fact that many rules of evidence used in other Canadian courts do not apply, which is broadly true of British asylum hearings too (Brooke LJ, *Karunakaran*). According to the IRB (1998: ¶1.2), testimony must be evaluated in the light of

conditions and laws in the claimant’s country of origin, as well as the experiences of similarly situated persons in that country. The Federal Court has cautioned, however, that ‘[t]here can be no consistency on findings of credibility.’ Credibility cannot be prejudged, and is an issue to be determined ... in each case based on the circumstances of the individual claimant and the evidence.

The IRB’s guidelines note that credibility findings, especially when adverse to appellants, must be properly founded on the evidence and on reasonable inferences drawn therefrom (1998: ¶1.6). They should consider all the evidence together, not bit by bit (¶2.1); this involves more than just seeking out inconsistencies, because even if particular pieces of evidence lack credibility – in which case ‘clear reasons must be given’ (¶2.2.1) – the claim must still be assessed on the basis of whatever evidence *has* been found credible (¶2.1.2). Moreover, applicants should have opportunities, through cross-examination, to clarify matters where credibility is in question (¶2.5.1).

There is no equivalent guidance for British Immigration Judges, but if there were it would be unlikely to differ greatly. The crucial questions, however, are whether, how, or to what extent such principles are put into practice by the Home Office and judiciary. Because credibility findings ‘go to the heart of the identity’ of asylum applicants, one Senior Immigration Judge has written, ‘to get it wrong is to add insult to injury ... to inflict yet further damage upon a human being who has already undergone experiences incomprehensible to most of us’ (Jarvis 2000: 6). In practice, nonetheless, credibility decisions are clearly influenced to some degree by

stereotypes rather than claimants' own particularities; for example, more than twice as many women as men (15% as against 6.5%) are judged credible by British IJs (Harvey 1998: 191; Jarvis 2000: 8).

Telling their stories

For most asylum applicants the principal evidence of the persecution they have experienced is provided by their personal stories of suffering, which is why decisions on credibility are such important preliminaries to the determination process.

There are numerous occasions during the course of their asylum appeal, on which the applicants are required to tell their stories. The first is generally the screening interview, held soon after arrival in order to establish their identity, nationality, and mode of travel. The screening pro forma states that it is *not* concerned with exploring the substance of their claim, but it does, confusingly, ask them why they have come to the UK – and of course, if in their fatigue and terror they slip up regarding the date of birth of a family member, this will be held against them later.

There will then be a substantive asylum interview which will go into their claim in much more detail, though the mode of questioning – and of course, the logistics of interpretation - often restrict applicants' ability to fully explain what *they*, as opposed to the case-worker, thinks is most relevant. In parallel with this process, at least if they have been fortunate enough to find a competent lawyer, the appellant will be providing a witness statement with the help of their legal representative. Ideally, this takes several sittings, because the process is emotive and tiring; details have to be checked; and the final product has to be read back in their own language. This may be forestalled by the speed of the process, however; under NAM, and especially under the Detained Fast Track, there may be barely time to produce even a rudimentary witness statement. In any case, legal reps differ markedly in their views as to when the statement should actually be submitted; many see the taking of the statement as a useful 'dress rehearsal' for the asylum interview itself, but that does not necessarily mean that they intend to actually *submit* the statement prior to the interview; many see that as a hostage to fortune, giving UKBA case-workers extra ammunition in their obsessive search for discrepancies.

In many cases applicants will also narrate their story to a doctor who is preparing a medico-legal report; this provides yet another risk of minor discrepancies arising - or appearing to arise. Their representative may sometimes take a

supplementary witness statement after the refusal letter has been received, in which the applicant rebuts any points based on errors or misunderstandings. Finally, there is the appeal hearing itself. Applicants are rarely questioned at length by their own lawyers, as we saw, but they are of course subjected to detailed cross-examination.

There are, then, a whole series of contexts in which asylum applicants are required to narrate their stories of persecution. In a purely structural sense these are all alike: they are dialogues involving, paradoxically, three participants – the questioner, the asylum applicant, and of course the interpreter, who is implausibly regarded by the Home Office and the courts, as a mere conduit through whom perfect phatic communion can be achieved. But although structurally similar, these contexts are of course fundamentally different, in terms of the purposes and motives of the respective questioners.

The processes whereby asylum lawyers structure their clients' statements to maximise their impact as evidence have received little attention until now, but it seems reasonable to expect that such accounts will be converted from what Conley and O'Barr (1990) call 'relational mode' into 'rule-oriented mode'.⁴

Their research, in small claims courts in the US where claimants generally present their own cases, shows that the ways in which lay persons present evidence in court lie along a continuum. At one extreme, witnesses who display a *relational orientation* tend to define rights and responsibilities in terms of 'a broad notion of social interdependence rather than on the application of rules' (1990: 61). For example, if the case involves a dispute with a neighbour, they will focus less on the particular event which led to them being in court and more on their moral outrage that someone who has lived beside them for years, should violate the social norms of good-neighbourliness. This is unlikely to be a successful strategy. Such evidence is not illogical, though lawyers tend to view it as such, but it conforms to a logic very different from that of the law. Consequently, the courts 'often fail to understand their cases, regardless of their legal merits' (1990: 61).

At the other extreme are those witnesses who adopt a *rule-oriented* approach. This means that they 'evaluate their problems in terms of neutral principles whose application transcends differences in personal and social status. In conceiving their

⁴ McKinley (1997) describes such a restructuring for a Zimbabwean asylum applicant in the USA, fleeing from an abusive forced marriage.

cases and presenting them to the court, they emphasize these principles rather than such issues as individual need or social worth' (1990: *ix*). Because such a perspective resembles that of legal professionals themselves, there is a good chance that people who present their problems in this way will be fully understood, and that their cases will be successful.

When asylum applicants' cases are put on their behalf by their lawyers, their submissions will be rule-oriented. Nonetheless, because they are usually unfamiliar with legal proceedings, let alone the particularities of law in the country where they are claiming asylum, it is very likely that applicants themselves will display a relational orientation in their responses during interviews and cross-examination.

With that proviso, their asylum interview, their witness statement, and the appeal hearing itself, all provide opportunities for asylum applicants to tell their stories of persecution. For some applicants, though, the incidents most helpful to their claims have to be coaxed out of them (if they ever emerge at all) by sympathetic, trusted questioners. Moreover, these stories often come out differently on different occasions, giving rise to the 'discrepancies' for which hawk-eyed Home Office staff are always on the lookout.

No doubt many applicants do want to tell their stories to as wide an audience as possible – as a therapeutic catharsis; to 'bear witness' to atrocities inflicted on their family or community; or to obtain official recognition of their persecution.⁵ . Whether applicants will reveal intimate personal details, straight after arrival, to strangers in a strange country, is another matter; but one 'common sense' UKBA assumption is that genuine applicants will mention all serious incidents of persecution at the earliest possible opportunity. When they later reveal the truth to their doctor or lawyer, the UKBA always attacks their credibility. The following refusal letter to a Sri Lankan Tamil woman is typical:

when the immigration officer asked you whether you had any other reasons or events that caused you to seek asylum, you did not add anything further. Even bearing in mind, your apprehension as expressed in your additional statement, he considered that your failure to mention anything about the alleged rape... undermined your credibility in raising it later.

⁵ During my research, one Nepali appellant came to me at the end of the hearing and thanked me profusely for listening to his story; it was important to him that as many people as possible learned about his problems.

Yet that interview had been conducted by a male Immigration Officer in the presence of a male Tamil lawyer. Both circumstances were bound to inhibit disclosure. Shame before men generally, and a fear that information may leak out to local members of their community, greatly inhibit the willingness of many women to disclose sexual assault (Berkowitz & Jarvis 2000: 48). Many have not even told their own family what happened.

Immigration Judges usually pay more attention than UKBA case workers to the cultural reasons why women may not divulge sexual assaults on such occasions, but they too do not always accept this as a sufficient explanation, as in this tribunal appeal by 'S', a Turkish Kurd. In the Tribunal's opinion":

while her excuse was that she was ashamed and embarrassed to reveal that matter to male Immigration Officers, that excuse does not stand up when it is considered that she had been in constant touch with her solicitors, some of whom must have been female, when she could have brought such matters to light, but had failed to do so.

It is well-known that many rape victims in western societies, too, fail to report rape attacks; this 'silent reaction to rape syndrome' is attributed to the 'psychological burden' felt by victims (Burgess & Holmstrom 1974). Because of the extra pressures they face, one might expect this to be at least as true for refugees, even at the cost of weakening their legal cases. It applies to men too. Doctors from the Medical Foundation Foundation for Victims of Torture report that male asylum applicants from Sri Lanka who suffer sexual abuse during detention are even more likely to remain silent until a relationship of trust has been established than are female rape victims (Peel *et al* 2000; Peel 2002).

Clearly, therefore, it would be quite wrong to base a negative credibility finding on initial silence alone; explanations for late disclosure should be taken very seriously. That does not of course mean that every applicant who finally claims to have been raped is telling the truth. Immigration Judges must decide on *overall* credibility, and in the case just mentioned there was no medical or psychiatric report supporting S's claim to have been raped; such a report would have lent significant weight to her case.

Remembering traumatic experiences

Another ‘common sense’ supposition – in the *Asylum Policy Instructions* quoted earlier – is that traumatic experiences will be remembered with perfect clarity and vividness. This goes hand in hand with a general assumption that variations and inconsistencies between different tellings of an event, even months or years apart, are damaging to general credibility – hence the significance attached by the UKBA, and to some degree the courts, to apparent inconsistencies in different versions of applicants’ stories. On both counts, however, anthropological and medical evidence point in the opposite direction.

The first issue is the incommunicability of pain. Certain pains (toothache, for example) are socialised by being labelled in everyday speech. Sufferers can map their own private experiences onto these public labels and then ‘sympathy and empathy take over, making the pain in question more or less shareable’ (Daniel 1996: 142).⁶ However, according to Elaine Scarry, the physical pain of torture ‘does not simply resist language but actively destroys it, bringing about an immediate reversion to ... the sounds and cries a human being makes before language is learned’ (1985: 4), while Stuart Turner points out that torture also has the ‘ability to shatter relationships [and] destroy trust’ (1995: 58), so much so that – as Valentine Daniel reports - victims often refuse to believe that their own comrades were indeed tortured, even when they themselves witnessed it (1996: 143, 150).

Not surprisingly, torture victims may find it almost unbearably hard to discuss such de-socialising experiences. Telling one’s story of persecution involves transforming private experience into public meaning, and thereby, says Kirsten Hastrup, constitutes a triumph of ‘agency in the face of disempowerment’ (2003: 314, citing Arendt 1958 and Jackson 2002). Many torture victims cannot achieve this at first, and even when they manage to do so, with the help of their doctor or lawyer, their accounts are not in vivid technicolor, but are monochrome sketches from which, says Elaine Scarry, ‘all the emotional edges have been eliminated’ (1985: 32). In court, their ‘listlessness’, their ‘passionless listings of atrocities committed by the torturer’, seems unconvincing (Daniel 1996: 143). Because the pain of torture is inexpressible, attempts to express it may sound unbelievable.

⁶ Members of spiritualist churches understand pain to be an emotion rather than a sensation, thereby turning it into an experience which can be communicated to and shared with others (Skultans 1974).

Secondly, a recent medical study examined variations in descriptions of traumatic events by Kosovan and Bosnian asylum applicants (Herlihy, Scragg & Turner 2002; cf. Cohen 2001). The discrepancy rate was as high as 30% for descriptions of central elements of both traumatic and non-traumatic events. Moreover, the longer the delay between interviews the higher the discrepancy rate for those with Post-Traumatic Stress Disorder. I attended a seminar in which Turner summarised these findings to an audience of Immigration Judges. Several were dismayed to discover that one cannot base credibility judgments on the consistency of accounts with previous versions, and admitted that they generally did so in coming to their decisions. Turner confirmed, however, that trauma memories are fragmented, so it is *not* the case that people remember very clearly the details of particularly important events. Discrepancies in recounting past experiences are high under any circumstances, but they are higher for traumatic events, so such discrepancies have no necessary connection with overall credibility.

Scholars working on oral histories and life stories would not be at all surprised by such findings. The sociolinguist Linde, for example, argues that life stories are generally judged on the basis of coherence rather than factuality, coherence being both ‘a social demand and an internal, psychological demand’ (1993: 220). These two aspects overlap, however, because telling one’s autobiography is both a cultural event and a manifestation of culturally specific views on the nature of personhood (Langness & Frank 1981: 101). For example, the western convention is that an autobiography should express motivations, emotions, and other elements of the ‘inner self’, whereas in other cultures it may serve as a vehicle for affirming the public self. In both cases, but especially the latter, its content therefore depends on the social relationship between teller and listener (Rosaldo 1976).

The causal chain in such narratives must also be ‘adequate’; that is, the sequence of events narrated must be explained in ways acceptable to the listener (Linde 1993: 221). When speakers feel causality to be inadequate, they may present the next step as an accident or ‘socially recognized discontinuity’ (1993: 221). This is even more likely to happen in a court than in everyday life, because lawyers present evidence in what seems to them the most logical order. This ordering reflects western understandings of causality, of course, whereby only events that occur prior in time can cause subsequent events (Conley & O’Barr 1990: 41). Ultimately, the ‘most pervasive and invisible coherence system is common sense – the set of beliefs and

relations between beliefs that speakers may assume are known and shared by all competent members of the culture' (Linde 1993: 222). In the case of asylum narratives, however, the cultural and experiential differences between teller and listener may be too great for common sense assumptions to be shared to anything like this degree. That is why witness statements are so crucial. They allow asylum applicants' legal representatives to structure their accounts according to the expectations of European legal cultures, and legal cultures. Causal adequacy can thereby be assured prior to the hearing, although it may of course begin to unravel once cross-examination starts.

Because *performance* is an intrinsic part of oral expression, the full meanings of stories emerge only during their telling. This process is, however, greatly inhibited by the rules of evidence applying in law courts. These rules are intended to circumvent 'practical problems posed by ordinary discourse' (Atkinson & Drew 1979: 8), but the result is that 'the rhetorical force of the account' is greatly diminished, making it less involving for the speaker, less dramatic and interesting for the listener, and – often, as a result – less credible for the Judge (Conley & O'Barr 1990: 40). The need to use interpreters has further dampening effects on the performative force of appellants' own utterances.

The meaning of a narrative is related to 'the interaction with ... the audience and its expectations' (Finnegan 1992: 93). In other words, such stories are not stored whole in one's sub-conscious, ready to be reproduced in full at each telling; rather, they are 'realised through performances carried out and mediated by people' (1992: 93–4). For legal anthropologists, it is generally agreed that

A 'story' does not exist fully developed on its own, but only emerges through a collaboration between the teller and a particular audience ... a research interviewer asking questions, a judge presiding in an informal court, a lawyer talking with a client (Conley & O'Barr 1990: 171).

The usual caveat applies of course; some discrepancies and elaborations may indeed indicate untruthfulness, but that decision has to be based on overall credibility, not purely on the discrepancies themselves. Clearly, however, such findings call into question some prevalent 'common sense' assumptions made by asylum decision-makers, and increase the difficulties in reaching fair decisions.

Country experts and credibility assessments

The evidence of country and medical experts may therefore be important for credibility assessments too, yet these experts cannot discuss such matters directly, as we shall now see. UNHCR (1992: ¶204) states that in order to be credible, asylum applicants' statements must be 'coherent and plausible' and not 'run counter to generally known facts'. However, this begs the questions of how to assess plausibility, and which facts are generally known. These are the very issues addressed by country experts like myself, who are asked to assess whether applicants' stories are plausible, and consistent with local history, politics and culture. There is a problem here, however. In legal circles 'credibility' is a term of art, a judgment which only the court is entitled to make. Whether 'plausibility' enjoys the same status has been a matter for debate.

The *Asylum Policy Instructions*, when distinguishing between the credibility of an applicant's evidence, and its plausibility, refer to a legal precedent showing that local cultural conditions must be taken into account:

In the case of *Y v Secretary of State [2006] EWCA Civ 1223*, the Court of Appeal noted that ... claims made by an applicant that appear implausible to a decision maker may nonetheless be true, and may be plausible when seen in the context of the attitudes and conditions of applicant's country of origin (*ibid.*).

Dutton (2003) favours the approach taken by Judge Lee in the Federal Court of Australia (*W148/00A*); this appeal concerned a Syrian, imprisoned by the intelligence authorities for refusing to go to Iran as a spy. His claim had been rejected by the Australian Refugee Review Tribunal, but Lee stated that they could not reject his account simply by asserting that it was 'implausible'; to qualify for such a description, events must be 'beyond human experience of possible occurrence, that is to say, inherently unlikely'.

Dutton (2003) sees four advantages in this approach. First, it recognises that an asylum applicant, of all people, is a 'candidate for the unusual', as Lord Justice Schiemann stated in the Court of Appeal (*Adam*). Second, it uses the most objective possible definition of common sense, based on general human experience rather than personal opinions. Third, 'it is a clear method and makes no allowance for individual preconceptions', but, fourth, it also leads to the rejection of 'fanciful' accounts.

The tribunal in *MM [DRC]*, chaired by the President, criticised this approach, however, preferring to define ‘plausibility’ as ‘apparent reasonableness or truthfulness’; its assessment might involve judgements ‘as to the likelihood of something having happened based on evidence and or inferences’. Objective evidence is often crucial in ‘revealing the likelihood of part or the whole of what was said to have happened actually having happened’, but plausibility is by no means always conclusive in assessments of credibility. The President concluded: ‘A story may be implausible and yet may properly be taken as credible; it may be plausible and yet properly not believed.’

As this illustrates, there is an important difference in British law between deciding that an account is plausible, and judging it to be ‘credible’. There are marked differences here between Court of Appeal Judges and Immigration Judges; the former tend to attach more weight to expert reports, and to expert comments on credibility, than do the latter, who often think – dangerously, in my view – that because they have wide experience of asylum cases they have themselves become ‘experts’ on particular countries. In any case, experts must think twice before expressing their opinions on credibility. The position depends upon the stage which the asylum application has reached. Before an appeal hearing, credibility is still an open question. The UKBA may have expressed doubts about credibility, but these are merely assertions by one party in an adversarial process, and an expert witness can legitimately disagree. By the time of a second appeal, however, a Judge may already have decided that aspects of the appellant’s story are not credible. When the Judge has reached this conclusion for what the expert considers questionable factual reasons, the situation is quite delicate. Experts must find some way of calling the Judge’s use of objective evidence into question without trespassing onto legal decision-making.

Cultural (mis)translation

For asylum claims to be fairly evaluated, applicants’ stories must be placed within their cultural, socio-economic, and historical contexts (UNCHR 1992: ¶42). Country of origin information and expert evidence play parts in explaining such contexts, and appeal hearings, too, ought to be occasions when culturally-specific differences in behaviour can be investigated, especially when the UKBA doubts the credibility of that behaviour. Yet in practice it is common for further cultural misunderstandings to arise during the hearing itself, and if these are not resolved they may raise further

questions about credibility. They often result from the process of interpretation. I must stress that I am not referring here to *faulty* interpretation; but all interpreters, however skillful, are faced with the problem that words in the asylum applicant's language, with particular ranges of meaning, cannot be mapped precisely onto words in the language of the court.

The legal expectation is that court interpreters will give verbatim translations of whatever is said by each speaker (Berk-Seligson 2002: 65). Mikkelsen (no date) describes this as 'a pervasive myth within the judiciary', and interpreters themselves often point out that whereas Judges tend to assume that literal translations are also accurate ones, in fact a strictly verbatim translation produces 'distorted communication' (Colin & Morris 1996: 17). Many interpreters feel strongly that the constraints placed on their role by legal processes limit their ability to facilitate communication (see Morris 1995: 26).

Some misunderstandings in court involve simple factual matters, which can easily be resolved if the court has the necessary information, but if they are not resolved HOPOs will seize on any apparent inconsistencies in order to call credibility into question. To illustrate how easily a damaging confusion may arise, consider the most common inconsistencies in asylum stories - those concerning dates. Any discrepancies between the dates given at interview, in their statement, to the doctor, in cross-examination, and so on, is certain to be seized upon by the HOPO as damaging the credibility of the account as a whole. The plausibility of such arguments varies; it *may* for example seem incredible for an applicant not to know the date of their marriage, or the date they left their home country. Whether they can reasonably be expected to remember the exact dates on which less momentous incidents occurred, especially if these happened several times or long ago, may be a different matter.

This is, moreover, a problem exacerbated by cultural differences (see also Kalin 1986). One complication which courts rarely take into account - because few lawyers are well-enough informed to ask them to do so - is that many asylum applicants come from countries which do not follow the Gregorian calendar. Discrepancies over dates may therefore arise from inaccurate conversions of dates into a calendar with which appellants may be unfamiliar. Many lawyers and Judges *are* aware that Iranians do not use the Gregorian calendar, and it has become widely recognised that this may cause problems. However, this understanding does not seem to extend to appellants from other cultural backgrounds.

Variations in kin relationship terminology can also create problems. Not surprisingly, I most often became aware of such misunderstandings in Tamil cases where I could follow the dialogue to some extent. Here, the HOPO was cross-examining the applicant about the doubts over credibility expressed in the RFRL:

HOPO: Your elder brother is not involved with the LTTE because he has a family?

Appellant: Yes.

HOPO: But on page A5 you say your elder brother *was* a member of the LTTE; why do you say that?

Appellant: I meant my cousin-brother. He is my mother's younger sister's son, who grew up with us and is considered to be like my brother.

HOPO: Why did you not mention him among your family members?

Appellant: I was asked about my own brothers and sisters.

English-speaking Tamils commonly use 'cousin-brother' for those relatives whom anthropologists label 'male parallel cousins'. Fortunately, the Judge was aware of this. She did not make this clear at the time, but she commented to me afterwards that the HOPO was new and had not yet come across this particular Tamil idiom.

Similar ambiguities regarding different parts of the body may be crucial when comparing appellant's evidence of how they were tortured with the placing of scars on their bodies, as reported by medical examiners. The following example arose when I was asked to write an expert report on a Tamil appellant. He had lost his first appeal, and was now appealing against that decision.

The Judge in that previous appeal mentioned an ambiguity regarding the location of bayonet wounds on the appellant's body. His adverse credibility finding was not based explicitly on this, but the effect of such discrepancies is usually cumulative. Yet this 'discrepancy' could have been simply a matter of different translation choices made by different interpreters on separate occasions. Tamils use the same word (*kal*) for foot and leg. This does not of course mean that Tamils confuse feet with legs, but they use composite terms; ankle is *kanukkal*, heel is *kutikal*, and knee is *mulankal*. In everyday speech, however, people often use *kal* with all these meanings, using the more precise terms only when necessary. It is impossible to know, after the event, how precise each statement by the appellant had been, and whether the interpreters had taken account of any composite prefix he might have used; it is, however, easy to see the scope for confusion.

These examples all concern fairly straightforward aspects of cultural difference, which could have been fully explained had the requisite information been available. If these explanations are not forthcoming, however, the damage done to an asylum applicant's credibility may be considerable. Moreover, less tangible cultural matters - to do with norms and values, for example - may be even more pernicious, and far harder to redress.

Judicial assessments of credibility

The first appeal is especially crucial where credibility is concerned, because unless IJs' assessments are clearly wrong, later tribunals will not overturn the initial findings on credibility - and with good reason, because Judges at first appeals do, after all, hear appellants giving oral evidence and undergoing cross-examination. But on what basis do they reach their decisions on credibility?

An analysis of asylum decision-making in Canada noted that Immigration and Refugee Board members tended to reach credibility assessments by applying their own 'assumptions of a universal Canadian cultural "logic"' (Rousseau *et al* 2002: 62). For the researchers, however, the assumed existence of a single frame of reference in refugee hearings, shared by decision-maker and applicant, seemed highly problematic (see also Clifford 1988: 329). While recognising the legal and procedural difficulty of the decision-makers' task, they also noted the 'capricious' treatment by Board members of evidence from experts such as doctors and psychologists (Rousseau *et al* 2002: 55).

Canadian hearings are tape-recorded and transcribed, unlike those in the UK, and study of such tapes revealed not only the effect of psychological trauma on applicants' testimony, as might be expected, but also the extent to which repeated exposure to narratives of torture and rape produced 'massive' avoidance reactions among decision-makers themselves, who displayed a high incidence of 'emotional distress', expressed prejudice, and considerable cynicism (Rousseau *et al* 2002: 64). The report concludes that such behaviour shows 'a very strong emotional reaction, a lack of empathy, and an association of the victim with the aggressor, all symptoms of an inability to cope with the emotional stress created by the hearing' (2002: 59-60). It includes examples of Board members denigrating, discounting, or not even reading psychological reports; discounting cigarette burns on an applicant's body because

‘she herself was a smoker’; giving little consideration to objective evidence; and using judicial knowledge in inappropriate ways.

I have never observed such extreme irregularities in a British hearing. However, it is certainly true that some British Judges express (out of court) cynicism about applicants generally, or stereotyped views about particular nationalities. It seems common for professionals in stressful occupations to distance themselves from the traumas to which they are repeatedly exposed, through denial, avoidance, or emotive reactions such as anger, lack of empathy, or cynical humour, but there are clearly adverse consequences for claimants if such reactions affect judicial evaluations of their credibility.

The most systematic research into how British IJs reach credibility decisions was carried out by Catriona Jarvis, herself now a Senior Immigration Judge, using questionnaires and follow-up interviews. IJs were asked to rank twenty-seven factors pertaining to credibility in order of importance; some were factors common to all judicial assessments, such as consistency or a failure to answer questions, while others were more specific to asylum appeals, such as delayed disclosure of rape or torture (Jarvis 2000: 10). Replies indicated considerable variation in *stated* practice, and showed that many credibility decisions rested on IJs’ ‘gut feelings’, their application of common sense (possibly another way of saying the same thing), or recourse to personal experience (2000: 16).

To that extent, as one judge bluntly put it, the process is ‘a lottery’ in which the decision depends above all on which judge happens to hear the appeal (Jarvis 2000: 19). Some general conclusions can be drawn, however. For example, appellants have less chance of winning if they do not attend, or attend without giving oral evidence. Many judges see oral evidence as essential for establishing credibility, because they cannot see how ‘fundamental justice could be achieved by... making significant findings of credibility solely on the basis of written submissions’ (Judge Wilson, in *Federation of Canadian Sikh Societies*). Others, like Lord Justice Sedley (*Yousaf & Jamil*), think the opposite: ‘it tends to be documentary material which demonstrates that the unconvincing witness has been telling the truth or the convincing one been deluded or lying’.

If this is so when strict rules of evidence apply, there must be even more doubt under the relaxed rules found in asylum appeals, and when witnesses may be traumatised. Nonetheless, IJs’ responses showed that negative credibility factors ‘will

weigh more heavily against you if you don't attend and give oral evidence than if you do' (Jarvis 2000: 20). Although it is an error of law to make a negative credibility finding on this basis, the fact that it obviously still happens is not surprising when one considers that there is generally no evidence (apart from standard objective sources) except the appellant's own.

Some IJs draw adverse conclusions on credibility when applicants choose to use interpreters even though they speak reasonable English; this too is an error of law. On the other hand, most UKBA reasons for disbelieving claims, such as applicants' lack of identity documents or their failure to claim asylum in transit, cut little ice with most IJs, the one exception being when no claim was made until after deportation proceedings were instigated (Jarvis 2000: 17). Similarly, adverse credibility findings are more likely when a claim is lodged only after that of a family member has been dismissed, though this may disadvantage wives who adhered to cultural norms of dependence, and initially allowed their claims to be subsumed under those of their husbands (2000: 21).

Numerous studies show that demeanour is an unreliable guide to credibility in any area of law (Jarvis 2000: 40, and sources therein). This is especially likely in asylum courts, given appellants' diverse cultural backgrounds and expectations regarding interpersonal behaviour. One recent tribunal cautioned that 'judging demeanour across cultural divides is fraught with danger' ('*B*' [*DRC*]), yet it figures importantly in the assessments of many IJs (Jarvis 2000: 23, 40). Like other legal decision makers, IJs are more inclined to believe appellants who are physically attractive, unless they seem to trade on their attractiveness in a manipulative way (2000: 40–1). Such prejudices may be particularly pernicious when allied to misconceptions about rape as an expression of sexual attraction, as they encourage some IJs to believe that the fears of attractive young ladies are well-founded but those of older women are not.

Finally, although they are crucial starting points in almost every appeal, credibility assessments are not conclusive. Decisions should be based upon the existence of future risk, and although the credibility of a person's account may be highly relevant, it is not necessarily decisive' (Symes and Jorro 2003: 466). The ultimate question is, does the applicant have a 'well-founded fear of persecution'? That is evaluated mainly on the basis of 'objective evidence' about the situation in their home country, so in practice the outcomes of most appeals depend on IJs

deciding which version of the objective evidence they prefer as regards risk on return. As the veteran IJ Mr Care pointed out, ‘background information is crucial to most findings of plausibility and frequently credibility as well’ (*Kanagasundram*). Finally, asylum applicants whose accounts are not deemed to be credible may still succeed in their claims if it is accepted that they would face a real risk of persecution if returned: ‘an applicant’s story may not be credible in the light of the objective circumstances but still the case is established’ (*Nimets*).

Court Cases Cited

- Adam, Nasreldin Mohammed v. Secretary of State for the Home Department* [SSHD] [2002]EWCACiv265, 4 March 2003
- 'B' (Democratic Republic of Congo) v. SSHD*, [2003]UKIAT00012, 12 June 2003
- Federation of Canadian Sikh Societies v. Canadian Council of Churches*, [1985] 1 SCR 178
- Kanagasundram v. SSHD*, 16094, 29 January 1998; 16094, 9 December 1999; 00TH02023, 18 September 2000
- Karunakaran v. SSHD*, HX/65362/1996 [IAA]; *Karanakaran v. SSHD*, [2000] Imm AR 271, [2000] 3 All ER 449 [CA]; *Karunakaran v. SSHD*, 00TH03086, 12 September 2000
- MM (Democratic Republic of Congo) v. SSHD* [2005]UKIAT00019, 27 January 2005
- Nimets v. SSHD*, 17884, 29 July 1999
- 'S' v. SSHD*, [2002]UKIAT02331, 2 July 2002
- 'W148/00A' v. Minister of Immigration and Multicultural Affairs* [2001] FCA 679, 22 June 2001 [Federal Court of Australia]
- Y v. Secretary of State* [2006] EWCA Civ 1223
- Yousaf and Jamil: R v. SSHD ex parte Yousaf and Jamil*, C/1999/1004, C/1999/1155, 21 June 2000

Bibliography

- Arendt, Hannah (1958) *The Human Condition*, Chicago: University Press
- Atkinson, JM & Drew, P (1979) *Order in Court: the Organisation of Verbal Interaction in Court Settings*, London: Macmillan
- Berk-Seligson, Susan (2002) *The Bilingual Courtroom: Court Interpreters in the Judicial Process*, Chicago: University Press
- Berkowitz, Nathalia & Jarvis, Catriona (2000) *Immigration Appellate Authority: Asylum Gender Guidelines*, London: Immigration Appellate Authority
- Bingham, Thomas [Lord Justice Bingham] (1985) 'The judge as juror: the judicial determination of factual issues', pp 1–27 in Rideout, P & Jowell, J (eds), *Current Legal Problems*, London: Stevens & Sons
- Burgess, Ann Wolpert and Holmstrom, Lynda Lytle (1974) 'Rape trauma syndrome', *American Journal of Psychiatry* 131: 981–86
- Clifford, James (1988) *The Predicament of Culture*, Cambridge MA: Harvard University Press
- Cohen, Juliet (2001) 'Errors of recall and credibility: Can omissions and discrepancies in successive statements reasonably be said to undermine credibility of testimony?', *Medico-legal Journal* 69(1): 25–34
- Colin, Joan & Morris, Ruth (1996) *Interpreters and the Legal Process*, Winchester: Waterside Press
- Conley, John M & O'Barr, William M (1990) *Rules versus Relationships: the Ethnography of Legal Discourse*, Chicago: University Press
- Daniel, E Valentine (1996) *Charred Lullabies: Chapters in an Anthropography of Violence*, Princeton NJ: Princeton University Press

- Deans, Mungo (2000) *Notes for Adjudicators*, Immigration Appellate Authority
- Dutton, Jake (2003) 'What to believe? A critique of the assessment of plausibility in asylum applications', *The Electronic Immigration Network Bibliotech*. (www.ein.org.uk/resources/full.shtml?x=163847; consulted 09/03/2004)
- Finnegan, Ruth (1992) *Oral Traditions and the Verbal Arts: a Guide to Research Practices*, London: Routledge
- Good, Anthony (2007) *Anthropology and Expertise in the Asylum Courts*, Abingdon & New York: Routledge-Cavendish
- Harvey, Alison (1998) 'Researching *The Risks of Getting it Wrong*', pp 176–98 in Nicholson, Frances & Twomey, Patrick (eds.). *Current Issues of UK Asylum Law and Policy*, Aldershot: Ashgate
- Harvey, Colin (2000) *Seeking Asylum in the UK: Problems and Prospects*, London: Butterworths
- Hastrup, Kirsten (2003). 'Violence, suffering and human rights: anthropological reflections', *Anthropological Theory* 3(3): 309-23
- Hathaway, James (1991) *The Law of Refugee Status*, London: Butterworths
- Henderson, Mark (2003) *Best Practice Guide to Asylum and Human Rights Appeals*, London: ILPA/Refugee Legal Group
- Herlihy, Jane, Scragg, Peter & Turner, Stuart (2002) 'Discrepancies in autobiographical memories: implications for the assessment of asylum seekers: repeated interviews study', *British Medical Journal* 324 (7333): 324–7
- Home Office (1998) *Fairer, Faster and Firmer: a Modern Approach to Immigration and Asylum*, (Government White Paper CM4018) London: The Stationery Office
- IRB (Immigration and Refugee Board of Canada) (1998) *Assessment of Credibility in the Context of CRDD Hearings*, Ottawa: IRB Legal Services
- (1999a) *Convention Refugee Determination Division Handbook*, Ottawa: IRB
- (1999b) *Weighing Evidence*, Ottawa: IRB Legal Services
- Jackson, Michael (2002) *The Politics of Storytelling: Violence, Transgression and Intersubjectivity*, Copenhagen: Museum Tusulanum Press
- Jarvis, Catriona (2000) 'For these or any other reasons: an examination of judicial assessment of the credibility of asylum seekers in the United Kingdom...', unpublished LL.M. dissertation, London
- Kalin, Walter (1986) 'Troubled communication: cross-cultural misunderstandings in the asylum hearing', *International Migration Review* 20: 230–41
- Kandel, Randy Frances (1992) 'How lawyers and anthropologists think differently', pp 1–4 in Kandel (ed), *Double Vision: Anthropologists at Law*, (NAPA Bulletin, No 11) Washington: American Anthropological Association
- Langness, LL and Frank, Gelya (1981) *Lives: an Anthropological Approach to Bibliography*, Novato CA: Chandler & Sharp
- Linde, Charlotte (1993) *Life Stories: the Creation of Coherence*, New York: Oxford University Press
- Mikkelson, Holly (no date) 'Verbatim interpretation: an oxymoron', (www.acebo.com/papers/verbatim.htm; consulted 1 February 2004)
- Morris, Ruth (1995) 'The moral dilemmas of court interpreting', *The Translator* 1(1): 25–46

- Peel, Michael (2002) 'Male sexual abuse in detention', pp 179–90 in Peel, Michael & Iacopino, Vincent (eds.), *The Medical Documentation of Torture*, London, San Francisco: Greenwich Medical Media Ltd
- Peel, Michael, Mahtani, A, Hinshelwood, Gail & Forrest, Duncan (2000) 'The sexual abuse of men in detention in Sri Lanka', *The Lancet* 355 (9220): 2068–69
- Rosaldo, Renato (1976) 'The story of Tukbaw: "they listen as he orates"', pp 121–51 in Reynolds, F & Capps, D (eds), *The Biographical Process: Studies in the History and Psychology of Religion*, Paris/The Hague: Mouton
- Rousseau, Cécile, Crépeau, François, Foxen, Patricia, & Houle, France (2002) 'The complexity of determining refugeehood: a multidisciplinary analysis of the decision-making process of the Canadian Immigration and Refugee Board', *Journal of Refugee Studies* 15(1): 43-70
- Ruppel, Joanna (1991) 'The need for a benefit of the doubt standard in credibility evaluation of asylum applicants', *Columbia Human Rights Law Review* 23: 1ff
- Scarry, Elaine (1985) *The Body in Pain*, Oxford: University Press
- Skultans, Vieda (1974) *Intimacy and Ritual: a Study of Spiritualism, Mediums and Groups*, London: Routledge & Kegan Paul
- Symes, Mark & Jorro, Peter A (2003) *Asylum Law and Practice*, London: LexisNexis
- Turner, Stuart (1995) 'Torture, refuge, and trust', pp 56-72 in Daniel, EV and Knudsen, JC (eds), *Mistrusting Refugees*, Berkeley: University of California Press
- UNHCR (1992) *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva: UNHCR
- Weston, Amanda (1998) "'A witness of truth": credibility findings in asylum appeals', *Immigration and Nationality Law and Practice* 12(3): 87