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# IS TRUTH IN THE EYE OF THE BEHOLDER? OBJECTIVE CREDIBILITY ASSESSMENT IN REFUGEE STATUS DETERMINATION

MICHAEL KAGAN\*

## I. INTRODUCTION

Credibility assessment is often the single most important step in determining whether people seeking protection as refugees can be returned to countries where they say they are in danger of serious human rights violations. Refugee applicants' cases often depend on the value of their word alone, since asylum-seekers can rarely specifically corroborate the central elements of their claims. Public concerns about asylum systems often center on suspicion that asylum-seekers weave false accounts to win residence in wealthy countries, fears that the September 11 attacks in New York and Washington and the ensuing "War on Terrorism" likely heighten. Protecting people at risk of rights violations and building confidence in the integrity of refugee status determination (RSD) require fair and reliable assessments of credibility.

Despite its importance, credibility-based decisions in refugee and asylum cases are frequently based on personal judgment that is inconsistent from one adjudicator to the next, unreviewable on appeal, and potentially influenced by cultural misunderstandings. Some of the people who need protection most are especially likely to have trouble convincing decision-makers that they should be believed. Responding to these concerns, courts, governments, commentators and the U.N. High Commissioner for Refugees (UNHCR) have increasingly sought to give credibility assessments a more concrete basis. Administrative agencies in the U.S. and Canada have articulated specific factors that adjudicators should consider when deciding whether to accept the testimony of a refugee claimant. UNHCR, governments, and courts have also recognized a number of reasons to accept refugee applicant testimony even when it contains significant flaws.

Despite this trend toward more objective credibility assessments, administrative tribunals and courts still wrestle with whether credibility is ultimately a matter of impression that should be left to first instance decision-makers. Appellate tribunals often accept negative credibility findings with very light

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scrutiny, making it difficult for rejected asylum-seekers to effectively appeal. While existing credibility assessment guidelines provided by governments and commentators identify factors that should be considered, they provide little guidance about how these factors should be weighed against each other to reach a final decision.

This article sets out principles, standards, and criteria drawn from international refugee law that should govern credibility assessments. It argues that adjudicators making credibility decisions should rely on concrete factors and analysis. It proposes a framework for analyzing an individual's testimony to give credibility findings a more reliable, reviewable, and objective basis. Finally, this article argues that appellate tribunals should review how first instance decision-makers make credibility assessments.

## II. THE IMPORTANCE OF CREDIBILITY ASSESSMENT IN REFUGEE STATUS DETERMINATION

Credibility is not one of the explicit criteria for refugee protection in international law.<sup>1</sup> But in practice, being deemed credible may be the single biggest substantive hurdle before applicants beginning the refugee status determination process. Since applicants can rarely corroborate their claims with specific independent evidence, establishing the facts in refugee cases usually depends on the value of applicants' testimonies.<sup>2</sup> Political rhetoric in many western countries frequently accuses asylum-seekers of being frauds who manipulate refugee protection to find a better way of life.<sup>3</sup> On the other extreme, some refugee advocates portray "refusing to believe the stories of individual claimants" as a technique by which "worldwide refugee protection is accepted in principle and denied in practice."<sup>4</sup> Despite advancement in broadening the interpretation of the refugee definition (for instance, by recognizing gender-related persecution claims), correct application of the Refugee Convention still depends on reliable credibility judgments.

Neither the 1951 Refugee Convention nor the Statute of the Office of the UNHCR<sup>5</sup> mentions credibility, but negative credibility assessments are a leading reason for rejections in most refugee status determination systems. At

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1. A refugee is any person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country." 1951 Geneva Convention Relating to the Status of Refugees, July 28, 1951, art. 1(A)(2), 189 U.N.T.S. 150 [hereinafter Refugee Convention].

2. See DEBORAH ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 150 (3d ed. 1999) ("The applicant's testimony is often the critical core of the asylum determination, since refugees generally are unable to produce external corroborative evidence.").

3. See, e.g., *The Asylum Seekers Debate*, BBC Online, at [http://news.bbc.co.uk/vote2001/hi/english/main\\_issues/sections/facts/newsid\\_1134000/1134970.stm](http://news.bbc.co.uk/vote2001/hi/english/main_issues/sections/facts/newsid_1134000/1134970.stm), (May 1, 2001) ("During the May 2000 [U.K.] local elections, Conservative leader William Hague sparked controversy after declaring that racketeers were 'flooding the country' with bogus asylum seekers.").

4. David Matas, *Credibility of Refugee Claimants*, 21 IMMIGR. L. REP. 2D 134 (1994).

5. G.A. Res. 428 (V), U.N. GAOR, 5th Sess., Supp. No. 20, at 46, UN Doc. A/1775 (1950).

the UNHCR Regional Office in Cairo, which has the largest individual status determination caseload of any UNHCR field office, a review of rejections issued over ten sample weeks in Spring 2002 showed that seventy-seven percent of rejections were attributed to applicants' "lack of credibility."<sup>6</sup> Reviews of asylum adjudication in other jurisdictions have found that negative credibility findings lead to a substantial portion, if not a plurality or majority, of refugee claim rejections.<sup>7</sup> Legal aid practitioners and refugee rights advocates often find that establishing and defending the credibility of their clients becomes the focus of their work on individual cases.<sup>8</sup>

Credibility has immense practical importance in refugee protection, but it is important not to let it swallow the actual refugee definition. Because credibility is so important to so many refugee claims, it is easy to begin to think of it as an actual part of the refugee definition, as if an asylum-seeker must prove his or her credibility to be protected as a refugee. Some UNHCR publications feed confusion by using the term "credibility" to refer to two separate issues. First, the term primarily refers to the assessment of a refugee claimant's testimony. Second, the word is sometimes used to ask whether a person has a "credible well-founded fear" or a "credible claim" — in other words, should the person be successful in making his or her refugee claim.<sup>9</sup>

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6. UNHCR-RO Cairo interviewing staff complete detailed written assessments of all refugee status determination cases, but UNHCR refuses to provide these to applicants or their legal representatives. UNHCR relies extensively on secret evidence in its decision-making, since it withholds (among other things) copies of interview transcripts, forensic expert opinions, correspondence with other organizations, internal legal opinions, and internal country of origin information that it uses to decide a person's refugee status. Until Autumn 2001, the office provided somewhat specific summaries of reasons for rejection when requested by an applicant's legal representative. Beginning in January 2002, it began posting coded categories of reasons for rejection on its public notice board next to applicant case numbers. Codes included "LOC" (lack of credibility), "NWP" (no well-founded fear of persecution), and "NRC" (manifestly unfounded). Although these categories are not informative about the specific reasons for an individual rejection, they do demonstrate the prominence of credibility in UNHCR's negative assessments. My review of UNHCR-RO Cairo results posted over 11 sample weeks in 2002, February 14 through March 21 and May 2 through May 30, showed 1,144 total rejections with 880 (76.9 percent) attributed to lack of credibility. Since during the same period the UNHCR recognition rate stood at approximately 25 percent, UNHCR was concluding that more than half of its applicants lacked credibility. See Michael Kagan, *Assessment of Refugee Status Determination Procedure at UNHCR's Cairo Office 2001-2002*, at 23-24, 28 (Am. Univ. in Cairo Forced Migration and Refugee Studies Working Paper (2003)), available at [www.aucegypt.edu/academic/fmrs](http://www.aucegypt.edu/academic/fmrs) (follow "Reports" link).

7. A study of one immigration court in the United States in the early 1990s found that credibility was cited in 15 out of 42 decisions by immigration judges and in a higher proportion of negative decisions. See Deborah Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 515 (1992-1993) ("Immigration judges cited credibility as a factor explicitly in negative asylum rulings in forty-eight percent of the decisions rendered in the course of this study.").

8. Based on personal experience providing legal aid to refugee claimants in Egypt, experience working as an intern and consultant with the Amnesty International refugee team in London, and conversations with refugee advocates and legal aid practitioners working in Australia, Canada, France, Germany, Lebanon, the Netherlands, Thailand, Uganda and the U.S. For a guide on how refugee claimants can prepare themselves for credibility assessment, see Matas, *supra* note 4.

9. This dual usage is evident in UNHCR's 1998 Note on Burden and Standard of Proof in Refugee Claims. In one key paragraph UNHCR uses the term credibility in two different ways. First, UNHCR discusses the overall determination of refugee status. See UNHCR, *Note on Burden and*

To prevent confusion, credibility in the refugee context should be used to refer only to whether the applicant's own testimony will be accepted in status determination, not to the decision about whether the person is actually a refugee.

A person does not need to be credible to be a refugee. Neither a state nor UNHCR can refuse someone protection simply because he or she has been less than completely honest.<sup>10</sup> Someone could conceivably be granted refugee protection against deportation, and nevertheless prosecuted for perjury in his or her asylum application. The New Zealand Refugee Status Appeals Authority provided the following explanation of this principle in a case concerning Tamil asylum-seekers:

A lack of credibility might not allow a meaningful finding of facts to be made with regard to incidents of the history or past persecution mentioned by an applicant. However, some aspects of the claim can still remain intact, such as (on the facts of the case) the fact that the three applicants were of Tamil racial background and the principle claimant belonged to a group made of young Tamil males living in the Northern Province of Sri Lanka. Those facts were not tainted by the lack of credibility. The determination of a well-founded fear of persecution had to be made by reference to the "untainted" facts.<sup>11</sup>

A Jew fleeing Germany in the early 1940s or a Tutsi fleeing Rwanda in 1994 could invent an entirely false refugee claim, but independent evidence of her ethnic identity combined with evidence of ongoing ethnic genocide could still establish well-founded fears of being persecuted for reasons of religion or race.<sup>12</sup>

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*Standard of Proof in Refugee Claims*, at para. 11 (16 December 1998) ("In assessing the overall credibility of the applicant's claim, the adjudicator should take into account such factors as the reasonableness of the facts alleged, the overall consistency and coherence of the applicant's story, corroborative evidence adduced by the applicant in support of his/her statements, consistency with common knowledge or generally known facts, and the known situation in the country of origin."). Then UNHCR uses credibility to refer to the believability of an applicant's statements. *See id.* ("Credibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed.").

10. *See* *Kopalapillai v. Minister for Immigration & Multicultural Affairs*, 1126 FCA (Sept. 8, 1998) ("Were we satisfied that the RRT had reached its decision in this case by adopting a procedure which placed on the applicant an onus of establishing that he was truthful, or even a procedure based on the assumption that the purpose of the hearing before it was to discover whether the applicant was a truthful person, we would be satisfied that the procedures adopted by the RRT contravened §420 of the Act."). *See also* *Re ARR*, Refugee Appeal No. 522/92 (N.Z. Refugee Status Appeals Authority 1995) (noting that under the Authority's terms of reference, the Authority has discretion, and that there may be cases where there is evidence that a migrant obtained his refugee protection through material misrepresentation or fraud, but where refugee status should not be cancelled because "the individual may nevertheless possess (on the true facts) a well-founded fear of persecution for a Convention reason and therefore be entitled to retain the grant of refugee status").

11. *Re SA*, Refugee Appeal No. 1/92 (N.Z. Refugee Status Appeals Authority 1992), *citing* *IRB, Re Sittam Palam*, 13 IMMIGR. L. REP. 2D 287 (1990).

12. In religious persecution cases, credibility assessments may need to be limited by concerns that questioning and evaluation of a person's religious sincerity, knowledge, and faith potentially infringes freedom of religion. *See generally* Tuan N. Samahon, Note, *The Religion Clauses and*

There is no exclusion clause in the Refugee Convention for people who fabricate testimony or who commit perjury.

Credibility assessment is a determination of whether a witness' testimony should be accepted as evidence when eventually determining whether the applicant has met the burden of proof to show that he or she is a refugee.<sup>13</sup> It is analogous to a decision about whether to suppress evidence in a criminal trial. A decision about whether to suppress evidence of criminal guilt may in effect determine the outcome of a criminal case. But in a criminal case, a decision about whether police wrongfully conducted a search without a warrant is kept entirely separate from the ultimate determination of whether the prosecution has met its burden of proof. Refugee cases are for good reasons less structured and involve less rigorous evidentiary standards than criminal cases. However, refugee decision-makers should similarly separate credibility assessment from the ultimate decision on refugee status.

### III. BENEFIT OF THE DOUBT PRINCIPLE

Although the Refugee Convention does not mention credibility, the objects and purposes of the Convention establish some principles that should guide the application of the Refugee Convention and hence guide assessments of credibility. One of the Convention's primary purposes is promoting "the principle that human beings shall enjoy fundamental rights and freedoms without discrimination."<sup>14</sup> The Convention should be interpreted and applied so as to promote protection from human rights violations. This calls for a relatively low standard of proof, since genuine victims of human rights violations are unlikely to have access to extensive sources of specific evidence. Demanding too much evidence from refugee claimants would lead states to refuse to protect people facing actual threats to their fundamental human rights and undermine the protection purpose of the Refugee Convention. This protection-oriented approach to assessing refugee claims is embodied by the "benefit of the doubt" rule.

"Benefit of the doubt" has become one of the most frequently quoted phrases in refugee law since UNHCR included it in its 1979 *HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS*.<sup>15</sup> UNHCR recognized that people who flee persecution are not likely to arrive with

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*Political Asylum: Religious Persecution Claims and the Religious Membership-Conversion Imposter Problem*, 88 GEO. L.J. 2211 (2000).

13. See *Diallo v. INS*, 232 F.3d 279 (2d Cir. 2000) (holding that the Board of Immigration Appeals erred by failing to rule specifically on an asylum applicant's credibility before determining whether he had met his burden of proof under the refugee definition).

14. Refugee Convention, *supra* note 1, at Preamble.

15. UNHCR, *HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES* paras. 196, 203, 204 (reedited 1992) [hereinafter UNHCR HANDBOOK].

documents to corroborate every central aspect of their claims.<sup>16</sup> In order to prevent people in danger of persecution from being refused protection because they cannot access evidence, the benefit of the doubt rule establishes that uncorroborated testimony by refugee claimants can be enough to prove that they meet the refugee definition.<sup>17</sup>

As promoted by UNHCR and as applied by leading courts, the benefit of the doubt rule offers little direct guidance about the assessment of credibility. The rule applies only if the applicant's account is in fact credible. As the UNHCR HANDBOOK explains it: "The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility."<sup>18</sup> The European Union's Joint Position on the Harmonized Application of the Definition of the Term Refugee in Article 1 takes the same approach.<sup>19</sup> Similarly, James C. Hathaway explains in his treatise on the refugee definition that, "so long as the claimant's testimony is plausible, credible, and frank, it may constitute the whole of the evidence of objective risk necessary to support an affirmative finding of refugee status."<sup>20</sup>

Though the benefit of the doubt rule applies only to credible testimony, the principles behind it should guide credibility assessments in at least two key ways.<sup>21</sup> First, negative credibility findings should not be based on unsubstantiated suspicions that claimants' testimonies are self-serving. Refugee claim-

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16. See *id.*, at para. 196; *Note on Burden and Standard of Proof in Refugee Claims*, *supra* note 9, at para. 10 ("As regards supportive evidence, where there is corroborative evidence supporting the statements of the applicant, this would reinforce the veracity of the statements made. On the other hand, given the special situation of asylum seekers, they should not be required to produce all necessary evidence. In particular, it should be recognized that, often, asylum-seekers would have fled without their personal documents. Failure to produce documentary evidence to substantiate oral statements should, therefore, not prevent the claim from being accepted if such statements are consistent with known facts and the general credibility of the applicant is good."). The U.S. Board of Immigration Appeals noted that "[a] failure of proof is not a proper ground *per se* for an adverse credibility determination. The latter finding is more appropriately based upon inconsistent statements, contradictory evidence, and inherently improbable testimony." *In re S-M-J-*, No. A70-852-705, 1997 BIA LEXIS 3, at 23-24 (BIA Jan. 31, 1997), *citing* *Artiga-Turcios v. INS*, 829 F.2d 720 (9th Cir. 1987). However, U.S. tribunals have limited the benefit of the doubt principle by holding that a claimant's uncorroborated testimony may suffice only if the lack of corroboration is "reasonable." See *Diallo*, 232 F.3d at 288-89; *Abdulai v. Ashcroft*, 239 F.3d 542 (3d Cir. 2001); *In re M-D-*, 21 I. & N. Dec. 1180 (BIA 1998); *In re Dass*, 20 I. & N. Dec. 120 (BIA 1989). Yet U.S. courts have reaffirmed that corroboration is not required so long as the applicant's testimony is "unrefuted and credible, direct and specific." *Ladha v. INS*, 215 F.3d 889 (9th Cir. 2000) (not addressing situations where failure to present available corroborative evidence may lead to adverse credibility findings.).

17. See UNHCR HANDBOOK, *supra* note 15, at paras. 196, 203, 204.

18. *Id.* at para. 204.

19. Joint Position Defined by the Council on the Basis of Article K3 of the Treaty of the European Union on the Harmonized Application of the Definition of the Term "Refugee" in Article 1 of the Geneva Convention of July 28, 1951 Relating to the Status of Refugees, 12105/95, para. 3, 1996 O.J. (L 63) 2, at para. 3 ("It should be understood that once the credibility of the asylum-seeker's statements has been sufficiently established, it will not be necessary to seek detailed confirmation of the facts put forward and the asylum-seeker should, unless there are good reasons to the contrary, be given the benefit of the doubt.").

20. JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 84 (1991).

21. Commenting on asylum determination in the United States, Joanna Ruppel explains that credibility and the benefit of the doubt principle cannot be entirely separated:

ants have an unavoidable incentive to make misrepresentations in order to win their asylum cases.<sup>22</sup> Were this reality allowed to impugn their testimonies, refugee law would fail to protect most people in danger of persecution. The Canadian Immigration and Refugee Board (IRB) Chairperson's guidelines instruct adjudicators to not reject a claimant's testimony for being self-serving without very strong reasons because "it is difficult to conceive what evidence would be available to a claimant in Canada that would not be self-serving."<sup>23</sup> By allowing uncorroborated claimant testimony to establish refugee status, the benefit of the doubt rule insulates testimonies by genuine applicants from attacks based on general suspicions about all asylum-seekers' honesty.<sup>24</sup> It serves as a safeguard to ensure that all refugees are not penalized because some people abuse the refugee protection system.

Second, refugee status determination should begin with the presumption that the claimant is telling the truth. The U.S Immigration and Naturalization Service advises: "An applicant who swears to certain allegations will be presumed to be telling the truth unless there is reason to doubt the truthfulness of those allegations."<sup>25</sup> The Canadian IRB has endorsed the same standard.<sup>26</sup> A presumption of truthfulness helps ensure that applicants enjoy the benefit of the doubt by accounting for the challenges they face in

Although the UNHCR Handbook does not explicitly extend the benefit of the doubt policy to include credibility assessment, giving applicants the benefit of the doubt in credibility evaluations conforms with the overall policy of generosity and leniency advocated in the Handbook. Moreover, training materials prepared by the UNHCR for INS officials provide that "when the credibility of the claimant is in doubt, the claimant will receive the benefit of the doubt." The implementation of a benefit of the doubt standard in credibility assessments would thus accord with the international standards enunciated by the UNHCR to give asylum-seekers the benefit of the doubt and to make asylum determinations in a humanitarian spirit.

Joanna Ruppel, *The Need for a Benefit of the Doubt Standard in Credibility Evaluations of Asylum Applicants*, 23 COLUM. HUM. RTS. L. REV. 1, 32 (1992).

22. See David Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1281-82 (1990).

23. IMMIGRATION AND REFUGEE BOARD, ASSESSMENT OF CREDIBILITY IN CLAIMS FOR REFUGEE PROTECTION, at 2.4.6 (June 2002) (citing *Kimbudi v. Canada*, 40 N.R. 566 (F.C.A. 1982)) [hereinafter ASSESSMENT OF CREDIBILITY IN CLAIMS FOR REFUGEE PROTECTION].

24. Based on interviews with government personnel involved in asylum adjudication, David Martin comments:

Asylum determinations thus often depend critically on a determination of the credibility of the applicant, for she will usually be the only available witness to the critical adjudicative facts of the case. Because that person also has substantial incentives to lie or to embroider the truth (and few disincentives), this makes for a system vulnerable to manipulation. I was struck, however, by the frequent comments from several participants I interviewed, particularly government decision-makers and INS trial attorneys, indicating that the asylum system is saved from complete collapse largely by the admirable honesty of most of the applicants.

Martin, *supra* note 22, at 1281-82.

25. U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, THE BASIC LAW MANUAL 102 (1994) [hereinafter BASIC LAW MANUAL]. See also ANKER, *supra* note 2, at 153-54.

26. ASSESSMENT OF CREDIBILITY IN CLAIMS FOR REFUGEE PROTECTION, *supra* note 23, at 1.1. See also HATHAWAY, *supra* note 20, at 84-86.



corroborating their cases. In addition to the lack of independent evidence in refugee claims, the presumption of credibility helps account for the difficulties of communication involved in refugee status determination. As Deborah Anker summarizes,

Various factors make it difficult for adjudicators to determine accurately the applicant's credibility. These include differences in cultural norms, the effect of an asylum seeker's past traumatic experiences and flight on her ability to recall events, language barriers, the adversarial nature of the hearing, the asylum seeker's limited access to legal counsel, and the adjudicator's sometimes inaccurate perceptions of foreign culture and politics.<sup>27</sup>

As the New Zealand Refugee Status Appeals Authority has held, mere doubts about an applicant's testimony should not be enough to reject her credibility.<sup>28</sup> Forcing applicants to "prove" their credibility would impose an effective limit on the protection accorded by the Refugee Convention, which is not authorized by the treaty and which many genuine applicants could not overcome. Given that credibility is not an actual criterion for refugee status, applicants cannot be expected to establish credibility as if it were part of their burden of proof. Rather, applicant testimony is a means by which asylum-seekers can prove the substantive criteria for refugee status. These considerations call for beginning refugee status determination with the presumption that the applicant will be truthful, which can be rebutted if there is substantial reason to reject credibility.<sup>29</sup>

#### IV. SUBJECTIVITY AND OBJECTIVITY IN ASSESSING CREDIBILITY

Credibility assessments can embody a struggle between norms of subjective and objective decision-making. Subjective assessments are highly personal to the decision-maker, dependent on personal judgment, perceptions, and disposition, and often lacking an articulated logic. They are very difficult to review and are likely to be inconsistent from one decision-maker to another. Objective credibility assessments apply standard criteria and require adjudicators to conduct a more structured inquiry. Because objective assessments tend to involve more specific and concrete explanations for decisions, they are easier for appellate tribunals to review.

Contrasting tendencies in refugee status determination performed by UNHCR illustrate extremes of subjective and objective credibility assess-

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27. ANKER, *supra* note 2, at 153.

28. See SA, Refugee Appeal No. 265/92 (N.Z. Refugee Status Appeals Authority 1994), available at <http://www.refugee.org.nz/rsaa/text/docs/265-92.htm>.

29. Joanna Ruppel notes that, like international refugee law, American administrative law governing other forms of remedial relief, such as social security benefits or unemployment compensation, requires that doubts be resolved in a claimant's favor. See Ruppel, *supra* note 21, at 28-29.

ments. In what seemed to be a very subjective approach to credibility assessment, a UNHCR officer in Kenya told a researcher: "I can understand if someone is lying or not in the first minute of the interview."<sup>30</sup> In a decision more clearly based on objective facts and reasoning, a UNHCR protection officer rejected a claimant's credibility using the following rationale:

She contradicted herself on central elements of her claim (number of persons arresting her, place of detention, length of detention, treatment during detention, conditions of release, contents of interrogation, reporting duties after release). Her statement in relation with her release from the prison in [deleted] clearly goes against available country of origin information. [Deleted] Prison is a special detention facility where only a certain type of 'offenders' are kept. If inmates are released for medical reasons, they are placed in a specific medical facility where they are kept under custody of a specific law-enforcement agency. Your client said first that she was released for medical reasons and later added that one of her relative (a brigadier in the police) "served" as a personal guarantee that she will return to the [deleted]. Such a possibility is unheard of and contradicts her previous statements. Serious contradictions also appeared in relation with her reporting duties after her release (every two days in the first instance interview + the statement written by a friend of hers and none in the interview today).<sup>31</sup>

Unlike the first example, this assessment has a clear factual and logical basis which makes clear that the decision was not arbitrary and which could be reviewed by an appellate body.

#### A. *Problems Posed by Subjective Credibility Assessments*

Refugee status determination is a human process; it is not an exact science. The assessment of credibility is inevitably prone to some subjectivity because it calls for an adjudicator to judge the trustworthiness of another human being. Emotional impressions of a person and "gut feelings" can have a substantial impact. Though this is unavoidable to some extent, subjectivity undermines confidence in the system. If decisions depend more on adjudicators' personal judgment than articulated logic, adjudicators' personal dispositions naturally come under the microscope, making the RSD system appear arbitrary. Questions about whether an individual decision-maker is personally too lenient or too strict become far more relevant than they should be, since in a subjective system individual tendencies become the driving force

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30. Guglielmo Verdirame, *Human Rights and Refugees: The Case of Kenya*, 12 J. REFUGEE STUD. 54, 59 (1999) (quoting a UNHCR resettlement officer).

31. Deletions are used to preserve confidentiality. The written correspondence relating to this case is on file with the author. Excerpted from correspondence from V. Cochetel, UNHCR Senior Protection Officer (June 20, 2001).

of decision-making. This apparent subjectivity has the potential to undermine public confidence in the adjudication system.

This problem was illustrated in 2000, when an American newspaper published a widely discussed statistical analysis of asylum decisions by U.S. immigration judges. The report showed vastly different rates of granting asylum from one judge to the next. At the extremes, one judge granted 53 percent of the asylum claims before her, while another less than two percent.<sup>32</sup>

Beyond statistics, the potential for inconsistency of credibility assessment was vividly illustrated in the UNHCR's adjudication of the cases of an elderly Sudanese mother and her adult son in Cairo.<sup>33</sup> Applying for protection separately, both mother and son testified to the same central events. The son reported having been detained, accused of supporting the Sudanese People's Liberation Army, and tortured. His mother described his disappearance and his return from detention in dreadful physical condition. After the son fled Sudan, his mother reported that she was herself detained and tortured because of his disappearance. Their accounts were so intertwined that it was logically difficult to accept one and not the other. UNHCR rejected the son at first instance. Then, while he was appealing his case, UNHCR recognized his mother at first instance. Weeks later, UNHCR rejected the son's appeal on credibility grounds, and closed his file.

A high profile controversy over an Afghan family in Australia in July 2002 illustrated a similar case of inconsistent decisions.<sup>34</sup> Two boys escaped from an Australian detention center and unsuccessfully sought asylum at a British consulate. Their father had been granted a refugee visa 18 months earlier, but the Australian government rejected applications by the rest of the family. When the case became public, the Minister of Immigration and Multicultural Affairs Philip Ruddock moved to revoke the father's visa, claiming without explanation that the family was actually from Pakistan.<sup>35</sup>

Similarly, in a study of refugee decisions in Australia, Susan Kneebone documented several vivid cases of asylum-seekers from China, Peru, and Fiji who presented similar cases and met with inconsistent credibility decisions,

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32. See Fredric N. Tulsy, *Asylum Seekers Face Capricious Legal System; Some Judges Grant Asylum in Only 1 in 20 Cases, Others in 1 in Every 2; Former Government Immigration Lawyers Are Toughest Asylum Judges; Rulings Vary Widely, Even for Applicants with Similar Stories*, SAN JOSE MERCURY NEWS, Oct. 18, 2000, at A1. Another American newspaper account describing similar variability between judges specifically blamed negative credibility assessments for one judge's reluctance to grant asylum. Lisa Getter, *Few Applicants Succeed in Immigration Courts*, L.A. TIMES, Apr. 15, 2001, at A20. Similar statistical rankings of US immigration judges are continually posted and updated on the Internet. U.S. Immigration Judge Database, at [www.asylumlaw.org](http://www.asylumlaw.org) (last visited Feb. 10, 2003).

33. This case is based on personal experience providing legal counsel to both mother and son at different stages of their refugee status applications to UNHCR. Information is on file with the author.

34. See *UK Denies Runaway Boys Asylum*, THE GUARDIAN UNLIMITED (England), July 18, 2002, available at <http://www.guardian.co.uk/australia/story/0,12070,757304,00.html>.

35. *Id.*

some rejected and some accepted.<sup>36</sup> In some instances, applicants were rejected on credibility grounds even when they seemed to present more detailed and substantiated cases than accepted applicants.<sup>37</sup>

As much as possible, refugee status determination should be about assessing whether a person is in danger of human rights violations, not about personal impressions applicants make on adjudicators. Guy S. Goodwin-Gill observes:

Experience shows that the refugee status determination process is often unstructured. Decision-makers commonly rely on instinct and a feel for credibility, but with inadequate attention to the problems of assessment, identification of material facts, the weight of the evidence, and standards of proof. Even where decisions are felt to be correct, lack of confidence can result from systematically basing oneself on subjective assessments and failing to articulate clearly the various steps which lead to particular conclusions and the reasons which justify each stage. Such lack of confidence can increasingly undermine the capacity to deal effectively with the caseload, whatever the strengths or weaknesses of individual applications, and no matter how many unstructured decisions are in fact right.<sup>38</sup>

The stakes in refugee cases are grave; an incorrect decision can lead a person to detention, torture, execution, or other severe human rights violations. Unstructured and unreviewable credibility assessments lead to inconsistent decision-making and great risks of mistaken refusals to protect people in danger. Allowing a central part of refugee status determination to be essentially subjective generates serious doubts about the fairness and effectiveness of the adjudication system. Applying a common approach to credibility assessment, which so often determines the outcome of refugee cases, would bolster confidence in an RSD system.

#### B. *Trends Toward Objective Credibility Assessments*

UNHCR previously saw credibility as a purely subjective decision by a decision-maker, but more recently has moved toward an objective approach. A 1989 UNHCR training manual advised decision-makers that, "hard facts are rarely available, and the credibility of the case before you will be a matter of personal judgment."<sup>39</sup> However, a 1995 UNHCR manual qualified this endorsement of subjectivity:

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36. Susan Kneebone, *The Refugee Review Tribunal and the Assessment of Credibility: An Inquisitorial Role?*, 5 AUSTL. J. ADMIN. L. 78, 89-93 (1998).

37. *Id.* at 89-90.

38. GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 350 (2d ed. 1996).

39. *Determination of Refugee Status*, UNHCR, at ch. 1, RLD 2 (1989).

Without question, there are unavoidable subjective elements which come into play in deciding on an application for refugee status. However, the actual determination cannot be arbitrarily made on the basis of the interviewer's intuitive or "gut" feeling for the case.<sup>40</sup>

Administrative agencies, appellate tribunals, and courts have increasingly insisted that adjudicators explain the specific reasoning behind negative credibility findings. The U.S. Board of Immigration Appeals (BIA) has held that a refugee status decision-maker may not reject an applicant on credibility grounds without "specific and cogent reasons," such as inconsistencies, vagueness or material omissions in testimony or evidence.<sup>41</sup> The Canadian IRB's guidelines note:

The Federal Court has commented frequently that if the Board rejects a claim essentially because of a lack of credibility, clear reasons must be given. Those aspects of the testimony which appear not to be credible must be clearly identified and the reasons for such conclusions must be clearly articulated. . . . This generally includes an obligation to provide explanations or examples of the basis for not accepting the claimant's testimony (for example, inconsistencies, implausibilities). It is not enough to say that the evidence is not believed, since this creates an appearance of arbitrariness.<sup>42</sup>

Requiring reasons for negative credibility assessments allows credibility decisions to be reviewed, shows that decisions are not arbitrary, and makes concrete elements of a person's testimony more important than an adjudicator's personal judgment.

#### V. Demeanor: The Persistent Vestige of Subjective Credibility Assessment

Coinciding with the trend to limit the role of subjective factors, administrative agencies in the U.S. and Canada have made efforts to reduce reliance on demeanor, or nonverbal communication signals, in credibility assessments. However, demeanor remains a recognized part of credibility assessments in many systems. Demeanor is an unreliable means of determining whether a refugee applicant is being truthful, and credibility standards would be improved by prohibiting any consideration of non-verbal communication in credibility assessments.

More than any other factor, evaluations of demeanor are highly dependent on the adjudicator's and the applicant's personal and cultural dispositions,

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40. *Interviewing Applicants for Refugee Status*, UNHCR, at 61, RLD 4 (1995).

41. *In re A-S-*, 21 I. & N. Dec. 1106, 1109 (BIA 1998).

42. ASSESSMENT OF CREDIBILITY IN CLAIMS FOR REFUGEE PROTECTION, *supra* note 23, at 2.2.1 to 2.2.2.

not to mention the difficult situation in which the refugee applicant finds him or herself during refugee status determination. The nonverbal cues that people tend to rely on to decide if another person is telling the truth vary widely from culture to culture.<sup>43</sup> The Federal Court of Australia has warned:

The dangers of attempting to assess the truthfulness of witnesses by reference to their body language, where different cultural backgrounds are involved, are well-known. . . . The problem is exacerbated even more when evidence is given by way of an interpreter. Judging the demeanour of the witness from the tone of the interpreter's answers is obviously impossible. Judging the demeanour of the witness from the witness's own answers in a foreign language would require a high degree of familiarity with that language and the cultural background of its speakers. It is all too easy for the 'subtle influence of demeanour' to become a cloak, which conceals an unintended, but nonetheless decisive bias.<sup>44</sup>

Even without cultural and linguistic differences, psychological studies have found that interpretations of demeanor are a poor indicator of whether someone is being truthful. Most people cannot accurately discern truth from lies in another person based on non-verbal cues.<sup>45</sup> In the criminal justice field, research with police officers has shown that only a minority can reliably detect lies in criminal suspects based on observing nonverbal cues alone, and those relying on body movements such as twitches, hand movements, and voice patterns are often the most inaccurate.<sup>46</sup> In some studies, police performed little better than chance and no better than untrained subjects at detecting lies, although police had more confidence in their ability to detect lies.<sup>47</sup>

Many people get nervous in formal hearings or court-like settings. Refugee applicants find themselves in an entirely different culture to which they

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43. See Walter Kalin, *Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing*, 20 INT'L MIGRATION REV. 230, 232-34 (1986).

44. *Perera v. Minister for Immigration & Multicultural Affairs*, 92 F.C.R. 6, para. 48 (Austl. 1999) (quoting *Kathiresan v. Minister for Immigration and Multicultural Affairs*, No. VG 305, p. 6 (Austl. 1998) (unreported)).

45. See Juliet Cohen, *Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers*, 13 INT'L J. REFUGEE L. 293, 308 (2001) (discussing one study where judges trained to pick up nonverbal cues to distinguish real from suggested memories were accurate only 60 percent of the time, compared to 50 percent normally), originally published in 69 MEDICO-LEGAL J. Part 1 (2001); BBC Online, *What gives a liar away?* (Nov. 1, 2001), at [http://news.bbc.co.uk/2/hi/uk\\_news/1630660.stm](http://news.bbc.co.uk/2/hi/uk_news/1630660.stm); Paul Ekman et al., *Who Can Catch a Liar?*, 46 AM. PSYCHOL. 913 (1991); Aldert Vrij, *Detecting the Liars*, 14 THE PSYCHOL. 596 (2001); Mark G. Frank, *Assessing Deception: Implications for the Courtroom*, 2 JUDICIAL REV 315. (1996); Gerald R. Miller & Judee K. Burgoon, *Factors Affecting Assessments of Witness Credibility*, in THE PSYCHOL. OF THE COURTROOM 169, 191 (Norbert L. Kerr & Robert M. Bray eds., 1982).

46. See Aldert Vrij & Samantha Mann, *Telling and Detecting Lies in a High-stake Situation: The Case of a Convicted Murderer*, 15 APPLIED COGNITIVE PSYCHOL. 187 (2001).

47. See *id.* (finding that police detected lies accurately 45 to 60 percent of the time, compared with a 50 percent rate by chance).

may be trying to assimilate and are asked to communicate potentially traumatic and painful events. They often must speak through an interpreter, which severely disrupts the interchange of communication signals on which demeanor assessments depend.<sup>48</sup> The Canadian IRB Chairperson's guidelines advise:

It would be a rare case where demeanour alone would be sufficiently material to the claim to undermine the entire testimony in support of a claim . . . . In general, the courts have attempted to diminish the role of demeanour in the final assessment of credibility.<sup>49</sup>

The IRB guidelines note that "every judge's assessment of credibility is influenced by a witness' demeanour" but caution that "although the reasons for reaching a conclusion on this issue may be partly subjective, they must also be founded on objective considerations."<sup>50</sup>

The INS Basic Law Manual contains a similar warning to "avoid relying exclusively on demeanor in finding an applicant credible or not credible."<sup>51</sup> The U.S. BIA has upheld a demeanor-influenced negative credibility decision when demeanor, such as a "very halting" and "hesitant" manner, confirms other more concrete grounds, such as substantial and widespread inconsistencies and vagueness.<sup>52</sup> However, the BIA has reversed decisions where demeanor alone led to a negative credibility finding.<sup>53</sup> UNHCR has advised against considering demeanor evidence with female applicants:

The type and level of emotion displayed during the recounting of her experience should not affect a woman's credibility. Interviewers and decision-makers should understand that cultural differences and trauma play an important and complex role in determining behaviour.<sup>54</sup>

Given the limited reliability of credibility judgments based on nonverbal communication in any context, and the especially acute problems with interpreting nonverbal communication in a refugee interview context, adjudicators have good reason to disregard demeanor entirely in credibility assessments. Credibility assessment guidelines in the U.S. and Canada would be improved by prohibiting entirely the use of nonverbal cues or demeanor in credibility assessments.

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48. See BASIC LAW MANUAL, *supra* note 25, at 107-09; ANKER, *supra* note 2, at 160-62.

49. ASSESSMENT OF CREDIBILITY IN CLAIMS FOR REFUGEE PROTECTION, *supra* note 23, at 2.3.7.

50. *Id.* (citing *King-Adjei v. Canada (M.E.I.)*, No. T-1584-91, 1992 WL 1333787 (Fed.T.D. March 16, 1992)).

51. BASIC LAW MANUAL, *supra* note 25, at 109.

52. See *In re A-S-*, 21 I. & N. Dec. 1106, 1111-12 (BIA 1998).

53. See *In re B-*, 21 I. & N. Dec. 66 (BIA 1995).

54. See UNHCR, *Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, at para. 36(xi).

## VI. DEFINING A CREDIBILITY STANDARD

If credibility assessments are to avoid arbitrariness, adjudicators need a common definition of what it should mean for a refugee claimant to be credible. In 1998, UNHCR articulated a definition of credibility that encapsulates widely accepted elements essential to credibility assessments while being consistent with the overriding protection purposes of the Refugee Convention. In its Note on Burden and Standard of Proof in Refugee Claims, UNHCR advised: "Credibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed."<sup>55</sup>

Much of this definition was not new; the UNHCR HANDBOOK had also stressed coherency, plausibility, and consistency with generally known facts.<sup>56</sup> These elements are widely accepted as the core criteria for credibility.<sup>57</sup> The importance of the 1998 UNHCR standard is the use of the phrase "capable of being believed" to define the ultimate standard. The U.S. BIA has endorsed a similar definition, including the element of being "believable."<sup>58</sup> This shifts focus away from the adjudicator's personal impressions of an applicant and onto more concrete factors. In essence, it asks "could a reasonable person believe the testimony?" rather than "do I believe this person?" Defining credibility in terms of being *believable* rather than being *believed* makes clear that an adjudicator should in some cases accept the credibility of applicants he or she may personally mistrust, since another reasonable person may find the applicant believable.<sup>59</sup>

The 1998 UNHCR standard thus makes credibility assessment more objective. It directs decision-makers to find a concrete basis for credibility assessments, in order to demonstrate either that there is a reasonable basis for accepting the applicant's account, or that no reasonable person could believe it. Using the believability standard, an adjudicator reaching a negative decision should rely on concrete elements to show that a reasonable person

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55. *Note on Burden and Standard of Proof in Refugee Claims*, *supra* note 9, at para. 11.

56. See UNHCR HANDBOOK, *supra* note 15, at para. 204.

57. See *In re Mogharabi*, 19 I. & N. Dec. 439, 445 (BIA 1987); WHO IS A REFUGEE? A COMPARATIVE CASE LAW STUDY 708 (Jean-Yves Carlier et al. eds., 1997) (describing criteria in Austria, Belgium, Denmark and the Netherlands); Sabine Weidlich, *First Instance Asylum Proceedings in Europe: Do bona fide refugees find protection?*, 14 GEO. IMMIGR. L.J. 643, 648 (2000) ("In Germany, for example, decision-makers appreciate the specification of events, their chronological presentation, and exact dates and names.").

58. See *In re Mogharabi*, 19 I. & N. Dec. at 445 (an "alien's own testimony . . . can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear").

59. The "believability" standard was implicitly implemented by the previous Canadian practice of having two adjudicators hear each refugee claim, and granting protection if either one made a favorable decision. This allowed an applicant to win asylum even when one adjudicator thought him or her not credible. Canada has unfortunately backed away from this system because of the resources required to have two adjudicators in each case. However, it may still be useful for adjudicators considering rejecting an applicant's credibility to ask whether another decision-maker hearing the same case would necessarily reach the same conclusion.



could not find the applicant believable. An adjudicator's "gut feeling" would not be sufficient, since another person may form an entirely different instinctive impression of the applicant. The "believability" standard opens the way for credibility assessments to be more consistent from one decision to the next, and for decision-makers to apply a common analytical framework to all credibility assessments.

UNHCR's believability standard is consistent with the unique nature of refugee status determinations and their low standard of proof. To be a refugee, people only need to show that their fears of being persecuted are well founded, rather than needing to show certainty, or even probability, that they would be persecuted.<sup>60</sup> Because refugee status determination is devoted to future protection and does not need to be concerned about infringing on anyone's rights (other than the claimant's rights should he or she be wrongfully rejected), refugee law developed a very low standard of proof. It is sufficient for an asylum-seeker to face a "real chance" of persecution,<sup>61</sup> or a "reasonable possibility" of persecution.<sup>62</sup> Given this low threshold of required risk, an adjudicator does not need to be absolutely convinced by an applicant's testimony, as a jury might need to be in a criminal case requiring proof beyond reasonable doubt. In a refugee case, where only a "real chance" must be proved, it should be enough for the testimony to be generally believable.

The 1998 UNHCR standard is superior to several alternative definitions of credibility. For instance, according to the New Zealand Refugee Status Appeal Authority, credibility cannot be rejected unless the decision-maker is "sure that the applicant's account is untrue."<sup>63</sup> This standard clearly follows the principle that doubt should be resolved in an applicant's favor, but it is an essentially subjective standard dependent on adjudicators' personal confidence in their assessments rather than on the factual or analytical basis of their assessments.<sup>64</sup>

As another alternative, Ilene Durst proposes borrowing from usual common law objective standards of proof to guide credibility assessments. Durst argues that asylum-seekers should be presumed credible, unless there is

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60. See *In re Mogharabi*, 19 I. & N. Dec. at 441.

61. *Chan v. Minister for Immigration and Ethnic Affairs* (1989), 169 CLR 379, 388.

62. *U.S. v. Cardozo-Fonseca*, 67 U.S. 407, 453 (1987).

63. See *In re S-A-*, Refugee Appeal No. 265/92 (Refugee Status Appeals Authority 1994) ("If . . . the statement that 'credibility is in doubt' means no more than that the Refugee Status Section was unsure as to the applicant's credibility, there was a duty to give the applicant the benefit of the doubt. In recent decisions of the Authority it has been said that unless it is possible to say that the decision-maker is 'sure that the applicant's account is untrue,' the benefit of the doubt must be given. The more so where . . . the consequences of a wrong or mistaken rejection of the appellant as a refugee would be 'disastrous', i.e., the higher the risk to the appellant (were the account true), the higher the threshold of 'sureness' before it can be said that the account is untrue.")

64. See Ilene Durst, *Lost in Translation: Why Due Process Demands Deference to the Refugee's Narrative*, 53 RUTGERS L. REV. 127 (2000).

“clear and convincing” evidence to the contrary.<sup>65</sup> This standard of proof is substantially more stringent than the usual “preponderance of the evidence” standard used in most civil cases in common law systems. As Durst argues, the myriad obstacles refugees face establishing their cases and the severe consequences of errant rejections justify this strong standard.<sup>66</sup> The clear and convincing standard responds to the difficulties *bona fide* refugees face by giving force to the presumption of credibility established in the U.S. and Canada.

However, there is some reason for caution about adopting the clear and convincing rule as the ultimate standard to define credibility assessment. The unusual nature of refugee law makes importing standards of proof from other area of law problematic.<sup>67</sup> Common law standards of proof are normally used to make final factual findings from an evaluation of all available evidence. This could confuse the nature of refugee credibility assessment, since credibility assessment is a more limited determination of whether the claimant’s testimony can be considered in the ultimate decision on refugee status. By comparison, the concept of believability focuses more clearly on the assessment of a person’s testimony. There is no strong objection to using the clear and convincing standard for credibility assessment in the refugee cases. In practice, requiring clear and convincing reasons to reject credibility will often produce the same results as UNHCR’s believability standard. As an informal rule of thumb, it would be useful for adjudicators to ask if the evidence against credibility is clear and convincing. As a formal definition of credibility, however, the UNHCR standard is better suited for the refugee status determination context.

## VII. POSITIVE AND NEGATIVE CREDIBILITY FACTORS

Efforts to give credibility assessments a more concrete basis have led governments, UNHCR, tribunals, and commentators to develop lists of factors that decision-makers should consider and that can weigh positively or negatively on credibility. Canada’s IRB<sup>68</sup> and the American Immigration and Naturalization Service<sup>69</sup> have compiled especially useful summaries of credibility factors.<sup>70</sup>

Credibility assessment involves comparing an applicant’s testimony to independent evidence. This may include other witness testimony, expert reports and assessments, documentary proof, or country of origin reports.

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65. *Id.* at 174-76.

66. *Id.*

67. *See* Karanakaran v. Secretary of State, 3 All E.R. 449 (Eng. C.A. 2000), discussed *infra* Section XI.

68. *See* ASSESSMENT OF CREDIBILITY IN CLAIMS FOR REFUGEE PROTECTION, *supra* note 23.

69. *See* BASIC LAW MANUAL, *supra* note 25, at 102-09.

70. *See also* ANKER, *supra* note 2, at 160-69 (summarizing factors used in the INS Basic Law Manual and U.S. asylum jurisprudence).

Independent evidence may specifically confirm or contradict an individual's account, for instance by verifying personal information and associations or indicating that a migrant did not leave his or her country when claimed. It may confirm key parts of a claimant's testimony, making it more likely that the rest of his or her account is true. It may generally corroborate an experience, for instance by confirming that a certain battle took place at a certain time. Or, it may provide a general context for a claim, for instance by confirming at a general level that domestic violence or torture are common problems in a particular country. This sort of general country of origin evidence helps demonstrate whether an account is, in UNHCR's terms, "consistent with generally known facts." Such evidence is important beyond credibility assessment, since it may independently establish or rebut a well-founded fear of being persecuted, and needs to be evaluated in its own right. When independent evidence is highly specific, its importance in confirming or rebutting an applicant's testimony is often quite clear.<sup>71</sup>

The difficult credibility assessment cases are usually those where establishing refugee status depends on applying the benefit of the doubt because specific independent evidence is not available to confirm central facts. The following discussion relates to this kind of case. In these cases, adjudicators must assess an applicant's testimony on its own internal merits. To do this, courts, governments, UNHCR and commentators have focused on a set of primary factors that help establish whether an applicant's testimony is believable.

The following table sets out the most important factors that come into play in credibility assessments. As the following discussion illustrates, credibility assessment is extremely difficult because each credibility factor is subject to substantial caveats and requires significant caution.

Positive Credibility Factors	Negative Credibility Factors <sup>72</sup>
• Detail & specificity	• Vagueness
• Consistency	• Contradictions
• Providing all facts early	• Delayed revelation of key facts
• Plausibility of the account	• Implausibility

71. See France Houle, *The Credibility and Authoritativeness of Documentary Information in Determining Refugee Status: The Canadian Experience*, 6 INT'L J. REFUGEE L. 6 (1994) (exploring the use of documentary evidence in credibility assessment).

72. Demeanor is not listed as a factor here although it continues to play an acknowledged role in credibility assessments. Its validity is subject to a great deal of doubt. Because of the problems inherent in judging demeanor mentioned *supra* at Section V, it is difficult to see how demeanor factors could ever show that a refugee applicant is or is not believable. Decision-makers would thus be on solid ground to never rely on demeanor in credibility assessments.

### A. *Detail and Vagueness*

One of the most commonly referenced criteria for assessing credibility is level of detail, with the basic equation that detail indicates credibility while vagueness indicates lack thereof.<sup>73</sup> Asylum-seekers strengthen their cases by providing as much information as possible about the central events that justify their fears of persecution: what did they see, what did they hear, what happened first, and what happened second. An applicant who describes having been arrested by four men in civilian uniforms, one with a mustache, and one carrying a machine gun, has a stronger case for credibility than one who simply says, “I was arrested.”

Some research suggests that detail or vagueness can be important indicators to distinguish real memories from false ones. In particular, “real” memories tend to include more sensory information — what someone saw and heard — while “false” memories tend to be more general and less vivid.<sup>74</sup> Exactly how much detail is required — and to what degree lack of detail undermines credibility — is not entirely clear.<sup>75</sup> Lack of detail can just as easily result from inarticulateness, memory failure, shyness, nervousness, or problems with interpretation and understanding as from lack of real memory. Asylum-seekers strengthen their cases if they are able to explain their experiences coherently, in chronological order, and with the kind of detail that only a person who really lived them could provide.

Recent cognitive research on asylum-seekers has demonstrated that people are not always capable of giving detailed accounts of past events. People naturally code long-term memories by the meaning and associations attached to them, so that the information remembered is an interpretation, not a true recording.<sup>76</sup> People have difficulty remembering details about incidents that carry little meaning for them, and memories of details tend to fade over time.<sup>77</sup> This suggests that applicants may not be able to provide full details in RSD interviews and hearings conducted long after they experienced critical events. It also reinforces the influence of differing cultures and personalities on refugee applicant testimony. Events that are central to an asylum case in a legal sense may not be what an applicant perceived to be important when the events happened. For instance, refugee status may depend on an applicant’s father’s political activities, but an applicant may remember much more about her father as a parent than as a politician.

Another problem with expecting details from refugees is that they may not know key information. Details such as dates, which people often do not

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73. See ANKER, *supra* note 2, at 163; ASSESSMENT OF CREDIBILITY IN CLAIMS FOR REFUGEE PROTECTION, *supra* note 23, at 2.5.3.

74. Cohen, *supra* note 45, at 296.

75. See *In re B-*, 21 I. & N. Dec. 66, 70 (BIA 1995).

76. Cohen, *supra* note 45, at 295.

77. *Id.*

remember, may be unreasonable to expect.<sup>78</sup> In one case, the U.S. BIA decided that “under certain circumstances, the failure to provide precise dates may not be an indication of deception.”<sup>79</sup> This is vividly clear in work with Sudanese asylum-seekers in Egypt, who often struggle to remember their own wedding dates because such dates are not culturally important, and whose passports frequently report birth dates as “January 1” because actual dates are rarely recorded in rural areas.

Not knowing relevant information is a particular problem for women, who often may be kept in the dark about activities of family members or even of events that directly affect themselves.<sup>80</sup> In the noted case *In Re Fauziya Kasinga*, where the BIA granted asylum to a woman from Togo fleeing female genital mutilation (FGM), the BIA rejected a number of challenges to Kasinga’s credibility based on vagueness and contradictions in her account. She had contradicted herself about who precisely would perform the genital cutting procedure and about whether she was in fact married. These were not sufficient to justify rejecting her credibility because “it is understandable that a teenage girl, who has been protected from FGM by her father, and who has never been subjected to the process, might have an imperfect understanding of who actually performs the procedure in her tribe.”<sup>81</sup> Her marital status was a matter of some ambiguity, since she had been married to an older man against her will.

Due in part to these kinds of concerns, it is difficult to say whether vagueness alone can justify a negative credibility finding. But lack of details unquestionably weakens testimony, and specificity about central events strengthens it.

### B. *Consistency and Contradictions*

Perhaps the most widely cited reason for rejecting refugee applicants’ credibility are inconsistencies within their accounts, or between separate occasions when they are asked to explain and re-explain their experiences. Inconsistency goes to the heart of whether a person’s account is coherent. Contradictions frequently occur because claimants are repeatedly questioned in different ways about their claims. For instance, in the U.S. asylum system

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78. UNHCR’s office in Cairo often warns applicants that they do not need to remember exact dates, largely due to a concern that refugees believe they need to know dates for all major events in their life, and will feel pressure to invent them if they cannot really remember.

79. *In re B-*, 21 I. & N. Dec. at 70.

80. See *Gender-related Persecution within the context of Article 1A(2) of the 1951 Convention*, *supra* note 54, at para. 36 (iii, v, vii, viii) (noting that victims of sexual violence should be interviewed by someone of the same sex as themselves, and should be reassured of confidentiality. In addition, refugee status adjudicators should recognize that women “often do not provide relevant information in interviews due to the male oriented nature of the questioning,” and in particular are reluctant to explain incidents such as rape, sexual abuse, genital cutting, honor killings, and forced marriage. Multiple interviews may be necessary to establish the trust needed for any victim of sexual violence or trauma to reveal their experiences).

81. *In re Fauziya Kasinga*, 21 I. & N. Dec. 357, 363 (BIA 1996) (Interim Decision).

applicants usually submit a personal statement or affidavit with their I-589 asylum application form. The asylum office then interviews them. If they are referred to an immigration court, they will need to testify, and be cross-examined. By the end of the immigration court hearing — which in the U.S. system is the main first instance decision-making forum — an asylum-seeker has likely told his or her story orally or in writing at least three times separated by many months. Contradictions between such retellings often lead to negative decisions because of the widely assumed premise that liars eventually slip up when carefully questioned, while people remembering real events will be able to recall them the same way each time.

Courts have repeatedly held that substantial inconsistencies in testimony and contradictions from one interview or hearing to the next can warrant negative credibility findings.<sup>82</sup> The BIA has used a three-step analysis for determining whether inconsistencies support a negative credibility finding:

As relates to this analysis, our review of the record reveals that (1) the discrepancies and omissions described by the Immigration Judge are actually present; (2) these discrepancies and omissions provide specific and cogent reasons to conclude that the respondent provided incredible testimony; and (3) the respondent has not provided a convincing explanation for the discrepancies and omissions.<sup>83</sup>

Thus, in any negative credibility finding based on contradictions, an applicant must be given the opportunity to explain the alleged contradictions, and the final decision must evaluate the contradictions in light of his or her explanation.<sup>84</sup> The U.S. Ninth Circuit has recognized that a refugee claimant's credibility should not be dismissed based on minor inconsistencies or misrepresentations, mistranslation or miscommunication, or mere omission of details.<sup>85</sup> Canadian Guidelines note:

It is clear from a long line of cases that an adverse finding of credibility based on contradictions in a claimant's or witness's testimony must be based on real contradictions or discrepancies that are of a significant or serious nature. Inconsistency, misrepresentation or concealment should not lead to a rejection of the claim where these are not material to the claim.<sup>86</sup>

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82. See generally Jonathan Su, *Interpretations of Asylum Law in the United States Court of Appeals for the Ninth Circuit in 2000-2001*, 16 GEO. IMMIGR. L.J. 191, 194-95 (2001).

83. *In re A-S-*, 21 I. & N. Dec. 1106 (BIA 1998).

84. See *Rajaratnam v. Canada (M.E.I.)*, [1991] 135 N.R. 300, 309 (F.C.A.) (holding that it is appropriate for the panel determining credibility to ask additional questions in order to clarify perceived inconsistencies).

85. See *Kaur v. INS*, 2003 U.S. App. LEXIS 565 (9th Cir. 2003); *Bandari v. INS*, 227 F.3d 1160, 1165 (9th Cir. 2000); *Aguilera-Cota v. INS*, 914 F.2d 1375, 1382 (9th Cir. 1990); see also Su, *supra* note 82, at 195.

86. ASSESSMENT OF CREDIBILITY IN CLAIMS FOR REFUGEE PROTECTION, *supra* note 23, at 2.3.4.

Credibility assessment should not be a search for contradictions, with any inconsistency immediately leading to a negative decision.<sup>87</sup>

The wide acceptance of using contradictions to justify negative credibility findings deserves substantial scrutiny because empirical studies of human memory suggest that inconsistency does not always indicate fabrication. A recent review of cognitive memory research concluded human beings are generally not capable of repeatedly reporting events with perfect consistency.

The fact that such marked variability occurs in the recall of everyday experiences that are not traumatic indicates that it is misguided to expect the successive recalls of asylum seekers to be perfectly consistent. Although it was formerly considered that so-called 'flashbulb' memories for dramatic events that are highly important and emotionally charged remain fixed, this view has been challenged by recent research which has shown that these memories also show variability. . . . There are strong grounds for arguing that lack of consistency per se cannot be used to give any negative weight to the assessment of credibility. . . . In the case of asylum seekers, especially, it is clear that great caution needs to be exercised in denying credibility. The normal variability of memory is likely to be exacerbated by the medical factors reviewed above and a general impairment of recall is to be expected as a result of their traumatic experiences and physical and mental state.<sup>88</sup>

A similar study of asylum-seekers from Kosovo and Bosnia in Britain concluded, "The assumption that inconsistency of recall means that accounts have poor credibility is questionable."<sup>89</sup> The British study's subjects had been granted leave to remain in Britain on a group basis, and had no need to establish an individual refugee claim, and hence had little incentive to fabricate.<sup>90</sup> They were interviewed about their experiences, and asked the same questions weeks or months later.<sup>91</sup> Discrepancies between the initial and later interviews occurred with every participant.<sup>92</sup> Discrepancies were most likely with details that the asylum-seekers perceived to be peripheral to their experience.<sup>93</sup> People suffering from post-traumatic stress were particularly likely to give inconsistent accounts the more time passed between

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87. See *Guo v. Minister for Immigration and Ethnic Affairs*, (1996) 64 FCR 151, 194 (per Foster, J.) ("It is well to remember that self-contradictory statements and apparent evasiveness, although of obvious importance, do not necessarily require a conclusion that the witness is being untruthful in those aspects of his or her evidence or, more significantly, that the whole of his or her evidence should be rejected.")

88. Cohen, *supra* note 45, at 298, 308 (emphasis added).

89. Jane Herlihy et al., *Discrepancies in autobiographical memories — implications for the assessment of asylum seekers: repeated interviews study*, *BMJ* 324, 324 (Feb. 9, 2002).

90. *Id.* at 325.

91. *Id.*

92. *Id.* at 326.

93. *Id.*

interviews.<sup>94</sup> Other research has shown that people fail to consistently recall information even about dramatic events.<sup>95</sup>

This emerging research calls for a re-examination of how inconsistencies are considered in credibility assessment. The underlying assumption that liars contradict themselves may be true, but it is not true that all people who contradict themselves are lying. At the very least, only substantial, pervasive contradictions at the heart of a refugee claim that are not subject to any convincing innocent explanation should be used to justify negative credibility findings.

### C. *Providing All Facts Early/Delayed Revelation of Key Facts*

In one case, the U.S. BIA has held that delayed revelation of a central event can alone lead to rejection of an applicant's credibility.<sup>96</sup> The BIA explained: "The applicant's failure to make any reference whatever on his asylum application or his biographic information form to experiences which he described in subsequent written statements as central to his persecution claim is sufficient to support an adverse credibility finding."<sup>97</sup>

This criterion requires substantial caution. Certainly, in some circumstances, late revelation of a major event raises serious questions about veracity. This is particularly the case where a person has shown no hesitancy to reveal similar events in the past. But, as UNHCR has repeatedly advised, decision-makers must take into account that victims of the most serious human rights violations may delay revealing their experiences.<sup>98</sup> Bona fide refugees may fear authority, may be traumatized, may avoid painful memories, may be uncomfortable revealing intimate violations (especially in cases of sexual assault), or may feel shame about their experiences. While delayed revelation of an event is sometimes a legitimate negative credibility factor, delayed revelation of important details can result from the phenomenon of "reminiscence" or "hyperamnesia" by which "new information about an event [becomes] available over repeated recall."<sup>99</sup> Because memories of complex events are triggered by a variety of oral and visual cues, people may recall more information when stimulated repeatedly in different ways. People may recall more information at later sessions, even when they previously thought they could not remember anything else.<sup>100</sup>

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94. *Id.* at 326-27.

95. *See* Cohen, *supra* note 45, at 297-99.

96. *See In re M-S-*, 21 I. & N. Dec. 125, 127 (BIA 1995) (Interim Decision).

97. *Id.*

98. *See Gender-related Persecution within the context of Article 1A(2) of the 1951 Convention*, *supra* note 54, at para. 36; *Note on Burden and Standard of Proof in Refugee Claims*, *supra* note 9, at para. 9; UNHCR, GUIDELINES ON THE PROTECTION OF REFUGEE WOMEN paras. 58, 59 (1991); UNHCR HANDBOOK, *supra* note 15, at paras. 190, 198.

99. Herlihy et al., *supra* note 89, at 327. *See also* Cohen, *supra* note 45, at 297.

100. Cohen, *supra* note 45, at 297.



#### D. *Plausibility*

Plausible refugee testimony depicts a realistic, possible chain of events. While this seems on the surface a sensible criterion to consider in credibility assessment, it actually adds very little. A decision-maker would need some basis for concluding that an applicant's account is implausible. The U.S. Ninth Circuit Court of Appeals has reversed decisions that refugee claims are "implausible" when such decisions are based on unsupported assumptions.<sup>101</sup> This would usually require some information about the applicant's country of origin. The plausibility criterion hence overlaps with examining whether an account is consistent with generally known facts about the country of origin. A finding of implausibility based on concrete evidence about how a country of origin functions is really a finding that the account is not consistent with generally known facts.

Some decisions based on plausibility cite "common sense" or "rational perceptions."<sup>102</sup> But such conclusions should not be reached without giving an applicant the chance to rebut them.<sup>103</sup> This is critical, since adjudicators must realize that what seems to be common sense about how things work in the country of asylum may not apply in the applicant's country of origin.

U.S. courts have held that decision-makers should not find an account implausible on mere speculation, especially speculation about how a foreign culture or government would function.<sup>104</sup> Persecution is often carried out by secretive organizations and agencies, so that any person's knowledge of how they are likely to behave is potentially incomplete. Implausibility findings should be based on objective, verifiable facts suggesting an account is really impossible. A person who claims to have taken a train where there are no tracks is making an implausible claim. But a person claiming that a train made an unscheduled stop is not necessarily saying anything implausible; he is saying something unexpected (but not impossible) occurred.

### VIII. REASONS FOR ACCEPTING FLAWED TESTIMONY

For a number of reasons, flawed applicant testimony should sometimes be considered credible for the sake of refugee status determination.<sup>105</sup> Hathaway writes, "It is critical that a reasonable margin of appreciation be applied

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101. See *Salaam v. INS*, 229 F.3d 1234 (9th Cir. 2000).

102. See *Nkrumah v. Canada (M.E.I.)* [1993] 20 IMMIG. L. REP. 2D 246, 249 (F.C.T.D.).

103. *Id.*

104. See *Aguilera-Cota v. INS*, 914 F.2d 1375, 1381 (9th Cir. 1990) (holding that negative inferences about plausibility must be supported by substantial evidence).

105. Ruppel proposes regulations that would require asylum adjudicators to consider a list of factors that may affect credibility, including cultural differences, psychological effects of persecution, risks of anxiety, fear of revealing information about people still living in the country of origin, and difficulties applicants face applying for asylum (such as lack of counsel). Ruppel, *supra* note 21, at 12-26, 38.

to any perceived flaws in a claimant's testimony."<sup>106</sup> UNHCR advises:

[Due] to the applicant's traumatic experiences, he/she may not speak freely; or that due to time lapse or the intensity of past events, the applicant may not be able to remember all factual details or to recount them accurately or may even confuse them; thus he/she may be vague or inaccurate in providing detailed facts. Inability to remember or provide all dates or minor details, as well as minor inconsistencies, insubstantial vagueness or incorrect statements that are not material may be taken into account in the final assessment on credibility, but should not be used as decisive factors.<sup>107</sup>

Vagueness, evasiveness, and inconsistency can indicate fabrication, but they can also result from cultural misunderstandings, fear of authority, past trauma, or the natural frailties of human memory.

Three general points should be made about assessing flawed testimony. First, credibility assessment should not always be an "all or nothing" choice. There may be reason to consider parts of an applicant's testimony credible and dismiss other parts as lacking in credibility.<sup>108</sup> Second, credibility assessment should not be a search for flaws in testimony that could justify rejecting the applicant's account. In particular, testimony that is flawed only in respect to peripheral facts should not be dismissed for lack of credibility.<sup>109</sup> Third, whenever flaws in the central aspects of a person's testimony appear, it is critical that they are noted openly and the applicant be given a chance to explain or respond. This is a critical safeguard because so many negative credibility factors can result from cultural, linguistic, or procedural misunderstandings.<sup>110</sup>

#### A. *Putting Incoherent or Incomplete Testimony in Context*

Genuine refugees may not be able to express themselves clearly for a number of reasons. A person's ability to explain him or herself clearly

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106. HATHAWAY, *supra* note 20, at 85. *See also* *Aguilera-Cota*, 914 F.2d at 1382 ("Forms are frequently filled out by poor, illiterate people who do not speak English and are unable to retain counsel. Under these circumstances, the IJs cannot expect the answers provided in the applications to be as comprehensive or as thorough as they would be if set forth in a legal brief.").

107. *Note on Burden and Standard of Proof in Refugee Claims*, *supra* note 9, at para. 9.

108. *See* ASSESSMENT OF CREDIBILITY IN CLAIMS FOR REFUGEE PROTECTION, *supra* note 23, at 2.1.2.

109. *See id.* at 2.6.3 ("The Federal Court has cautioned the Board members not to display excessive zeal in an attempt to find contradictions in the claimant's testimony."); ANKER, *supra* note 2, at 165, HATHAWAY, *supra* note 20, at 85.

110. *See* ANKER, *supra* note 2, at 167. Openly noting flaws in testimony facilitates reasoned discussion about how a person's credibility should be assessed. If decision-makers (or, in an adversarial RSD system, government counsel) do not openly raise credibility doubts, the applicant and his or her lawyer are placed in tactical quandary. On the one hand, they may be able to make strong arguments for accepting testimony despite its flaws. On the other hand, the human realities of decision-making may make an advocate hesitant to draw the adjudicator's attention to flaws in a client's account that no one else has mentioned.

depends to a great degree on education and personality. It can also be impaired by “culture shock,” the bewilderment, depression, and anxiety that can afflict anyone who relocates to a foreign culture, especially someone who relocates involuntarily.<sup>111</sup> As Walter Kalin explains:

Such an asylum-seeker may speak in a confused, nervous, fragmented and unconvincing manner not because he or she is lying but because of the anxiety and insecurity caused by the difficulties of life in an entirely new social and cultural environment.<sup>112</sup>

A person may have learned by experience in repressive political systems to be very hesitant about revealing information to strangers, in particular government officials. UNHCR advises: “A person who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive vis-à-vis any authority. He may therefore be afraid to speak freely and to give a full and accurate account of his case.”<sup>113</sup> For instance, a Sudanese man in Cairo spent more than six months in a Sudanese prison lying to his jailers about his ethnic identity, since members of his tribe were active opponents of the government. For a person with such experience to reveal all personal details immediately in an asylum application to a foreign institution in Egypt, a country closely allied with the Sudanese Government at the time of his application, may require a substantial leap of faith.

Experience working with mainly Sudanese exiles in Cairo has illustrated the ways that gender and educational background influence refugee status determination. Husbands and brothers sometimes react with surprise that they will not be able to speak for their wives or sisters in applications to UNHCR. Women sometimes indicate that they have very little experience talking with an official institution like UNHCR, since their male relatives normally perform that role. On top of these obstacles, women who have been victims of sexual assault have particular problems explaining their full experiences in RSD interviews.<sup>114</sup> The combination of these challenges can be fatal to refugee claims. For instance, a young Dinka woman who had been abducted and enslaved in Southern Sudan and later sexually assaulted by security forces in Khartoum was rejected at first instance when she failed to describe any of her rape experiences in interviews at UNHCR. She spoke

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111. Kalin, *supra* note 43, at 232; see UNHCR HANDBOOK, *supra* note 15, at para. 190 (“It should be recalled that an applicant for refugee status is normally in a particularly vulnerable situation. He finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own.”).

112. Kalin, *supra* note 43, at 232.

113. See UNHCR HANDBOOK, *supra* note 15, at para. 198. See also Kalin, *supra* note 43, at 232.

114. See UNHCR, GUIDELINES ON THE PROTECTION OF REFUGEE WOMEN, *supra* note 98, para. 60 (“The female victim of such sexual torture obviously may be reluctant or find it very difficult to speak about it, particularly to a male interviewer.”).

only Dinka, and during her appeal she said that she felt comfortable talking about the rape to UNHCR staff, but she did not reveal the rape because UNHCR's Dinka interpreters were all male.

Use of interpreters may generate cultural misunderstandings or mistranslation that could lead an applicant's testimony to seem incoherent or implausible.<sup>115</sup> The Federal Court of Australia set aside a rejection where the applicant gave consistently incoherent answers with an interpreter who did not demonstrate any qualifications.<sup>116</sup> Canadian Guidelines advise that decision-makers "must take into account the fact that the claimant is heard and questioned through an interpreter and that innocent misunderstandings are possible."<sup>117</sup> In Egypt, southern Sudanese who were educated in English have a distinct advantage in communicating in their UNCHR interviews. Less educated southerners often speak only southern Sudanese (Juba) Arabic or a tribal language, and must talk through interpreters when they speak with UNHCR interviewers, who generally speak English and Egyptian Arabic.

Even without interpreters, cultural misunderstandings can make simple communication incoherent. People who work with Sudanese in Egypt generally know that when a person says "my brother," it could mean child of the same parents, or merely someone from the same tribe or village. Some misunderstandings are more obscure. A legal aid practitioner in Cairo related the case of an English-speaking Somali who had appeared evasive in his interview at UNHCR. The applicant, who had given a great deal of detail about his background to his lawyer prior to his hearing, repeatedly said "no" when the UNHCR officer asked him whether he knew the tallest building in Mogadishu, and whether he knew some of the leading people in an organization to which he said he belonged. Later, when his lawyer asked him why he had answered negatively to these questions, he explained that he was of course aware of whom these prominent people were, and he could identify the tallest building in Mogadishu. But he had never actually been inside the building, and he had never established a personal relationship with the people, so he did not feel he could say he "knew" them.<sup>118</sup>

#### B. *The Impact of Inadequate Questioning Techniques on Applicant Testimony*

Cognitive research, as well as my experience working with refugee claimants in Egypt, suggests that the level of detail and consistency in a

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115. See Kalin, *supra* note 43, at 233.

116. *Perera v. Minister for Immigration & Multicultural Affairs* [1999] FCA 507 at paras. 40-43.

117. ASSESSMENT OF CREDIBILITY IN CLAIMS FOR REFUGEE PROTECTION, *supra* note 23, at 2.6.5.

118. Example provided by Colleen Hoey, AUC/EOHR Refugee Legal Aid project. See Kalin, *supra* note 43, at 233-38 for a discussion of contrasting cultural concepts that obstruct refugee status interviews.

claimant's testimony is a complicated interaction between the claimant's ability to express him or herself and the method of interviewing used.<sup>119</sup> For example, UNHCR-Cairo rejected an applicant from Sudan because he was "evasive" when asked about the ethnic community organization he joined in Khartoum. In his first interview, without legal advice or representation, he was asked for details about the group, and he said, "It is a community organization for the purpose of helping the community." When asked again to provide more details, he simply repeated that it was a community organization. After he sought legal aid, he told his lawyer that he had no idea why UNHCR thought he was being evasive, but continued giving the same bland answer to his lawyer. Yet when asked "Think about a day when you went to work with the group, what did you do first?" he began to provide a long and specific description about how he raised funds for the organization and went to meetings to decide how to distribute the resources. He had failed to provide this information to UNHCR because he did not understand what UNHCR was looking for when the interviewer asked only for "more details." Because he did not understand what kind of information he needed to provide, and because the interviewer did not realize the need to be more specific, he appeared evasive and vague.<sup>120</sup>

Soliciting detail from asylum-seekers, especially about traumatic events, may innocently stimulate false memories. People tend not to provide as much vivid detail in response to open-ended questions allowing free responses, especially if asked to talk about traumatic events.<sup>121</sup> Providing specific cues and asking more suggestive closed questions yield far more detail,<sup>122</sup> but can also cause false memories by power of suggestion and result in inconsistent responses under repeated questioning.<sup>123</sup> People interviewing refugee claimants thus must walk a tightrope. Open questions are likely to produce more consistent and accurate responses, but not as much detail. More specific questioning will illicit more detail, much of it accurate, but can also lead to falsely-remembered information that an applicant will not recall consistently in the future. Interviewers must search for specific pieces of information with neutral, non-leading questions — a difficult objective to meet.

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119. See Cohen, *supra* note 45, at 307 ("The observation of a lack of supporting detail, especially sensory and geographical, for example, describing cell, food, and hygiene arrangements, may indicate unprepared answers to an unforeseen question. However, it may also simply indicate limitations in the interview technique.").

120. UNHCR recently recognized the importance of interview environment and techniques. Among other things, UNHCR stresses the importance of establishing an "open and reassuring environment," taking time to establish trust and understanding between applicant and interviewer, remaining "neutral, compassionate and objective during the interview," allowing the applicant to present his or her claim without interruption, and mixing open-ended and specific questions. *Gender-related Persecution within the context of Article 1A(2) of the 1951 Convention*, *supra* note 54, at para. 36.

121. Cohen, *supra* note 45, at 300.

122. *Id.* at 296, 300.

123. *Id.* at 296.

The cultural and linguistic problems inherent in refugee testimony are compounded if refugee status determination interviews take on the style of cross examination, where the interviewer is in complete control, asking specific closed questions, and not giving the applicant the freedom to explain his or her case in his or her own way. Refugee status interviews can unwittingly favor educated, multi-lingual, well-traveled, and articulate people, since they will generally be better able to handle the asylum process and pointed questioning in particular. The more hostile or adversarial questioning becomes, the more traumatized, uneducated, and insecure applicants will be disadvantaged. Aggressive questioning techniques were rejected by an Australian court that held that RSD decision-makers must be cautious not to intimidate refugee applicants while they test evidence. In *Ex Parte H*,<sup>124</sup> the High Court of Australia examined a hearing transcript where the adjudicator frequently interrupted the claimant and told him that he believed he was lying. The court explained that refugee adjudicators need to carefully scrutinize evidence and testimony, but that this cannot overwhelm the claimant's ability to make his case.

Where [ ] parties are not legally represented in inquisitorial proceedings, care must be taken to ensure that vigorous testing of the evidence and frank exposure of its weaknesses do not result in the person whose evidence is in question being overborne or intimidated. . . . It cannot be assumed that the prosecutors would have received an unfavourable assessment of their credibility if they had had the opportunity to present their claims without repeated interruptions from the Tribunal affirming its lack of belief in their claims. Nor can it be assumed that they could not have given further details of events which might have supported their applications. In particular, it should be noted that the male prosecutor was interrupted when he attempted to give an account of a stoning episode in which, presumably, his home was stoned.<sup>125</sup>

A study conducted in the early 1990s on US asylum hearings raised concerns because government lawyers tended to copiously and at length cross-examine asylum applicants on a variety of matters peripheral to actual bases of refugee claims.<sup>126</sup> Similarly, a study of decisions by the Australian Refugee Review Tribunal (RRI) found that refugee status hearings were often too confrontational, even though the RRT was designed to be a non-adversarial body.<sup>127</sup>

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124. *Ex parte H* [2001] HCA 28 (2001).

125. *Id.* at paras. 31, 34. See also ASSESSMENT OF CREDIBILITY IN CLAIMS FOR REFUGEE PROTECTION, *supra* note 23, § 2.6.4.

126. See Anker, *Determining asylum claims in the United States*, *supra* note 7, at 493-95.

127. Kneebone, *supra* note 36.

### C. *Trauma*

Many refugees are survivors of past torture and violence that can leave deep physical and mental scars. The psychological effects of traumatic events can hamper a refugee's ability to communicate why he or she is afraid to return home, and make it difficult for some of the most vulnerable refugees to establish claims that would give them legal protection. Symptoms of Post-traumatic Stress Disorder, Acute Stress Disorder, depression, and other disorders that can result from human rights abuses<sup>128</sup> or from the stress of forced migration include, among others, nervousness, lack of affect, difficulty concentrating, involuntary flashbacks, sleeplessness, memory loss, avoidance of painful memories, and detachment from others. These symptoms make it difficult for people to coherently communicate what they have survived.<sup>129</sup>

In *Alan v. Switzerland*,<sup>130</sup> the U.N. Committee against Torture considered an application by a Kurdish Turk who sought to avoid deportation under the Convention against Torture, article 3,<sup>131</sup> and who had been diagnosed with post-traumatic stress disorder.<sup>132</sup> During his application for asylum, he had contradicted himself about a number of incidents central to his claim that he would be in danger if returned to Turkey. In different hearings, he gave differing numbers of times he had been arrested and different accounts of how long he was detained each time.<sup>133</sup> He gave differing accounts about why he was arrested on a particular occasion,<sup>134</sup> and he gave contradictory accounts of an encounter with a member of the Turkish Parliament.<sup>135</sup> He also did not know some dates related to the political party to which he said he

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128. See generally AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV) § 309.81 (4th ed. 1994) (Posttraumatic Stress Disorder); *The Istanbul Protocol*, in MANUAL ON THE EFFECTIVE INVESTIGATION AND DOCUMENTATION OF TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (1999) (submitted to the U.N. High Commissioner for Human Rights).

129. See generally Linda Piwowarczyk, *Seeking Asylum: A Mental Health Perspective*, 16 GEO. IMMIGR. L.J. 155 (2001). For a discussion of psychological stresses relating from the immigration experience generally, see RoseMarie Perez Foster, *When Immigration is Trauma: Guidelines for the Individual and Family Clinician*, 71 AMER. J. ORTHOPSYCHIATRY 153 (2001).

130. *Ismail Alan v. Switzerland*, Committee against Torture, Communication No. 21/1995, U.N. Doc. CAT/C/16/D/21/1995 (1996).

131. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984). Article 3(1) provides: "No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." The Committee against Torture does not hear Refugee Convention claims, but claims under article 3 involve the common principle of *non-refoulement*, and involve a similar assessment of future risk. Decisions applying article 3 are thus valuable guidance for refugee cases, especially since many states that are parties to the 1951 Refugee Convention are also parties to the Convention against Torture.

132. *Ismail Alan v. Switzerland*, U.N. Doc. CAT/C/16/D/21/1995, at para. 2.4.

133. *Id.* at para. 6.3.

134. *Id.* at para. 6.4.

135. *Id.* at para. 6.5.

belonged.<sup>136</sup> The Committee nevertheless accepted that he was in danger of torture if returned to Turkey. It explained:

[T]he Committee considers that complete accuracy is seldom to be expected by victims of torture and that such inconsistencies as may exist in the author's presentation of the facts are not material and do not raise doubts about the general veracity of the author's claims.<sup>137</sup>

Canadian courts have recognized similar concerns. In one case, the court warned not to demand too much detail from people who have been in prison in view of "the fact that [police] interrogations such as those experienced by the [claimant] are designed to blur and blend together in the minds of those interrogated."<sup>138</sup> In another case, the court voided a credibility decision based on inconsistencies that were explainable by a diagnosis of post-traumatic stress disorder.<sup>139</sup>

#### IX. LIMITS OF THE CURRENT APPROACH TO CREDIBILITY

By providing a list of specific elements on which to base credibility decisions, the U.S. and Canadian guidelines represent a considerable advancement. They move credibility assessment away from a subjective approach, where an applicant's truthfulness is entirely in the eye of the beholder, to a system where decisions should be based on concrete factors. Yet, while they set out the ingredients for sound credibility assessments, they do not completely resolve how to actually make credibility findings. The problem with the current approach is that listing factors to be considered in a credibility assessment does not help decision-makers decide how to weigh them in an individual case, especially in a borderline case.

This calls for filling a gap in the prevailing approach embodied by the U.S. and Canadian guidelines. Adjudicators need a framework by which to analyze positive factors, negative factors, and considerations that may explain flaws in testimony. An adjudicator may be confronted with testimony that is coherent in some respects, vague or contradictory in some respects, and potentially influenced by cultural or linguistic misunderstandings, natural memory flaws or trauma.

The limits of current guidance are illustrated by comparing the U.N. Committee against Torture's decision in *Alan v. Switzerland*<sup>140</sup> to the U.S.

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136. *Id.* at para. 6.4.

137. *Id.* at para. 11.3.

138. *Miral v. Canada (Minister of Citizenship and Immigration)* (F.C.T.D., No. IMM-3392-97, Muldoon, February 12, 1999), at para. 17.

139. *Reyes v. Canada (Minister of Employment and Immigration)*, 1993 A.C.W.S.J. LEXIS 45526; 1993 A.C.W.S.J. 578955; 39 A.C.W.S. (3d) 674 (1993).

140. *Ismail Alan v. Switzerland*, U.N. Doc. CAT/C/16/D/21/199.



BIA's decision in *In Re M-S*.<sup>141</sup> Both cases involved applicants who claimed to be victims of physical abuse or torture, and who had given substantial contradictions about central elements of their claims. In *Alan*, the claimant gave differing numbers of times he had been arrested, different accounts of how long he was detained each time and differing accounts about why he was arrested on a particular occasion.<sup>142</sup> The Committee against Torture found Alan credible because he had been traumatized by torture, so that "complete accuracy" could not be expected of him.<sup>143</sup> In *M-S*, the claimant gave four somewhat different accounts of the precise time period when he served in the Romanian army, and failed to describe a critical (and potentially traumatic) experience during an incarceration in his first written submissions. The BIA decided to uphold a negative credibility finding against him.<sup>144</sup>

These two decisions take dramatically different approaches to credibility assessment. The Committee against Torture forgave contradictions arguably more substantial than the inconsistencies in *In re M-S*, since Alan contradicted himself about the substance of multiple key events, while *M-S* was inconsistent primarily about time and dates only and was hurt mainly by his delayed revelation of a key event. The *Alan* decision could be criticized for its failure to spell out exactly how and why Alan's symptoms of trauma affected credibility assessment.<sup>145</sup> The BIA's decision tended toward the opposite extreme. It found that mere failure to describe all central facts early in the process can alone support an adverse credibility finding, without any analysis at all of whether the mistreatment the applicant reported could have been connected to his inability to give a consistent chronology.

Can both decisions be right? Both decisions are based on factors and considerations recognized and accepted by available guidelines and jurisprudence. But there is little available guidance to definitively determine which decision is correct, or if both are flawed. Under available guidelines and jurisprudence, decisions still depend critically on personal judgment to weigh countervailing factors. One decision-maker may consider an applicant's testimony to be credible because its weaknesses can be explained by trauma, while another adjudicator assessing similar testimony may reject it. To a large extent, credibility assessment remains in the eye of the beholder, and the refugee status determination system hangs on a highly subjective decision-making process.

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141. *In re M-S*, 21 I. & N. Dec. 125 (BIA Nov. 8, 1995) (Interim Decision).

142. *Ismail Alan v. Switzerland*, U.N. Doc. CAT/C/16/D/21/1995, at para. 6.3.

143. *Id.* at para. 11.3.

144. *See In re M-S*, 21 I. & N. Dec. 125, 127 (BIA Nov. 8, 1995) (Interim Decision).

145. Alan was able to submit an expert opinion that he suffered from post-traumatic stress, which likely was critical to his case. *Ismail Alan v. Switzerland*, U.N. Doc. CAT/C/16/D/21/1995, at para. 2.4.

## X. A FRAMEWORK FOR OBJECTIVELY ASSESSING APPLICANT CREDIBILITY

The principles and guidance that have been provided by courts, governments, scholars, and UNHCR can be applied to design a standard analytical framework for assessing credibility. This would bring more consistency and reliability to credibility assessments by ensuring that adjudicators not only have a common list of factors to consider, but also a common road map for deciding how to weigh the factors. What follows is a suggested framework. In many ways, this framework elaborates on the test established by the BIA in *In re A-S-* for analyzing inconsistencies in an applicant's statements.<sup>146</sup> It is designed for cases that rely entirely on testimony; documentary evidence that specifically corroborates a refugee claim would make credibility assessment much easier and would render much of this analysis unnecessary because an adjudicator would not need to apply the benefit of the doubt.

This analytical framework is founded on four key principles. First, refugee status determination begins with a presumption that the claimant is credible. Second, credibility assessment must consider positive credibility factors, not just look for flaws in a claimant's testimony. Third, applicants must have the chance to explain or rebut alleged flaws in their testimony, and negative credibility factors must be evaluated in light of any circumstances that may provide an innocent explanation for the imperfections. Fourth, adjudicators should consider whether parts of an applicant's testimony should be considered credible even if other parts are not.<sup>147</sup>

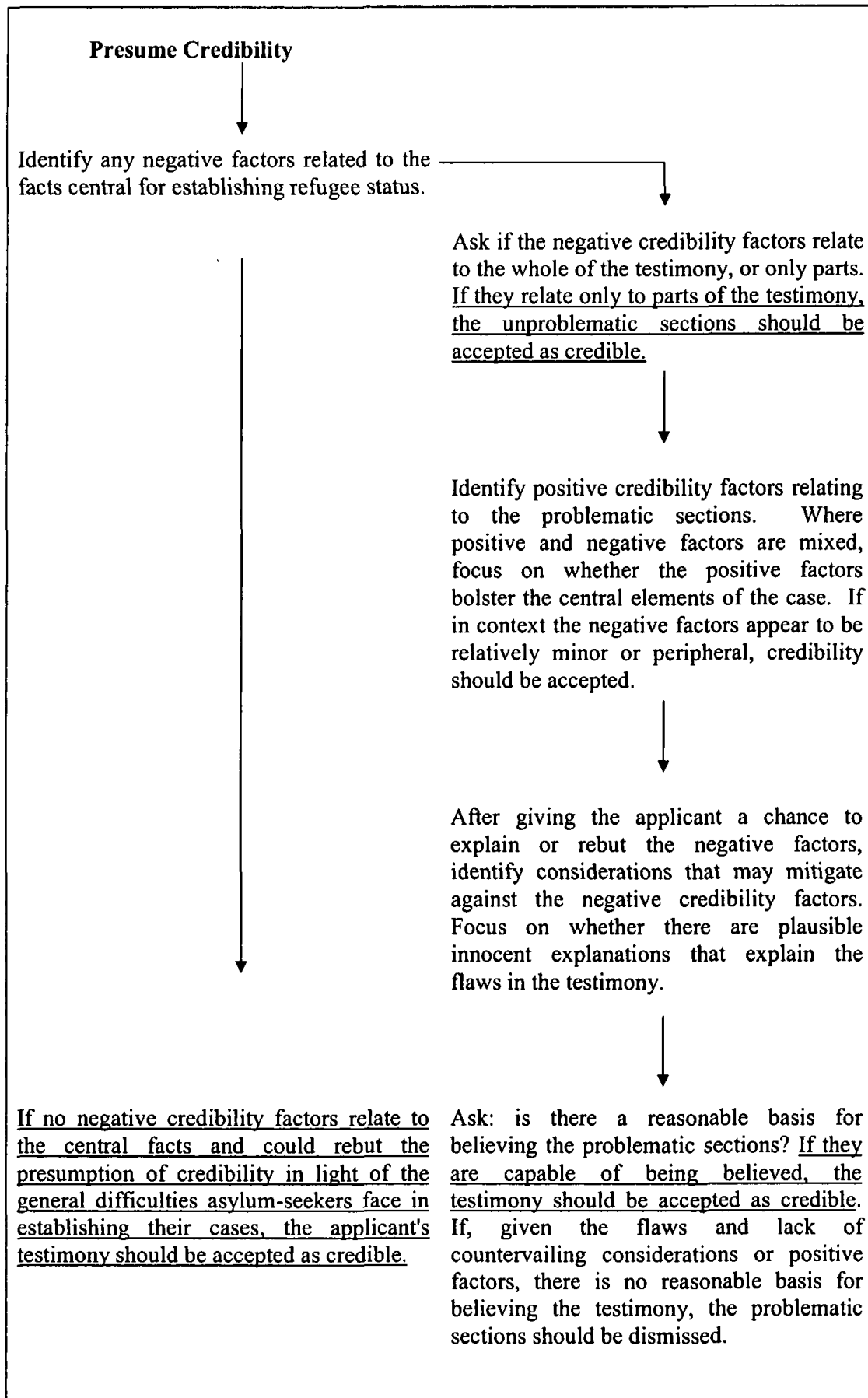
### A. *Initial Assessment: Presumption of Credibility and Identification of Any Negative Credibility Factors*

Refugee status determination should begin with a presumption that the applicant is being truthful. Since the process begins with a presumption of credibility, the next logical step is to ask if there are actually any negative credibility factors that could potentially rebut the presumption in light of the general difficulties asylum-seekers face in establishing their cases. Credibility is not actually an issue in every case. If there are no significant negative credibility factors, then the applicant's credibility can be assumed for the sake of refugee status determination, since there would be no basis for rejecting it. The key point in this initial assessment is that the negative factors

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146. *In re A-S-*, 21 I. & N. Dec. 1106 (BIA 1998) ("In general, we defer to an Immigration Judge's adverse credibility finding based upon inconsistencies and omissions regarding events central to an alien's claim where a review of the record reveals that (1) the discrepancies and omissions described by the Immigration Judge are actually present; (2) these discrepancies and omissions provide specific and cogent reasons to conclude that the alien provided incredible testimony; and (3) a convincing explanation for the discrepancies and omissions has not been supplied by the alien.").

147. *See Guo v. Minister for Immigration and Ethnic Affairs*, (1996) 64 FCR at 194 (Foster, J.) ("It is well to remember that self-contradictory statements and apparent evasiveness, although of obvious importance, do not necessarily require a conclusion that the witness is being untruthful in those aspects of his or her evidence or, more significantly, that the whole of his or her evidence should be rejected.").



should relate to the facts that are actually central to establishing the refugee claim. If a person contradicts himself about general educational or family background facts, or is vague about his or her marriage, an adjudicator should not draw any negative credibility conclusions unless these issues actually are important for establishing a well-founded fear of being persecuted. If the negative credibility factors would not prevent a reasonable person from finding a basis for believing the applicant's testimony, then the testimony can be presumed credible.

If there are negative credibility factors that could undermine credibility about central elements of an applicant's case, no conclusion can be drawn at this point in the analysis. A range of positive and mitigating factors must be considered first.

### B. *Specifying Areas of Concern*

As established in Canadian and US guidelines,<sup>148</sup> part of an applicant's testimony may be credible, while other parts not. An adjudicator should therefore examine whether the identified negative credibility factors extend throughout the testimony, or if they are concentrated in one particular area. For instance, a claimant might describe consistently and in detail his or her activism in a political party, but become vague or contradictory about an arrest. In such a case, the untainted parts of the testimony should be considered credible. In this example, even if the arrest report is ultimately considered not credible, the adjudicator should accept that he or she was active in the party and determine if this on its own could demonstrate that he or she meets the refugee definition. The applicant might still be able to establish a well-founded fear of being persecuted, despite a partial negative credibility finding.

### C. *Identifying Positive Credibility Factors*

Once the specific areas of credibility concern have been identified, the credibility assessment should note positive factors in addition to negative factors. This will help establish a context in which to decide if the negative credibility factors render the testimony unbelievable. For example, imagine a case where a person who reports she had been arrested contradicts herself about how many police arrested her, about how many days she was detained, and about whether prison guards wore uniforms. Such contradictions at the center of her case, taken in isolation, appear good reason to conclude that her report of being arrested is not credible. But these contradictions may not seem so conclusive if the applicant is able to provide vivid detail about what

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148. See *supra* notes 23 and 51.

the prison looked like inside, about the daily routine inside prison, and about methods of interrogation in prison. In context of such positive credibility factors, the gaps in her testimony are more easily explained by innocent memory failure.

The importance of negative credibility factors can only be evaluated when weighed in context with positive credibility factors. Where positive and negative factors are mixed, a decision-maker should focus on whether the positive factors bolster the central elements of the case. If in context the negative factors appear to be minor, peripheral, or easily explainable, credibility should be accepted.

#### D. *Identifying Reasons for Accepting Credibility Despite Flaws in Testimony*

If the negative factors appear to rule out any reasonable basis for believing the testimony, credibility assessment should include an evaluation of any potential innocent explanations for the gaps or flaws. Explanations could include trauma, fear of authority, lack of gender sensitive environment during testimony, cultural or linguistic misunderstandings, or normal memory failure. At this stage, it is essential that an applicant be given the chance to respond and rebut any concerns about his or her credibility. Especially where an applicant lacks legal representation, an adjudicator should search for potential explanations for observed problems in his or her testimony.

There needs to be an actual, reasonable explanation for the testimony flaws, not just an assumption that there is an innocent explanation for all gaps. The Committee against Torture's decision in *Alan* is somewhat unsatisfactory because it does not explain why post-traumatic stress might have caused inconsistencies in Alan's case. Instead, it generalizes that complete accuracy cannot always be expected of torture victims. The decision would have been stronger with a specific explanation of Alan's PTSD diagnosis, setting out his symptoms and explaining how they related to his credibility.

Substantial negative credibility factors at the heart of a case serve to rebut the initial presumption of credibility. The applicant, in essence, needs a counter-rebuttal to resurrect his or her credibility. It is important for a decision-maker to keep in mind the general difficulties asylum-seekers face in explaining their cases, but these general circumstances would normally not be enough to rebut substantial specific flaws in an individual's testimony. Consideration of innocent explanations for flawed testimony should be as specific as possible. If the applicant might be traumatized, obtaining a psychological assessment would be critical, as would assessing whether the person's symptoms are likely to have impacted his or her ability to testify coherently. If the applicant is a potential victim of sexual assault, it would be important to look at the interview and hearing environment, for instance asking whether the applicant faced a room including strangers of the opposite

sex. If the testimony seems confused or vague, evaluating the quality of linguistic interpretation would be critical. Whether an applicant's credibility is ultimately accepted or rejected, it is not enough to generally acknowledge the potential problems summarized in this article, in administrative guidelines, and in other commentaries. At this stage, credibility assessment requires a specific evaluation of whether particular mitigating factors actually apply in an individual case.

E. *Deciding Borderline Cases: Is There a Reasonable Basis for Believing the Testimony?*

Once all credibility factors and mitigating considerations have been examined, a final credibility decision can be reached. Critically, the adjudicator should not decide whether he or she actually believes that the applicant's account is true. Rather, following UNHCR's guidance and the approach endorsed by the BIA, the adjudicator should determine if the testimony is capable of being believed. In other words, the adjudicator should determine if there is any reasonable basis for believing the applicant. If negative factors substantially undermine central elements of the testimony, and if no mitigating circumstances provide a specific explanation for the negative factors, the testimony may simply not be believable. If the credibility concerns are minimal in context, or if they can be specifically explained by mitigating factors, there is likely a reasonable basis for believing the testimony, and it should be considered credible.

The critical point is that credibility assessment in borderline cases should turn on a search for a reasonable basis to believe, not on finding a reasonable basis to reject testimony. If at the end of the assessment, no confident conclusion about credibility can be reached, the presumption that applicants will tell the truth should decide the case.

## XI. APPELLATE REVIEW OF CREDIBILITY DECISIONS

Any full evaluation of credibility assessments in refugee cases must include an examination of the way appellate tribunals review such decisions. Normally, appellate jurisprudence would be the source of standards and analysis in an area of law. But a review of credibility-based decisions indicates that appeals tribunals frequently accept first instance credibility findings with very little analysis.

Appellate courts and tribunals generally hold that credibility findings by first instance adjudicators in refugee cases should be reviewed with what American courts call "deference." Deferential review is a standard of appellate scrutiny that reverses lower decisions only if they are irrational or

unreasonable.<sup>149</sup> This is a very light form of appellate scrutiny because it does not allow a tribunal to simply analyze an issue and make the decision it thinks is the most correct. By comparison, *de novo* review would allow an appellate tribunal to decide an issue fresh.

Recently, some governments have acted to strip appellate tribunals of the option of *de novo* review of credibility findings. Australia enacted revisions to its Migration Act in 2001, limiting circumstances in which decisions of the RRT can be reversed by the judiciary.<sup>150</sup> This legislation grew out of a public debate in Australia where government ministers blamed judges for undermining the government's attempts to restrict access to asylum.<sup>151</sup>

New regulations enacted by the U.S. Department of Justice in September 2002 follow a related path. Under a new rule enacted by Attorney-General John Ashcroft, the Board of Immigration Appeals

will not engage in *de novo* review of findings of fact determined by an immigration judge. Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to

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149. Different judicial systems use different terms to define various types of appellate review, although the concepts appear interchangeable. For instance, Australian law distinguishes "merits review" from "supervisory or judicial review."

Merits review involves a *de novo* appeal from an administrative decision and requires that a tribunal reach the correct and preferable decision in an individual case on the facts before it. The reasons of the original decision-maker are not binding upon the tribunal, which must decide the matter afresh. Merits review is to be distinguished from supervisory or judicial review, in which the reasons of the original decision-maker are scrutinized for errors of law. The metaphor that has been coined to describe the merits review function is that the tribunal "steps into the shoes of the original decision-maker."

Kneebone, *supra* note 36, at 81.

150. Under the Migration Legislation Amendment (Judicial Review) Act 2001, (No. 134, 2001) decisions of the Refugee Review Tribunal may be successfully appealed to federal courts only if the decision was not in good faith, was "not reasonably capable of reference to the decision-making power," was in violation of the Commonwealth Constitution, or was beyond the subject matter of the applicable legislation. Migration Act 1958, Part 8 (as amended). The legislation shields RRT decisions from Federal Court review by including them in a "privative clause," Migration Act 1958 §§ 474(2), 476(6), and by specifying that "the Federal Court and the Federal Magistrates Court do not have any jurisdiction in relation to [an RRT] decision." Migration Act 1958 §476(1). Federal Courts can still hear appeals "arising under the Constitution, or involving its interpretation." Judiciary Act 1903 § 39B and Migration Act 1958 §475A. A previous High Court decision interpreting the impact of such privative clauses held that decisions may also be appeals "provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that is reasonably capable of reference to the power given to the body." *R v Hickman, ex parte Fox & Clinton* (1945) 70 CLR 598 (Dixon, J.). In addition to these provisions, claimants are blocked from arguing in Federal Court that RRT decisions breach natural justice by a separate provision which specifies that the RRT procedure is the "exhaustive statement of the requirements of the natural justice hearing rule." Migration Act 1958 § 422B. The Australian Department of Migration and Multicultural Affairs summarizes these changes at [http://www.immi.gov.au/legislation/judicial\\_review.htm](http://www.immi.gov.au/legislation/judicial_review.htm) (last checked Feb. 11, 2003).

151. See, e.g., *Australia minister backs down in row with judges over refugees*, AGENCE FRANCE PRESS, June 4, 2002; Paul Kelly, *Refugees subject to immigration law*, THE WEEKEND AUSTRALIAN, July 25, 2001.

determine whether the findings of the immigration judge are clearly erroneous.<sup>152</sup>

The BIA may review “questions of law, discretion, and judgment and all other issues” *de novo*.<sup>153</sup>

The deference applied by the new U.S. rules is not unique to immigration or refugee cases.<sup>154</sup> In other areas of the law, findings of fact (including assessments of witness credibility) would be reversed on appeal only if clearly unreasonable, on the assumption that first instance decision makers are best situated to make conclusions about factual matters.<sup>155</sup> Questions of law, or questions that mix facts and law, would be reviewed *de novo*. As the U.S. Department of Justice explained, “The Department’s adoption of the ‘clearly erroneous’ standard encompasses the standards now commonly used by the federal courts with respect to appellate court review of findings of fact made by a trial court.”<sup>156</sup>

#### A. *Scrutinizing the Arguments for Deference*

International standards for refugee status determination require that rejected applicants have access to an independent appeal of their cases.<sup>157</sup> Any weakening of appellate review should be scrutinized to ensure that it does not undermine the possibility of meaningful appeal for rejected applicants.

The deferential review asks appellate judges to uphold rejections of refugee claims about which they have significant doubts, despite the potential human suffering that can result from errant rejections. In a case illustrating the dilemma of deferential review in refugee status cases, the Federal Court of Australia divided two to one on the issue of whether to review a negative credibility decision with deference.<sup>158</sup> The case concerned a man who said he would be subject to execution if returned to Iran because he had expressed support for the assassination of a general in the Iranian Armed Forces and taped underground radio and television broadcasts by an opposition group. He reported being arrested and detained in solitary confinement for three months, during which time he said he was tortured. He reported that his

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152. 8 CFR § 3.1(d)(3)(i) (amended Sept. 25, 2002).

153. 8 CFR § 3.1(d)(3)(ii) (amended Sept. 25, 2002).

154. U.S. Courts of Appeals must review the legal decisions of administrative bodies with deference. *See INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999); *Chevron v. N.R.D.C.*, 467 U.S. 837 (1984).

155. *In re A-S-*, 21 I. & N. Dec. 1106 (BIA 1998).

156. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, Supplementary Information, 67 Fed. Reg. 54878, 54890 (Aug. 26, 2002) (citing *Dickinson v. Zurko*, 527 U.S. 150, 153 (1999)).

157. *See* UNHCR, *Asylum Processes: Fair and Efficient Asylum Procedures* ¶ 43, EC/GC/01/12 (May 2001); UNHCR, *Fair and Expeditious Asylum Procedures* § 4 (1994); Council of Europe, Recommendation No. R (81) 16, *On the Harmonisation of National Procedures Relating to Asylum* (1981); UNHCR EXCOM, *Conclusions No. 8 Determination of Refugee Status* (1977)(vi).

158. *W148/00A v. Minister for Immigration and Multicultural Affairs*, (2001) 185 A.L.R. 703.



health then deteriorated, and he was taken to a hospital, where a friend on the hospital staff helped him escape.<sup>159</sup> The lower RRT found that if his testimony were true, he was indeed in danger of “grave consequences” in Iran.<sup>160</sup> The RRT also noted that he had been consistent in his testimony, although he failed to state that he had taped illegal broadcasts in his first hearing, and his report was generally confirmed by country of origin information on Iran. But the RRT rejected his credibility because it was “implausible” that he would have been left unguarded at the hospital when he escaped, or that he could have traveled the distance he described.<sup>161</sup>

On appeal to the federal court, Judges Tamberlin and Nicholson found parts of the RRT’s reasoning “largely speculative,” “inconclusive,” and “cause for concern.” Despite these doubts, they upheld the RRT’s credibility finding because they applied a deferential standard of review, which they based on appellate standards from other areas of administrative and regulatory law. They held that an appellate body must not reverse credibility decisions even if “the probabilities of the case are against, or even strongly against, the finding.” They argued that such a deferential standard is called for because of the role of demeanor evidence, specifically

body language and general impression conveyed by a witness in the way in which questions are answered but also on a careful consideration of the factual background or available information, coupled with ordinary experiences as to likely patterns of response. Such an impression cannot be communicated by consideration of the transcript alone.<sup>162</sup>

In dissent, Judge Lee argued that the grave stakes in refugee cases, in this case the right to life, called for “anxious scrutiny,” and that the RRT’s credibility findings lacked sufficient support in concrete inconsistencies or facts.<sup>163</sup>

This Australian case is a disturbing demonstration of deferential review’s impact. The appeals court found the negative credibility finding questionable in a number of respects, and recognized that an incorrect decision could lead a person to lose his life. But the two-judge majority’s decision to uphold the rejection was, arguably, a natural and correct application of the deferential standard. Though questionable, the RRT’s decision did have a basis. It was not without reason; rather, the RRT spelled out a list of reasons for rejecting credibility.

In the refugee status determination context, many of the primary arguments for deferential appellate review imported from other areas of the law

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159. *Id.* (summarized in opinion by Judges Tamberlin and Nicholson).

160. W148/00A v. Minister for Immigration and Multicultural Affairs, (2001) 185 A.J.R. 703. (Lee, J.).

161. *Id.*

162. *Id.*

163. *Id.*

are misplaced. Refugee status determination involves a legal inquiry with several unique characteristics.<sup>164</sup> First, it assesses risks in the future, rather than determining facts about the past.<sup>165</sup> Second, refugees rarely have access to very much documentary or witness evidence to support their claims, requiring decisions on incomplete information.<sup>166</sup> Third, it invariably involves applicants from other cultures and language backgrounds.<sup>167</sup> Fourth, its purpose is protection rather than assignment of blame or rights and responsibilities between adverse parties.<sup>168</sup> Fifth, an errant decision in refugee status determination carries particularly grave consequences. Other areas of the law share some of these features, but rarely all.<sup>169</sup>

In *Karanakaran v. Secretary of State*, the U.K. Court of Appeal explained that evidentiary standards in refugee cases cannot always be borrowed from other areas of the law, principally because refugee status determination requires an assessment of the future based on the limited evidence available to asylum-seekers.<sup>170</sup> Lord Justice Brooke, in his opinion for the court, said:

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164. See generally Michelle Foster, *Causation in context: interpreting the nexus clause in the refugee convention*, 23 MICH. J. INT'L L. 265, 291-97 (2002).

165. *Id.* at 298.

166. *Id.* at 296-97.

167. *Id.*

168. *Id.* at 294.

169. The law of equity, especially concepts such as breach of fiduciary duty, bears much in common with refugee law's purpose of providing protection rather than assigning blame. See *id.* at 292. But such cases are frequently financial and lend themselves to much more documentary evidence. Family law, especially child protection, shares several characteristics with refugee law, especially an interest in protection, a reliance on emotionally troubled testimony about murky intimate subjects, and a need to make critical decisions based on incomplete evidence. But refugee law is still unique in that the need to assign responsibility plays no role, because proving an applicant's well-founded fear of persecution does not require infringing the interests of any other party. In child protection, the "best interests of the child" often compete with other interests that courts try to protect, such as a parent's interest in raising his or her children. In the U.S., for instance, the Supreme Court has held that parental rights are protected by the due process clause of the 14th Amendment. See *Santosky v. Kramer*, 455 U.S. 745, 752-61 (1982); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972). Because parents have a legal right to raise their children, parental rights cannot be terminated unless supported by "clear and convincing evidence." *Santosky*, 455 U.S. at 769. Since refugee protection does not infringe on any other party's interests in this way, refugee status determination need not require such a high burden of proof.

170. See *Karanakaran v. Secretary of State*, 3 All E.R. 449 (Eng. C.A. 2000). The *Karanakaran* case centered on whether it would be "unduly harsh" for a young Tamil Sri Lankan man whose home had been bombed by the government and who had been targeted for recruitment by the LTTE (Tamil Tigers) to be returned to Colombo, according to the prevailing British interpretation of the so-called "internal flight alternative." The court focused its analysis on the applicable standard of proof: Did *Karanakaran* need to prove by the balance of probabilities that return to Colombo would be unduly harsh, or did he only need to prove that it was a serious possibility that it would be unduly harsh? The court first concluded that special standards of proof are required in refugee cases because refugee status determination assesses potential events in the future, while other areas of law require findings of fact about past events. A previous British decision had held that when past events are evidence of possible future events, the past events must be proved by the balance of probabilities, following the standard rule about proving past or present facts in civil cases. See *R. v. Immigration Appeals Tribunal, ex parte Jonah*, [1985] Imm. A.R. 7 (Nolan, J.). But this approach was both overly complex and inappropriate given the "notorious difficulty many asylum-seekers face in 'proving' the facts on which their asylum plea is founded." *Citing Kaja v. Secretary of State* [1995] Imm. A.R. 1. Refugee status determination, unlike normal civil cases, requires taking into account "evidence to which

In the present public law context, where this country's compliance with an international convention is in issue, the decision-maker is, in my judgment, not constrained by the rules of evidence that have been adopted in civil litigation, and is bound to take into account all material considerations when making its assessment about the future.

Just as normal evidentiary standards should not be applied when they do not fit the unique nature of refugee status determination,<sup>171</sup> normal rules of appellate review should not necessarily apply in the refugee context.

The rationale given by many tribunals for deferring to a first instance adjudicator's credibility findings is rooted in the assumption that first instance decision-makers are best placed to review witness testimony. This assumption relies heavily on the role of demeanor in credibility assessments.<sup>172</sup> For instance, the BIA explained its rationale for deference in the case *In re A-S*:

[W]e emphasize that the Immigration Judge is in the unique position of witnessing the live testimony of the alien at the hearing. . . . Because an appellate body may not as easily review a demeanor finding from a paper record, a credibility finding which is supported by an adverse inference drawn from an alien's demeanor generally should be accorded a high degree of deference.<sup>173</sup>

The Department of Justice, citing *In re A-S*, similarly based its new regulations on the fact that "immigration judges conducting the hearings are aware of variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said."<sup>174</sup>

This is a highly questionable justification given the problems in interpreting non-verbal communication in a cross-cultural context<sup>175</sup> and given that the INS and the BIA have both made clear that demeanor should not be the sole basis for a negative credibility finding in asylum cases.<sup>176</sup> In dissent, Chairman Paul W. Schmidt of the U.S. BIA has argued that:

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[decision-makers] are willing to attach some credence, even if they could not go so far as to say it is probably true."

171. See also Foster, *supra* note 164 (arguing that refugee status law requires a context-specific causation standard in order to apply the "nexus" requirement in the refugee definition).

172. See, e.g., Sarvia-Quintanilla v. INS, 767 F.2d 1387, 1395 (9th Cir. 1985); W148/00A v. Minister for Immigration and Multicultural Affairs (June 22, 2001) unreported F.C.A. 679.

173. *In re A-S*, Interim Decision #3336, 21 I. & N. Dec. 1106, 1111 (BIA 1998).

174. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,889 (Aug. 26, 2002).

175. See generally Kalin, *supra* note 43.

176. Despite the INS and BIA caution about demeanor, many U.S. courts have suggested that demeanor-based decisions are actually deserving of more deference than other credibility decisions. See Cordero-Trejo v. INS, 40 F.3d 482, 487 (1st Cir. 1994); Paredes-Urrestarazu v. INS, 36 F.3d 801, 818-21 (9th Cir. 1994).

the absence of personal interaction with the parties and their counsel in the trial courtroom insulates us from the almost inevitable, and often distracting, frustrations and extraneous factors that could accompany such personal interaction, particularly in a “high-volume” trial system like the Immigration Court.<sup>177</sup>

Since non-demeanor evidence of credibility is documentary or can be recorded in a hearing transcript, appellate tribunals are well positioned to review credibility decisions *de novo*.<sup>178</sup> Even with incomplete records, appellate tribunals have in some cases been willing to make credibility decisions. For instance, in one case, the BIA decided to accept an applicant’s credibility rather than remand the case for credibility to be determined by an immigration judge even though parts of the first instance testimony transcript were inaudible.<sup>179</sup> A strict adherence to the principle that first instance decision-makers are best positioned to judge credibility might have called for a remand.

Deferential credibility standards prevent appellate bodies from promoting consistent refugee status decisions because a clear jurisprudence to guide credibility assessments cannot emerge.<sup>180</sup> In a system where most appeals are by rejected asylum-seekers and where incorrect rejections expose people to serious human rights abuses, a standard designed to affirm first instance decisions even when they are questionable should be of great concern.<sup>181</sup> In codifying deferential standards of appeal, the U.S. Department of Justice explained that it wanted the Board of Immigration Appeals to concentrate on “writing quality precedent-setting decisions” in those cases that present difficult or controversial legal questions.<sup>182</sup> Unfortunately, in the asylum context, deferential review will likely undermine this goal by restraining the BIA’s capacity to develop precedents about how credibility assessment - a central element of asylum adjudication - should be conducted.

The stakes in refugee cases — and hence the need for appellate review — are high. In refugee status determinations, the lack of corroborative evidence in most cases makes claimants’ credibility central to almost every case to an extent rare in many other areas of law. At the same time, refugee claimants face special obstacles in presenting clear testimony, calling for adjudicators to apply special standards and weigh unique considerations. The unique

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177. *In re A-S-*, 21 I. & N. Dec. at 1113-14 (noting that deference is not required because refugee status decisions are normally appealed to specialized tribunals, rather than to courts of general jurisdiction) (Schmidt, Ch., dissenting).

178. *See id.* at 1114. (Schmidt, Ch., dissenting).

179. *See In re Kasinga*, Interim Decision #3278, 21 I. & N. Dec. 357, 358, 364 (BIA 1996).

180. *See In re A-S-*, 21 I. & N. Dec. at 1114 (While deference is “likely to achieve more uniform affirmation of adverse credibility findings on appeal, it does not, in any way, promote uniformity of credibility decisions among the many Immigration Courts.”) (Schmidt, Ch., dissenting).

181. *See id.* (Schmidt, Ch., dissenting).

182. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,880 (Aug. 26, 2002).

characteristics of refugee status determination have led to the development of specialized interviewing techniques and special standards of proof.<sup>183</sup> In this context, the deference afforded first instance credibility findings is unjustified. Refugee adjudicators are not just finding facts; they are applying specialized standards. Refugee credibility assessments should be considered mixed questions of fact and law that should be reviewed *de novo* on appeal.

The argument against deferential appellate review is subject to one caveat, however. In many asylum systems, applicants can appeal first instance rejections to a specialized administrative appeals tribunal, before seeking redress in a court. In the U.S., for instance, immigration judges' decisions are appealed to the BIA before reaching the U.S. Court of Appeals. Because these administrative tribunals offer a chance of appeal by a specialized body, there is a plausible argument for higher courts to be somewhat deferential toward their decisions. This was noted by the Federal Court of Australia:

We accept that refugee cases may involve special considerations arising out of problems of communication and mistrust, and problems flowing from the experience of trauma and stress prior to arrival in Australia. Ordinarily, the knowledge and experience of members of the RRT may be expected to assure that they are sensitive to these special considerations.<sup>184</sup>

This makes some sense, given that the argument against deferential review is based on the need to apply special standards in refugee status determination. However, this heightens the need for *de novo* appellate review of credibility findings by truly independent and sensitive administrative tribunals.<sup>185</sup> If decisions by administrative appeals tribunals are to be granted any deference by courts, then courts and governments need to ensure that the

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183. In a study evaluating refugee status determination in Canada, James C. Hathaway commented:

Refugee status determination is among the most difficult forms of adjudication, involving as it does fact-finding in regard to foreign conditions, cross-cultural and interpreted examination of witnesses, ever-present evidentiary voids, and a duty to prognosticate potential risks rather than simply to declare the most plausible account of past events.

JAMES C. HATHAWAY, *REBUILDING TRUST: REPORT OF THE REVIEW OF FUNDAMENTAL JUSTICE IN INFORMATION GATHERING AND DISSEMINATION AT THE IMMIGRATION AND REFUGEE BOARD OF CANADA* 6 (1993).

184. *Sivalingam v. Minister for Immigration & Multicultural Affairs*, (1998) 1167 FCA 11. *Cf. In re A-S-*, 21 I. & N. Dec. at 1114 (noting that the BIA is a specialized tribunal, and therefore need not regard immigration judges' decisions with deference) (Schmidt, Ch., dissenting).

185. It is puzzling that the Federal Court of Australia endorsed the "knowledge and experience" of the RRT even while citing a study questioning whether the RRT was in practice adequately sensitive to the special considerations necessary to assess refugee credibility. *See Sivalingam v. Minister for Immigration & Multicultural Affairs*, (1998) 1167 FCA (citing *Kneebone*, *supra* note 36).

tribunals in practice live up to the expectations of their specialized roles.<sup>186</sup>

### B. *Reviewing the Method of Credibility Assessment*

The new U.S. regulations prevent the BIA from reversing some credibility-based rejections where it would have reached a different decision. Given the life-or-death stakes in asylum cases, this is a disturbing state of affairs. Nevertheless, credibility assessments are not beyond appellate scrutiny. The Department of Justice was at pains to emphasize that the BIA *should* review and analyze factual findings by immigration judges.<sup>187</sup> Existing precedents and the new regulations empower the appellate tribunal to scrutinize the analytical process by which a first instance decision-maker reached his or her credibility finding. The BIA has significant latitude to apply appellate scrutiny to the analytical method used in credibility assessments.

While expressing deferential review standards in refugee cases, some appellate tribunals and courts have been quite active in dissecting and reversing first instance credibility decisions.<sup>188</sup> In Canada and the United States, an emerging approach maintains deferential review, but reverses first instance credibility findings that lack concrete reasons. The U.S. BIA in *In re A-S-* adopted a standard by which credibility decisions are not reviewed *de novo*, but first instance decisions are not upheld where immigration judges do not provide “specific and cogent reasons” for their decisions.<sup>189</sup> The BIA often emphasizes that immigration judges’ credibility decisions should be treated with deference, but at the same time sometimes reviews them in detail and sometimes reverses the decisions, including decisions based on evaluations of demeanor.<sup>190</sup>

Similar to the U.S. approach, the Canadian Federal Court of Appeal in *Aguebor v. Canada* (Minister of Employment and Immigration) endorsed deferential review:

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186. See Stephen H. Legomsky, *Refugees, Administrative Tribunals, and Real Independence: Danger Ahead for Australia*, 76 WASH. U. L. Q. 243 (1998) (arguing that “Australia’s system of administrative justice is in grave danger as a result of dramatic recent threats to the independence of key adjudicators”).

187. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,889 (Aug. 26, 2002) (“The Department does not accept the suggestions that a clearly erroneous standard of review, as provided in this rule, will lead to decisions by the Board that ‘rubber stamp’ the decisions of the immigration judges without thoughtful review or analysis. . .”).

188. See generally ANKER, *supra* note 2; Mary C. Hurley, *Principles, Practices, Fragile Promises: Judicial Review of Refugee Determination Decisions Before the Federal Court of Canada*, 41 MCGILL L.J. 317 (1996).

189. *In re A-S-*, Interim Decision #3336, 21 I. & N. Dec. at 1109 (“Because our review of the record reveals that the Immigration Judge’s findings are supported by specific and cogent reasons, and that reasonable inferences and conclusions were drawn by him with regard to credibility, we will not substitute our judgment for that of the Immigration Judge.”). Similarly, the Ninth Circuit has held that an immigration judge “must have a legitimate *articulable* basis to question the petitioner’s credibility” and must state “a specific cogent reason for any stated disbelief.” *Shoaf v. INS*, 228 F.3d 1070, 1075 (9th Cir. 2000) (quoting *Garrovillas v. INS*, 156 F.3d 1010, 1013 (9th Cir. 1998)). But the Ninth Circuit is still deferential toward first instance credibility decisions, for it examines the decisions’ logic to see if they are “fatally flawed.” *Zahedi v. INS*, 222 F.3d 1157, 1166 (9th Cir. 2000).

190. See *In re B-*, Interim Decision #3251, 21 I. & N. Dec. 66 (BIA 1995).

There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review.<sup>191</sup>

However, Canadian courts have clarified that findings based on implausibility must be based on firm evidence, and cannot be highly speculative.<sup>192</sup> For instance, a Canadian federal court reversed a finding disbelieving a woman who said she feared violence by her husband because the adjudicator had ignored the witness and expert testimony in the case. The court reversed the decision because “stereotypes regarding profiles of abused women and appropriate behaviours of abused women were the foundation of its decision.”<sup>193</sup>

The new U.S. regulations do not actually change the approach to credibility developed in BIA jurisprudence, though they do make it difficult for the BIA to refine or revisit its precedents. First, the text of the new regulations is not substantially different from the previous BIA standards. The “clearly erroneous” standard in the new regulations is essentially the same as the “deference” the BIA had already been applying. In U.S. law, a finding is “clearly erroneous” if the appellate tribunal comes to a firm conviction that it was a mistake, even if there was some evidence to support it.<sup>194</sup> Unlike in a *de novo* review, it is not enough for an appellate tribunal to simply decide that that it would have come to a different conclusion.<sup>195</sup> But in *In re A-S-*, the BIA did not say it would reverse credibility findings it merely disagreed with. As the Department of Justice explained,<sup>196</sup> the BIA in *In re A-S-* spelled out an analytical framework by which to reach a firm conviction that the first instance decision was a mistake.<sup>197</sup> Second, the Department of Justice made

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191. [1993] 160 N.R. 315, 316.

192. See *Cazak v. Minister of Citizenship and Immigration*, [2002] F.C.T. 390, para. 20 (citing *Arumugam v. Canada*, [1994] F.C.J. 122, para. 5).

193. *Cazak*, [2002] F.C.T. at para. 23.

194. *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985).

195. *Id.*

196. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,889 (Aug. 26, 2002) (“[U]nder this rule, the Board should start from the premise that it will accept the findings of fact made by the immigration judge, unless the Board identifies specific reasons, including the inverse of those stated in *In re A-S-*, for forming a definite and firm conviction that a mistake has been made.”).

197. *In re A-S-*, Interim Decision # 3336, 21 I. & N. Dec. 1106, 1109 (BIA 1998) (In general, the court defers to an Immigration Judge’s adverse credibility finding based upon inconsistencies and omissions regarding events central to an alien’s claim where a review of the record reveals that “(1) the discrepancies and omissions described by the Immigration Judge are actually present; (2) these discrepancies and omissions provide specific and cogent reasons to conclude that the alien provided incredible testimony; and (3) a convincing explanation for the discrepancies and omissions has not been supplied by the alien.”).

clear that it did not intend to overrule *In re A-S*. Rather, the Department stated that, by issuing the new regulation, it meant for the BIA to continue its current approach of reviewing credibility decisions and expand it to cover other areas of fact finding.<sup>198</sup>

While findings of fact will be left primarily to first instance decision-makers, the current approach allows and encourages appellate tribunals to review the method by which credibility assessments are conducted.<sup>199</sup> Indeed, the analytical framework for credibility assessment proposed in this article in Section 10, *supra*, is built on the framework articulated by the BIA in *In re A-S*— that was endorsed by the Department of Justice.<sup>200</sup>

## XII. CONCLUSION

Credibility assessment in the refugee context is by nature a delicate act. It judges a vulnerable person's believability across a cultural chasm, and must account for the myriad reasons a *bona fide* refugee may appear unconvincing. Saying some asylum-seekers lie is much easier than deciding a particular individual should be disbelieved — especially if countries are to maintain their fidelity to the protection and humanitarian purposes of the Refugee Convention.<sup>201</sup>

Credibility assessment is made more difficult because of government migration policies beyond the limits of refugee law. As international law stands, refugee protection is a limited exception to the general norm that states have the right to exclude most aliens. Wealthy governments should

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198. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,889 (Aug. 26, 2002) (“The Department believes that these standards [as articulated by the BIA in *In re A-S*— to apply to credibility findings] offer some appropriate guidance, but should be applied to the broader factfinding process.”).

199. See *Aguilera-Cota v. INS*, 914 F.2d 1375, 1381 (9th Cir. 1990) (“The fact that an IJ considers a petitioner not to be credible constitutes the beginning not the end of our inquiry. . . . [W]e examine the record to see whether substantial evidence supports that conclusion, and determine whether the reasoning employed by the IJ is fatally flawed. It is not enough that the IJ has arrived at point B from point A, or that others might also; the question we must answer is: was it reasonable to do so?”).

200. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,889 (Aug. 26, 2002) (“The Department does not accept the suggestions that a clearly erroneous standard of review, as provided in this rule, will lead to decisions by the Board that ‘rubber stamp’ the decisions of the immigration judges without thoughtful review or analysis.”).

201. David Martin summarizes the problem:

A reformed system must equip its decision makers to avoid snap judgments and make adequate allowance for cross-cultural difficulties. But such awareness must also be employed with care. Some of the writings about cross-cultural sensitivity seem almost to assume that there is an innocent explanation for any stumble, vagueness, or change of story. This is not necessarily the case. A reformed system must also equip its adjudicators to sort through such phenomena and still be able to spot false tales — because sometimes inconsistency and reticence really do result from falsehood and not from more innocent explanations. The line to be walked is a fine one.

*Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1287 (1990).



recognize that asylum systems are naturally put under strain by policies of controlling economic migration. In the face of tremendous economic incentives to migrate, such policies increase the incentive for non-refugees to apply fraudulently for asylum, feed suspicions that asylum-seekers are abusing refugee protection, and force unrealistic expectations that adjudicators can reliably screen out the “real” refugees. The faults often found in asylum systems may often be symptoms of untenable immigration policies that place undue strain on refugee status determination.

In the present refugee protection system, where the incentive to manipulate asylum undeniably exists, credibility assessment is a necessary evil. It imposes a huge burden on decision-makers and huge risks on applicants, but cannot be avoided. The desire to extend protection to as many people as possible cannot overshadow the need to protect the integrity of the refugee system in a world of increasing migration control. If refugee protection is to have any meaning in the system that exists, refugees must be distinguishable from other migrants. The credibility standard cannot be so forgiving that in the hands of a dishonest applicant it would render refugee status determination a mere formality, where people could obtain immigration benefits by putting forward a formulaic story that cannot effectively be questioned. Although many or most applicants would continue to be honest, too much openness to abuse could threaten public confidence in the entire refugee protection regime.

Credibility assessment can realistically aspire to make sure that cheating will not be easy. But it cannot expect to prevent all abuse. Refugee status determination needs consistent credibility assessment that does not blindly accept refugee claims, but which judges them on a liberal standard that errs on the side of protection and considers all of the obstacles genuine refugees face in articulating their cases. Credibility assessment is a necessity, but it must be approached with substantial caution.

Refugee status determination should not overestimate human beings' ability to tell when one another are being dishonest. Just as refugee claimants rarely have enough evidence to conclusively “prove” their claims, adjudicators and governments rarely have enough evidence to conclusively prove that claimants are committing fraud. Only in the relatively unusual case where conclusive documentary evidence exists can adjudicators (or government officials) reliably say that they are “sure” an applicant is not telling the truth. For the same reason, adjudicators can rarely say they are absolutely sure an applicant *is* telling the truth. As Judge Geoffrey Care has noted about refugee status determination, “Experience is not much use; we never know if the assessment was right or wrong.”<sup>202</sup> The purposes of the Refugee Convention

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202. Geoffrey Care, *The Refugee Determination Process: A Judge's View* 5 (Jan. 6, 2001) (unpublished paper presented to the 7th International Research and Advisory Panel of the International Association for the study of Forced Migration, South Korea) (on file with author).

call for erring on the side of protection and belief, with full recognition that this means some people will cheat the system. The alternative is to refuse protection to many people who need it, and betray the commitment states have made to protect people in danger of persecution.

Governments and courts have moved to make credibility assessment less subjective and give credibility findings a more concrete basis. This process can be continued by appellate tribunals examining credibility findings without deference, both to prevent errant rejections and to develop jurisprudence on a critical aspect of refugee status determination. Developing and applying a standard analytical framework for credibility assessment would help ensure that people in danger of human rights violations more consistently get the protection they need, while bolstering confidence in the reliability of the refugee status determination system.