Cross-Cultural Complications: Assessing the Credibility of Asylum Applicants’ Testimony

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Summary

Credibility assessments play a central part in refugee status determinations. The difficulty of adducing evidence to substantiate a claim for asylum renders applicants’ own testimonies extremely important, and by providing credible testimony an applicant may be given the benefit of the doubt and may thereby be able to meet the applicable standard of proof. In addition, this thesis argues that a positive finding of credibility is a vital step to being granted refugee status because it is only through credible testimony from the applicant herself that certain elements of the refugee definition can be satisfied. In spite of its importance, international refugee law does not stipulate how credibility assessments should be conducted. Domestic frameworks, too, are often vague on this topic. In this blurred context, three main pillars of credibility have evolved: internal consistency, external consistency, and plausibility. It is the purpose of this thesis to explore some of the problems that arise when decision-makers evaluate asylum applicants’ testimony according to these criteria, with particular focus on the cross-cultural setting of the refugee status determination.

In its analysis of findings of internal inconsistency, the thesis focuses on three possible explanations for such discrepancies. The first is memory effects: this section concludes that human memory is generally not able to recall past experiences with complete consistency and accuracy. The second issue is the widespread use of interpreters in asylum processes, and it is demonstrated that this too is a potent source of internal inconsistencies. Thirdly, late disclosures of central aspects of applicants’ stories resulting in internal inconsistencies can often be explained by reference to applicants’ distrust in state authorities or the notions of privacy and shame that many applicants hold with regard to certain experiences. Moreover, the chapter on external consistency argues that findings of inconsistency between asylum applicants’ testimony and information about conditions in applicants’ countries of origin from other sources are more complex than is widely acknowledged. The contested nature of ‘facts’ and the difficulty of viewing country of origin information (COI) as ‘objective evidence’ are discussed, and it is further argued that asylum decision-makers are generally not well equipped to assess whether there is consistency or not. With regard to assessments of the plausibility of applicants’ accounts, the thesis finds that such assessments are grounded on unspoken assumptions on the part of decision-makers as to what is plausible and what is not. The thesis discusses the role of the ‘reasonable man’ as an analytical tool in credibility assessments, but argues that this concept has little value in the cross-cultural context of the refugee status determination. It is further argued that assumptions about reasonable knowledge can be very misleading in credibility assessments, and that any reliance on applicants’ demeanour is inappropriate as a way to evaluate credibility.

The thesis concludes that credibility assessments are all too often being conducted in ways that do not accurately separate fraudulent applicants from genuine ones, as the three grounds of credibility are frequently evaluated in ways that cannot properly distinguish between the two categories. Consequently, credibility assessments risk failing applicants who are genuinely at risk of being persecuted for a Convention reason. In response to these problems, the thesis offers a number of recommendations that are intended to be legally binding as international law and enforceable if they are not adhered to by decision-makers.
Preface

First of all, I want to thank all the people that have made it possible for me to complete this thesis. I want to thank my supervisor, Professor Göran Melander, for his insightful comments, anecdotes and kind words of encouragement. Throughout this trying semester I have always felt that I could turn to you with my concerns, and time and time again I have left your office with renewed confidence in my endeavour. I am also deeply grateful to Sigrid Premberg and Sebastian Multala for their roles as discussion partners and proofreaders. You have provided me with new perspectives and your patient listening will late be forgotten. I also want to thank all my fellow students for making the spring of 2013 a rather enjoyable time to spend in the library. Further, I wish to express my gratitude to all the teachers at the Migration Law course of 2012, in particular to Vladislava Stoyanova. This course provided me with the fundamental knowledge of refugee law that enabled me to pursue this specialised topic, and it assured me that refugee law really is the area that I want to focus on in the future. In my view, it was the most inspiring course of the entire Masters programme. Lastly, I want to thank my family for their eternal love and support. You have given me the confidence to pursue my dreams and fight for what I believe to be right, even when this is not the easiest path to take. I have managed to complete this thesis only because of your unwavering encouragement and faith in me.

I also want to take the opportunity to say a few words about why I have chosen to write about this topic. Law, understood as justice and equality for all persons, has always been of great interest to me. Meanwhile, I am fascinated by the diversity that human societies display. This led me to pursue studies in both law and social anthropology, and I have often wondered how these two areas of interest could be combined. Finally, I realised that refugee law draws on both. Refugeehood is relative to the applicant’s country of origin, yet the international laws of the Refugee Convention are the same for all. Looking further into this area, I found that the assessment of asylum applicants’ credibility as witnesses of their own life stories provides an extremely interesting object of study for the intersection of the two disciplines, strictly speaking a legal issue which nevertheless has so much to learn from other spheres of knowledge. Not much has been written about credibility assessments from this somewhat dual perspective. During the course of writing this thesis, I have become increasingly aware of the complexity of assessing credibility, which is further exacerbated by trying to reconcile legal processes with insights from other disciplines. This thesis attempts to contribute some new perspectives on credibility assessments, but its findings are only a starting point and I hope that this area of the refugee status determination will receive much more academic scrutiny in the future. Therefore, I wish to finish off my introductory remarks with a quote much used by the late Lord Bingham:

“I have stirred these points, which wiser heads in time may settle.”

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## Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>COI</td>
<td>Country of Origin Information</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>FGM</td>
<td>Female genital mutilation</td>
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<tr>
<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<tr>
<td>NGO</td>
<td>Non-Governmental Organisation</td>
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<tr>
<td>PTSD</td>
<td>Post-Traumatic Stress Disorder</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
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1. Introduction

The international community has agreed on the need for a system that offers protection to persons that are at risk of persecution in their countries of origin. In our world of Westphalian nation-states, people cannot move freely across borders and between countries; thus, it is not a given that victims of persecution can flee from their aggressors. This is why refugee law, and the international protection offered by that framework, is needed. The possibility to gain asylum provides an invaluable lifeline for millions of people worldwide that fear persecution for the reasons specified in the Refugee Convention.\textsuperscript{2} It is the responsibility of all contracting parties\textsuperscript{3} to ensure that the Convention is implemented in a way that will grant protection to such persons. This, however, is not a straightforward task. The path between the legal definition of refugeehood and the actual recognition of such protection passes through the refugee status determination process, wherein the evidentiary difficulties that so often haunt claims for asylum render a proper application of the Refugee Convention extremely complex. According to Hathaway, a leading authority on refugee law, “[r]efugee 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, [and] ever-present evidentiary voids.”\textsuperscript{4}

Subject to a few exceptions,\textsuperscript{5} a refugee in the legal sense of the word is a person who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, 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.”\textsuperscript{6} In practice, however, most claims for asylum do not turn on the exact interpretation of these legal concepts.\textsuperscript{7} Rather, the decisive issue becomes whether or not the applicant convinces the decision-maker that the evidence she presents for her claim is credible: according to Kagan, the credibility assessment is often “the single most important step” in determining a claim.\textsuperscript{8} As it turns out, while the assessment of the credibility of the applicant and her testimony may be thought to constitute a rather trivial rule of procedural law, this detail ends up being the decisive factor in a majority of refugee status determinations worldwide. If the credibility of the applicant is not accepted, she will rarely succeed in satisfying the substantial criteria that make up refugee status. In practice, credibility

\begin{itemize}
\item \textsuperscript{2} Convention Relating to the Status of Refugees, 28 July 1951, referred to as the ‘Refugee Convention’ throughout this thesis.
\item \textsuperscript{3} As of 22 May 2013, there were 145 contracting parties: http://treaties.un.org/pages/ViewDetailsII.aspx?src=UNTSONLINE&mtdsg_no=V~2&chapter=5&temp=mtdsg2&lang=en, last accessed on 22 May 2013.
\item \textsuperscript{5} Refugee Convention (1951), supra note 2, Article 1(D); 1(E) and 1(F).
\item \textsuperscript{6} Refugee Convention (1951), \textit{ibid}, Article 1(A)(2).
\item \textsuperscript{7} See, for example, A. Macklin, ‘Truth or Consequence: Credibility Determinations in the Refugee Context,’ International Association of Refugee Law Judges: Ottawa, Canada, 14-16 October 1998, p. 134.
\end{itemize}
has been amplified from an alleviating evidentiary rule to a decisive factor in determining asylum claims.⁹

Each and every asylum applicant who is deemed not credible in her claim but who is genuinely at risk of being persecuted constitutes an immense failure for the asylum system. The potentially deadly consequences of an erroneous decision mean that no genuine refugee should fall through the asylum safety net because their stories are not accepted as evidence. Nonetheless, statistics indicate that lack of credibility is the foremost reason why asylum claims are rejected.¹⁰ All the more worrying, a substantial number of the asylum claims that are overturned on appeal find that the initial credibility assessment was flawed. As a case in point, a report by Amnesty International published in April 2013 found that 84 percent of its sample UK cases that were overturned on appeal indicated that the initial decision-maker had wrongly made a negative assessment of the applicant’s credibility.¹¹ Considering this information alongside the 25 percent rate of overturn on appeal of initial decisions to refuse asylum,¹² flawed credibility assessments are clearly a very important reason why asylum applicants are being rejected. This merits serious consideration and investigation; thus, it becomes critical to look at the bases for decision-makers’ rejections of credibility. In addition to being extremely important, assessing credibility is also exceptionally hard. According to Amnesty International, credibility assessments are inherently difficult because they require the decision-maker to break with her instinctive practice of assessing someone’s behaviour in relation to whether it fits her own expectations of what would be a ‘normal’ or ‘common sense’ response to a certain situation.¹³ On top of this, asylum decision-making is usually not bound by normal rules of evidence:¹⁴ compared to many other areas of adjudication, it is remarkably unregulated. Meanwhile, it is clear that reliable procedures are central to the practical enforcement of the protection offered by international refugee law.

1.1 Research questions

This thesis will problematise the credibility assessments that are routinely being made in refugee status determination processes. In particular, it will focus on the complications that arise out of the ipso facto cross-cultural setting that comes about when an applicant leaves her country of origin and claims asylum in a foreign state, where persons of a completely different background¹⁵ end up assessing the credibility of her testimony. The main question that this thesis will address is: what problems arise in assessing the credibility of asylum applicants in light of the cross-cultural setting of the refugee status determination? In order to provide answers to this, several other sub-questions will be addressed. While discussing the main research question,

¹⁰ For example, a survey by Kagan of rejections issued at UNHCR’s regional office in Cairo during the spring of 2002 showed that 77 percent of rejections were attributed to “lack of credibility;” M. Kagan (2002), supra note 8, p. 369.
¹¹ Amnesty International, A question of credibility: Why so many initial asylum decisions are overturned on appeal in the UK, April 2013, p. 12.
¹² Amnesty International (2013), ibid, p. 4.
¹³ Amnesty International (2013), ibid, p. 34.
¹⁴ See, for example, the Australian Migration Act 1958 section 353(2)(a) and the Canadian Immigration and Refugee Protection Act, S.C. 2001, section 173(c).
¹⁵ Of course, there are exceptional situations where the decision-maker in the country of arrival shares a cultural background with the applicant, but these are certainly very rare.
the thesis will simultaneously explore how credibility assessments are being conducted. Consequently, it becomes important to understand the basics of how credibility assessments are regulated in domestic legal frameworks, which is another sub-question that will be looked at. Having compared these frameworks to the problems that arise, the thesis will devote one chapter to analysing how these problems could be alleviated and will to that effect make recommendations for common international standards of assessing credibility. First of all, however, in order to demonstrate why the main question is an important one to ask in the context of refugee status determinations, the thesis will address what role credibility assessments play in such processes.

1.1.1 Delimitations
In the course of writing this thesis, certain delimitations have been called on. To begin with, only the credibility of the asylum applicant’s own testimony will be addressed, and not that of other possible witnesses or any documentary evidence that the applicant may be able to present. It will therefore not discuss assessments of medical reports, although the assessment of such reports is sometimes discussed together with the assessment of country of origin information. The latter is clearly of interest in the present thesis, given its importance in cross-cultural assessments of credibility. Overall, more attention will be paid to elements of credibility grounds that are unique to the international application of refugee law. This means that although memory effects will be discussed in chapter 5 and demeanour in chapter 7, they will not be afforded the degree of analysis that they perhaps deserve because they are not as such unique to the cross-cultural setting of the refugee status determination. Moreover, it should be mentioned that the thesis will not look at the particular situations of specific groups of asylum applicants, such as children or applicants of diminished mental capacity. Another delimitation worth mentioning is that the focus of this thesis is strictly on refugee law, at the expense of procedural law more generally and the law of evidence in particular. A deeper study and comparison of the approach to fact-finding in refugee law as compared to other legal disciplines remains outside the scope of this study, although it is readily admitted that the analysis would have benefited greatly from this. Finally, this thesis will only look at credibility assessments in the context of refugee status determinations. Thus, it will not discuss credibility in relation to other forms of subsidiary protection which may in fact be granted when an applicant’s credibility is not wholly accepted and therefore she is not found eligible for refugee status, but her situation is nonetheless such that it merits some other form of leave to remain.

1.2 Structure and methodology
The structure of this thesis is designed to answer the main research question and the sub-questions in a way that is accessible and structured in a logical manner. Chapter 2 will discuss the role of credibility as an alleviating evidentiary rule, by explaining how credibility relates to the burden of proof, the standard of proof, and the benefit of the doubt. Chapter 2 will also attempt to define ‘credibility’ for the purpose of this thesis. Chapter 3 will explore another function that credible testimony plays in meeting the legal criteria of the refugee definition. To this end, the chapter will

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16 This is not a clear-cut distinction: some aspects of demeanour are exaggerated in cross-cultural adjudication, and some other grounds of credibility discussed are also of relevance in the evaluation of credibility in domestic procedures – for example, the issue of late disclosure in cases pertaining to sexual abuse.
discuss subjective and objective approaches to ‘well-founded fear of being persecuted.’ Taken together, chapters 2 and 3 will thus cover the role that credibility assessments play in refugee status determination processes. Moving on, chapter 4 will look at domestic frameworks for credibility assessments, thereby addressing another sub-question. This is important in order to understand what rules domestic decision-makers are guided by in conducting credibility assessments. In addition to surveying the domestic laws on credibility assessments more generally, chapter 4 will address three specific issues that will later prove to be of great importance for evaluating credibility. These include whether or not there is an obligation to confront applicants with negative credibility findings; what the role of partial non-credibility is; and what possibilities applicants have to appeal negative credibility findings. Thereafter, chapters 5, 6 and 7 will analyse the three main grounds of credibility assessments: internal consistency, external consistency, and plausibility. These are the thesis’s central chapters, and it is mainly here that the problems arising in cross-cultural asylum credibility assessments will be discussed and evaluated. Having examined the grounds for credibility assessments and the problems that they involve, chapter 8 will attempt to formulate some recommendations that could improve the accuracy of credibility assessments, paying special attention to the cross-cultural element of refugee status determinations. At that point, all the research questions set out above will have been addressed and chapter 9 will serve to summarise the findings that they have led to.

In order to answer the research questions, this thesis will rely on a combination of asylum decisions, academic sources, reports produced by international organisations and non-governmental organisations (NGOs), domestic and international legislation, and domestic guidelines on credibility assessments. This thesis is solely based on written materials and no empirical studies have been undertaken. Given the magnitude of the topic of cross-cultural credibility assessments, there is surprisingly little academic coverage of it. The different grounds of credibility have been mentioned and briefly discussed by some legal scholars, but rarely analysed at length. Some aspects have received more attention, notably the distorting effect that human memory can have on the ability to present a consistent testimony. To the best knowledge of the author, the grounds of credibility assessment have not previously been coherently analysed from a legal perspective that puts specific focus on the cross-cultural element of the refugee status determination. Consequently, this thesis is based on a multitude of different sources drawn from a variety of academic disciplines. Most of them are written by legal scholars and take a predominately judicial perspective on the issue of credibility assessments. However, the thesis will also refer extensively to materials produced by trained psychologists, physicians, sociologists and social anthropologists. Given the cross-cultural focus of the thesis, the latter will receive special attention as experts of social structures and contexts in different societies from which legal processes dealing specifically with cross-cultural evaluation have much to learn.

The thesis addresses the international refugee law framework, but since this is implemented through domestic processes materials from a variety of jurisdictions have been utilised. Further, the asylum decisions referred to are drawn from several different levels of decision-making: first-instance administrative decisions, appellate tribunal judgments, and even on occasion cases from higher courts decided on the basis of judicial review. Most asylum decision will be drawn from English-speaking
common law jurisdictions, primarily from the UK, the US, Canada and Australia. There are three main reasons for this. Firstly, UNHCR has favoured the common law approach to evidentiary concepts and has adopted it in its application of refugee law. Therefore common law and its evidentiary concepts can be said to be of greater relevance to international refugee law than its civil law equivalents. Secondly, the aforementioned countries are some of the main recipients of applications for asylum.\textsuperscript{17} Thirdly, in order to achieve a consistent and accurate interpretation the present author has chosen to restrict herself to materials written in English or Swedish, as opposed to relying on translations. This final point is also the reason why most domestically produced reports relied on in this thesis stem from English-speaking countries.

This thesis will refer to all asylum applicants as ‘applicants,’ no matter the particular term used in the country where the claim has been made and irrespective of the hierarchical level on which the case is being decided. Likewise, the term ‘decision-maker’ will be used for all those deciding asylum claims, without regard to domestic terminology or distinction between administrative and judicial fora.

1.2.1 Limitations
The proposed methodology contains several limitations. First and foremost, an international survey of credibility assessments comes at a high cost. Refugee status determinations are extremely diverse: they vary between countries, but also between individual decision-makers. When asylum decisions from the whole world are the object of study, it is clear that many findings will not be of relevance to a majority of the refugee status determinations being made.\textsuperscript{18} A focused study would have had the advantage of producing more specific results that are highly relevant to the particular sample being studied. In spite of this limitation, the present thesis has chosen to focus on refugee law worldwide, since it ultimately aims to pronounce on the state of international refugee law rather than its implementation in any specific country. As will become clear in chapter 9, its recommendations will be for the common international framework. Some of these recommendations will not bring about a change in certain domestic jurisdictions because they may already be in place there, but this thesis argues that across the globe, credibility assessments should live up to these standards.

Another important limitation concerns the asylum decisions under study. Most first-instance decisions are not publically reported, but are only accessible through the applicant, her legal representative, or possibly the agency conducting the determinations. Many of the academic sources and NGO reports referred to in this thesis have been able to access and investigate such decisions, and this analysis will at times refer to first-instance decisions that have been published in this way. Often, it is only certain parts of the decisions that are included in these sources. Clearly, it is a limitation that these decisions are not accessible for independent verification in their entirety. This thesis thus relies on the integrity of the academic and non-academic sources here referred to, and has carefully selected materials from well-known and respected organisations and academics. Hopefully, these sources can be trusted to

\textsuperscript{17} According to UNHCR, in 2012 the top five receiving countries of asylum claims were the US, Germany, France, Sweden, and the UK: UNHCR, \textit{Asylum Trends 2012: Levels and Trends in Industrialized Countries}, 21 March 2013, p. 8.

\textsuperscript{18} In 2012, 479,300 applications for asylum were submitted worldwide: UNHCR (2013), \textit{ibid}, p. 7.
have produced accurate and fair reports of the refugee status determinations that they refer to, but it is recognised that this constitutes a limitation nonetheless.

Finally, it should be emphasised that this thesis is problem-oriented: it focuses on asylum claims where the credibility assessments have not been conducted satisfactorily. Alas, it cannot be expected to provide a fair account of how most credibility assessments are conducted, for that is not its purpose. The author hopes and believes that most asylum decision-makers would not reach negative findings of credibility on the grounds that decision-makers in the examples below have done. The purpose of the thesis is however to demonstrate that these findings are possible to reach under the current structures for credibility assessments, and that some decision-makers – even if they are only a minority – do reach them, on highly dubious grounds. Once again: it is not the intention of this thesis to condemn all decision-makers in asylum processes worldwide, but this concern cannot preclude it from pointing out that asylum seekers are currently being rejected for reasons that hinder the correct application of the Refugee Convention and the protection offered by the institution of asylum.
2. The role of credibility as an alleviating evidentiary rule

In the following chapter, the link between establishing the legal elements of the refugee definition and the credibility of the applicant’s testimony will be elaborated on. As was noted by the UK Immigration and Asylum Tribunal in *Assuming*, asylum cases differ from most other types of legal disputes in the seriousness of the consequences of an erroneous decision, in the focus of the decision on future events, and the inherent difficulties of obtaining objective evidence.\(^{19}\) Against this background, it is clear that the question of what evidentiary threshold must be reached in order to amount to a ‘well-founded fear of being persecuted’ is “all-important.”\(^{20}\) In analysing this issue, UNHCR has favoured using the terms ‘standard of proof’ and ‘burden of proof’, borrowed from the law of evidence of common law countries.\(^{21}\) For this reason the following analysis will also employ this terminology, but notes that most civil law systems take a different approach to analysing whether an applicant for refugee status has met the requisite standard.

2.1 The burden of proof

In order to meet the standard of proof for ‘well-founded fear of being persecuted,’ facts must be established which cumulatively meet the threshold set by this standard. Such facts are ascertained by adducing proof or evidence, which may be either oral or documentary. The duty to provide evidence in order to prove such facts is termed the ‘burden of proof.’\(^{22}\) General principles of the law of evidence hold that the burden of proof lies on the person making an assertion: thus, in asylum claims, this burden falls on the applicant for refugee status,\(^{23}\) and the relevant facts of the case will have to be supplied in the first place by the applicant herself.\(^{24}\) This renders the testimony of the applicant extremely important to the assessment of the claim: indeed, Hathaway has held that the careful consideration of the applicant’s own evidence is the “heart of the refugee status determination process.”\(^{25}\) However, legal accommodations have been made for the particularities of the asylum claim with reference to the difficulty of obtaining objective evidence. While the burden of proof in principle lies with the applicant the decision-maker shares her burden of ascertaining the relevant facts, and in some cases the latter may even be compelled to use all the means at her disposal to produce the necessary evidence in support of the application.\(^{26}\) Even though UNHCR explains this duty as being achieved largely by the decision-maker being familiar with

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\(^{21}\) UNHCR, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, para. 3.

\(^{22}\) UNHCR *Note* (1998), *ibid*, para. 5.


the objective situation in the country and by guiding the applicant in providing the relevant information, it is nevertheless an important adjustment and a principal recognition of the difficult situation faced by the asylum seeker in substantiating her claim for refugee status.

2.2 The standard of proof

Civil and criminal law cases commonly make use of two distinct standards of proof: while civil cases are to be proven “on a balance of probability”, criminal cases require proof of a higher calibre, namely “proof beyond a reasonable doubt.” Given the grave consequences of an erroneous asylum decision, together with the difficulties of obtaining evidence in support of a claim, it would be unjust to require the high evidentiary standard employed in criminal law to be met in refugee status determination proceedings. Whereas the gravest mistake in criminal proceedings would be to incriminate an innocent person, the gravest mistake in asylum cases would be to refuse the application of a person at risk of being persecuted, thus forcing her into the arms of her persecutors. Consequently, there is no need for decision-makers to be assured beyond a reasonable doubt that they are making the right call when they are granting asylum, for the necessity to avoid the risk of a wrongful refusal greatly outweighs any potential societal costs of a wrongful grant of status. The opposite, however, would certainly result in applicants being denied and subsequently suffering great harm at the hands of their persecutors. Such considerations lie behind UNHCR’s clarification that the determination of refugee status does not purport to identify refugees as a matter of certainty, but as a matter of likelihood.

2.2.1 Explaining the standard of proof

The determinative standard of proof in the refugee definition is ‘well-founded.’ Senior courts of common law countries have elaborated on the meaning of this phrase in order to guide the interpretation and application of the Refugee Convention. In Cardoza-Fonseca, the US Supreme Court held the applicable standard to be a “reasonable possibility” of persecution, with Steven J. explaining that “[t]here is simply no room in the […] definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no ‘well-founded fear’ of that ever happening.” In Sivakumaran, the UK House of Lords per Lord Keith held the standard of proof to be a “reasonable degree of likelihood that [the applicant] will be persecuted,” whereas Lord Goff articulated the applicable test to be whether a “real and substantial risk of persecution” actually exists. The standard set out in Sivakumaran still stands, but has since been simplified to a “real risk” test. Moreover, the Australian High Court has favoured a

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27 UNHCR Note (1998), supra note 21, para. 6.
29 UNHCR Note (1998), supra note 21, para. 2.
33 Ex parte Sivakumaran [1988], ibid, p. 1000 per Lord Goff.
34 PS (Sri Lanka) v. Secretary of State for the Home Department [2008] EWCA Civ 1213, para. 11 per Sedley LJ.
standard of proof that assesses whether there is a “real chance” of persecution, since this test “conveys the notion of a substantial, as distinct from a remote chance, of persecution occurring.” and the Canadian Federal Court of Appeal has approved “good grounds for fearing persecution” as a description of the evidentiary standard. The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status sets out the applicable test for ‘well-founded fear’ to be met if it can be established to a “reasonable degree” that the applicant’s continued stay in her country of origin has become intolerable for the reasons stated in the refugee definition. All these different formulations of the standard of proof clearly point in the same direction, namely that it must not be shown to be likely or probable that the applicant will be persecuted if returned: instead, decision-makers are to assess whether there is a “possibility,” a “risk” or a “chance” of such persecution occurring. Accordingly, the applicable standard of proof is quite low: it is in fact even lower than the civil law standard of a “balance of probability.” The standard of proof in refugee status determinations holds that an applicant can be recognised as a refugee even when there is only a small “possibility,” “risk” or “chance” that she will be persecuted, as long as this risk is “real” or “reasonable.” In Kaja, it was held by the UK Asylum and Immigration Tribunal that this standard of proof applies to the evaluation of evidence, too, thus enabling evidence of uncertain truth to be put on the scales towards meeting the overall standard of proof for ‘well-founded fear of being persecuted.’ This was approved by the British Court of Appeal in Karanakaran, which clarified that past events and future risk are both to be proven on a “reasonable degree of likelihood” rather than on the balance of probabilities, because they are part of a single composite test. It is also to be noted that the standard of proof can be met by an aggregate of evidence. According to the Handbook the cumulative effect of the applicant’s experience must be taken into account, and although no single incident may be sufficient to meet the applicable standard, taken together all the incidents described by the applicant may render her fear ‘well-founded.’

2.2.2 The role of past persecution in meeting the standard of proof
The applicable standard of proof flows from the nature of the plea: for asylum claims, this constitutes an assessment of the risk of persecution based on the establishment of facts and the applicant’s state of mind, rather than being based solely on such facts and mindsets. It is future risk that is central to whether a ‘well-founded fear of being persecuted’ exists: past persecution is in no sense a condition for refugee status. But in determining whether the standard of proof for future risk has been met, past persecution is often invoked as evidence. The weight to be given to such proof in building towards the applicable standard is not entirely clear. According to Grahl-Madsen, past persecution is to be considered a presumption for the likelihood of

36 Adjedi v. Minister for Employment and Immigration [1989] 2 FC 680, per MacGuian J.
38 Koyazia Kaja v. Secretary of State for the Home Department, HX/7-673/93 (11038), United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 10 June 1994.
42 D. Jackson (1999), supra note 19, p. 449.
future persecution, constituting *prima facie* proof to the effect that the applicant may again become a victim of persecution should she return to her home country. But this arguably grants too much importance to past persecution as part of refugee recognition, for if that presumption is not rebutted it would result in refugee status being bestowed for reasons of past persecution, which is not what the Refugee Convention is concerned with. There cannot be such a presumption, for the existence of “historic fear” is not sufficient in itself. Even if past persecution does not give rise to a presumption of future persecution, however, it may nonetheless constitute important evidence to justify a claim of current well-founded fear.

It may even be said to lend “considerable force” to a submission of fear in the future. The EU’s Qualifications Directive, which applies to all EU Member States in their implementation of the Refugee Convention, holds that past persecution “is a serious indication of the applicant’s well-founded fear of persecution…unless there are good reasons to consider that such persecution […] will not be repeated.” On the same note, UNHCR has stated that past persecution or mistreatment weighs “heavily” in favour of a positive finding of future risk, but simultaneously points out that its absence is not a decisive factor, either.

In sum, the applicant for refugee status can satisfy the ‘well-founded fear of being persecuted’ criterion by meeting the applicable standard of proof, usually by showing that there is a “real risk” or a “reasonable possibility” that she will be persecuted. Past persecution is often invoked as evidence of a future risk, and although such proof constitutes a “serious indication” of future risk it is not of itself sufficient, nor is it necessary. Due to the particular circumstances of the asylum case the testimony of the applicant usually amounts to the bulk of her evidence, both with regard to describing past persecution and reasons for future risk. It is this evidence that lies at heart of her effort to meet the applicable standard of proof. If her testimony is not deemed credible, however, it will not be admissible as evidence building towards the threshold for a ‘well-founded fear of being persecuted.’ Credibility assessments are thus of central importance to the applicant’s ability to meet the standard of proof.

### 2.3 The benefit of the doubt and the credibility of the applicant

Although UNHCR contends that the burden of proof is shared between the applicant and the decision-maker, in practice it often rests firmly with the applicant. Yet, given the nature of the asylum seeker’s situation, it is hardly possible for her to prove every part of her case: “if this were a requirement the majority of refugees would not be recognised.” For this reason, it is often necessary to give the applicant the benefit of the doubt. In the context of the standard of proof this term is used for the factual

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46 *Ex parte Adan* [1998], *ibid*, *per* Lord Slynn.
48 Council Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, 2004/83/EC, Article 4(4).
50 J. Sweeney (2009), *supra* note 9, p. 713.
assertions made by the applicant: given that the standard of proof does not require the decision-maker to be fully convinced that all factual assertions are true, the benefit of the doubt is triggered where the decision-maker considers that the applicant’s story on the whole is coherent and plausible— in other words, credible. This means that any element of doubt should not prejudice the applicant’s claim. Instead, focus is shifted away from the details to the overall impression made by the evidence presented by the applicant. The benefit of the doubt is not freely granted to all applicants: the Handbook holds that it should only be given when all available evidence has been obtained and checked, and when the decision-maker is satisfied as to the applicant’s general credibility. In this way, the notion of credibility “works together with the benefit of the doubt to compensate for the evidential difficulties faced by asylum seekers.”

As has been explained throughout this chapter, credibility is central to the refugee status determination process because it is necessary in order to render the applicant’s testimony admissible as evidence, and because a positive credibility finding will grant the applicant the benefit of the doubt with regard to facts which she cannot conclusively prove. Since the burden of proof rests mainly upon the applicant, she will need to adduce the required evidence to meet the standard of proof for a ‘well-founded fear of being persecuted,’ and since it is generally very hard to obtain objective evidence that demonstrates this future risk, the testimony of the applicant is vital. When credibility is asserted, the benefit of the doubt comes into play and can assist the applicant in establishing her claim to the applicable standard of proof. According to UNHCR, 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.” This formulation implies that there are three separate aspects of credibility, namely coherence, plausibility, and non-contradiction of generally known facts. Weston has suggested a similar division of the concept in her analysis of UK decision-makers’ practice: she proposes that credibility assessments involve checking for internal consistency, external consistency, and plausibility. While Weston’s dissection of the credibility concept clearly draws on and covers the aspects mentioned by UNHCR, it is even more precise in its terminology and provides an excellent starting point for analysis. For this reason, the remainder of this thesis will discuss the role of credibility assessments in the refugee status determination process according to Weston’s division of the concept.

2.3.1 Credibility, proof and truth
It is important to clarify that the term ‘credibility’ is being used in at least two distinct ways within the refugee status determination process, but only one of them is relevant for this thesis. Kagan has observed that even UNHCR itself confuses these separate usages. The ‘broad’ interpretation of ‘credibility’ asks whether the applicant has a
‘credible well-founded fear’ or a ‘credible claim,’ thus referring to whether the application is meritorious and successful as a whole. According to this understanding, describing a claim as ‘credible’ is to say that the applicant’s statements are true. The term ‘credibility’ has been used by UNHCR in this sense when referring to the ‘overall credibility’ of a claim. By contrast, the ‘narrow’ approach refers to the assessment of an applicant’s testimony. This understanding sees credibility more as a pre-requisite evidential step: a ‘credible’ statement “is one that is not certainly true, not yet proven but, because it is plausible, consistent, and reflects generally known facts, must not be dismissed from the consideration of whether the applicant has a well-founded fear of persecution [sic].” It is this understanding that UNHCR is promoting when the Handbook talks about giving the benefit of the doubt, and this understanding clearly sees credibility as an alternative, rather than a synonym, to proof. It is this more narrow understanding of the term that will be employed throughout this thesis, and numerous leading academics on this area of refugee law have also proclaimed in favour of this view. Thus, assessing ‘credibility’ for the purpose of this thesis means assessing whether or not the applicant’s testimony is accepted as evidence building towards the applicable standard of proof for being recognised as a refugee, possibly working together with the benefit of the doubt. ‘Being credible’ is thus not the same as ‘being proven’ or ‘being true.’ When a decision-maker holds that an applicant is credible, this is not the same as saying that she holds the applicant’s statements to be true. It is sufficient that the testimony “is capable of being believed,” and not necessary that the decision-maker herself actually believes the applicant. Writing from her experiences as an immigration judge, Macklin suggests that credibility determinations are not about ‘discovering’ truth, but rather about making choices about what to accept and what to reject in the face of evidential uncertainty. Norman, another immigration judge, has likewise concluded that credibility assessments are not principally about assessing the truth of an applicant’s claims, but about making findings of fact that are reasonable and open on the evidence. In the end, findings of credibility are subjective assessments – be it as it may that they are at the very core of meeting the standard of proof to establishing a well-founded fear of being persecuted. They are not objective truths and should never be treated as such. However, the fact that credibility assessments are ultimately subjective does not mean that they may be conducted in any manner that the decision-maker sees fit. This chapter has demonstrated the central role that credibility assessments play as an alleviating evidentiary rule in refugee status determinations, and it is clear that an applicant’s credibility is too precious to be dismissed on anything less than well-reasoned grounds.

60 M. Kagan (2002), ibid.
61 J. Sweeney (2009), supra note 9, p. 708.
62 UNHCR Note (1998), supra note 21, para. 11.
64 J. Sweeney (2009), supra note 9, p. 708.
66 J. Sweeney (2009), supra note 9, p. 711.
68 J. Sweeney (2009), ibid, p. 711.
69 UNHCR Note (1998), supra note 21, para. 11.
70 M. Kagan (2002), supra note 8, p. 381.
71 A. Macklin (1998), supra note 7, p. 140.
3. The role of credibility in demonstrating a ‘well-founded fear of being persecuted’

In addition to its role as an alleviating evidentiary rule, this thesis argues that credibility also plays another important part in the refugee status determination. This is concerned with the contents of the legal definition of refugeehood itself, more precisely with the applicant demonstrating that she has a ‘well-founded fear of being persecuted.’ According to the UNHCR Handbook, this phrase is “the key phrase of the [refugee] definition.”

In spite of its significance to the determination of refugee status, the interpretation of ‘well-founded fear of being persecuted’ has been fraught with controversy. The main debate concerns whether the phrase implicates a subjective element into the refugee definition, or whether it is to be assessed according to purely objective standards. According to Noll, this debate is essentially a procedural one, with significant repercussions on evidentiary assessment.

This chapter will explore these differing views, starting with the ‘combined’ approach followed by the ‘objective’ standpoint. It will conclude that both these different perspectives put great emphasis on credible testimony in order to establish a ‘well-founded fear of being persecuted,’ since testimony from the applicant herself is usually the only type of evidence that can satisfy the legal standard.

3.1 The ‘combined’ approach

The dominant view worldwide is that ‘well-founded fear’ comprises two essential elements, one subjective and one objective. Its hegemony over the purely ‘objective’ approach has been favoured by some academics, by most domestic courts, and by UNHCR. This proliferation means that it has taken on multiple forms in practice, of which only a few will be discussed here.

One of the most authoritative and widely cited sources on this subject, the UNHCR Handbook, has explicitly recognised a subjective element based on the subjectivity of ‘fear.’ What is more, the Handbook seems to give precedence to this subjective component over its objective counterpart by holding that “[d]etermination of refugee status will […] primarily require an evaluation of the applicant’s statements rather than a judgment on the situation prevailing in his country of origin.”

It goes on to explain ‘well-founded’ as implying that the applicant’s frame of mind must be “supported” by an objective situation — again, the choice of words suggests a strong

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77 “Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee” – UNHCR Handbook (2011), supra note 23, para. 37.
preference for the subjective aspect of refugee status determination. But what kind of subjective assessment is being alluded to? The answer is perhaps to be found in the paragraph which holds that an evaluation of the subjective element is inseparable from an assessment of the personality of the applicant “since psychological reactions of different individuals may not be the same in identical situations. One person may have strong political or religious convictions, the disregard of which would make his life intolerable; another may have no such strong convictions."

It would seem that the Handbook’s test requires proof of the characteristics which make the individual fear persecution, rather than proof of trepidation as such. But, as will become clear from the next section, this interpretation is not shared by all.

Given that UNHCR is the guardian of the Refugee Convention, its opinions on the interpretation of the instrument should presumably carry considerable weight. But there is little legal basis for such an inference: according to Goodwin-Gill, the Handbook does not clearly fall within the Vienna Convention on the Law of Treaties’ frame of reference as a source of treaty interpretation. Even so, domestic superior courts have often supported its positions — according to Lord Woolf MR the Handbook is particularly helpful as a guide to the Convention since there is no international court to interpret it, implying a very high regard for its guidance. As already mentioned, the ‘combined’ approach has been endorsed in several leading domestic cases. In Cardoza-Fonseca, the US Supreme Court per Blackmun J. held that “the very language of the term ‘well-founded fear’ demands a particular type of analysis – an examination of the subjective feelings of an applicant for asylum coupled with an inquiry into the objective nature of the articulated reasons for the fear.” Furthermore, in Ward the Supreme Court of Canada identified a bipartite test for fear of persecution, holding that “(1) the claimant must subjectively fear persecution, and (2) this fear must be well-founded in an objective sense.” The Australian High Court per Dawson J, for its part, held in Chan that ‘well-founded fear of being persecuted’ contains both a state of mind amounting to fear of being persecuted and a well-founded basis for that fear, motivating the objective element by holding that “[i]t is clear enough that the object of the Convention is not to relieve fears which are all in the mind, however understandable, but to facilitate refuge for those who are in need of it.” In the same case, Toohey J. elaborated on his interpretation as to why the test is a combined one: “[i]f the test were entirely subjective, the expression “well-founded” would serve no useful purpose. On the other hand, it is fear of persecution of which Art. 1A(2) speaks, not the fact of persecution. So it is apparent that while the requirement is not entirely subjective, it is not entirely objective either. Both elements are present.”

In addition to leading common law precedents, many noted academics have favoured the ‘combined’ approach. For example, Weis has asserted that asylum applicants “will

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82 G. Goodwin-Gill (2010), ibid, p. 224
86 Chan [1989], supra note 35, para. 16 per Dawson J.
87 Chan [1989], ibid, para. 21 per Toohey J.
have to give such indications as will enable the determining authority to decide whether she has good reasons to fear persecution" and to that end “the circumstances and the background of the person, his psychological attitude and sensitivity towards his environment play a role as well as the objective facts – what may be regarded as ‘good reasons’ in one case may not be ‘good reasons’ in another.” 88 Weis’ understanding of the subjective element seems to be that the applicant needs to show the decision-maker why she, in her particular circumstances, has fear – not that she necessarily has to demonstrate fear in the sense of trepidation. Melander has also argued for a ‘combined’ approach to ‘well-founded fear of being persecuted’ by holding the subjective element to mean “that the fear must be well-founded in the sense of not being feigned or imaginary,” as well as being sincere and reasonable. 89 To require fear to be reasonable, and not imagined, also points to that it should be based on the objective circumstances of the applicant, rather than on her emotions and dispositions. This, too, implies that the fear is to have its basis in the particular circumstances of the applicant, but without requiring subjective trepidation.

3.2 The ‘objective’ approach

Notwithstanding the ample support for the ‘combined’ approach elaborated on in the previous section, some leading refugee law scholars have argued that reference to distinct ‘subjective’ and ‘objective’ elements of the well-founded fear standard risks distorting the refugee status determination process. 90 Instead, they believe that ‘fear’ in the context of Article 1(A)(2) of the Refugee Convention should be understood as “a forward-looking expectation of risk,” 91 the well-foundedness of which is purely evidentiary in nature. 92 From this viewpoint it remains legally immaterial whether or not a person is subjectively fearful. 93 Although support for the ‘objective’ approach has proliferated over the last two decades or so, it was implicitly advanced already in the 1960s by Grahl-Madsen who argued that the adjective ‘well-founded’ suggests that it is not the frame of mind of the applicant which is decisive, but that the claim “should be measured with a more objective yardstick.” 94 According to Grahl-Madsen, every person claiming to be a refugee has ‘fear’ of being persecuted, irrespective of the expression that this fear may take. 95 Consequently, ‘fear’ hardly matters at all for the purpose of refugee status determination. In more recent academic commentary, the ‘objective’ approach has been most fiercely advanced by Hathaway, and it is regularly implemented by New Zealand courts. 96

Proponents of the ‘objective’ approach have advanced a number of criticisms towards the ‘combined’ approach. First and foremost, they have argued that inclusion of a subjective element results in differential protection being granted by the refugee definition. According to Hathaway and Hicks, the ‘combined’ approach can lead to denial of refugee status to at-risk applicants who are not fearful, or whose trepidation

91 University of Michigan Law School (2004), ibid, para. 4.
92 University of Michigan Law School (2004), ibid, para. 6.
93 J. Hathaway and W. Hicks (2005), supra note 75, p. 562.
95 A. Grahl-Madsen (1966), ibid, p. 174.
is not detected by the decision-maker.\textsuperscript{97} Since the ‘combined’ approach posits both the subjective and the objective elements as crucial to refugee recognition, failure to establish subjective fear necessarily leads to status being denied.\textsuperscript{98} Another criticism which has been advanced refers to the narrow linguistic interpretation of ‘fear’ which the ‘combined’ approach often leans on. Hathaway argues that ‘fear’ may either imply a form of emotional response or an anticipatory appraisal of risk, and that in the context of the Refugee Convention the term denotes the latter.\textsuperscript{99} This interpretation better accords with the equally authoritative French version of the text and the meaning that Francophone courts have attached to it.\textsuperscript{100} Moreover, internal consistency of the Refugee Convention also supports a forward-looking interpretation of ‘fear’ since the prohibition of \textit{refoulement} found in Article 33 aims to ensure that refugees are not exposed to actual risk of harm.\textsuperscript{101}

Even though Hathaway and his academic following vigorously resist admitting to a subjective element as part of the ‘well-founded fear’ criterion, they implicitly recognise a subjective aspect of ‘being persecuted.’ The \textit{Michigan Guidelines on Well-Founded Fear} explain that the determination of whether a given risk amounts to a risk of ‘being persecuted’ must look at the personal circumstances and characteristics of the applicant, recognising that “some persons will experience different degrees of harm as a result of a common threat or action.”\textsuperscript{102} Hathaway and Hicks justify this view by reference to international human rights law, which shows that certain characteristics of an individual can affect the question of whether her human rights are violated.\textsuperscript{103} They also note that the duty to consider “particularised” impact in assessing refugee status is anchored in the language of the refugee definition which speaks of ‘being persecuted’ in the passive voice,\textsuperscript{104} thus conveying “concern both with the conduct of the persecutor and the effect that conduct has on the person being persecuted.”\textsuperscript{105} This is clearly a form of subjective element, and since the ‘risk’ element is derived from ‘fear’ in the ‘objective’ approach, it would seem that this analysis is not so far from the ‘combined’ approach, after all. Nevertheless, the ‘objective’ approach regards it as a separate evaluation from that of the well-foundedness of fear. In the view of the present author, at least part of the discrepancy between the two main views lies precisely here: while some commentators analyse ‘well-founded fear of being persecuted’ as an integral concept,\textsuperscript{106} others divide the same phrase into two separate tests that must both be satisfied in order for an applicant to be granted asylum.\textsuperscript{107}

\textsuperscript{97} J. Hathaway and W. Hicks (2005), \textit{supra} note 75, p. 512.
\textsuperscript{98} J. Hathaway and W. Hicks (2005), \textit{ibid}, p. 514.
\textsuperscript{99} J. Hathaway (1991), \textit{supra} note 25, p. 66.
\textsuperscript{100} J. Hathaway and W. Hicks (2005), \textit{supra} note 75, pp. 538-540.
\textsuperscript{101} J. Hathaway and W. Hicks (2005), \textit{ibid}, p. 536.
\textsuperscript{102} University of Michigan Law School (2004), \textit{supra} note 90, para. 14.
\textsuperscript{103} J. Hathaway and W. Hicks (2005), \textit{supra} note 75, pp. 554-556.
\textsuperscript{104} J. Hathaway and W. Hicks (2005), \textit{ibid}, p. 556.
\textsuperscript{107} University of Michigan Law School (2004), \textit{supra} note 90; J. Hathaway and W. Hicks (2005), \textit{supra} note 75.
3.3 Implications for the role of credibility

According to Noll, credibility can relate to two objects of belief: either belief in the applicant’s fear, or belief in the well-foundedness of that fear. Noll’s analysis holds that it is belief in the well-foundedness of fear that is central to the refugee status determination, but that it is confusing to call this credibility assessment because a finding of non-credibility essentially means that there is too little information for the decision-maker to settle the claim and that the search for evidence must go on. Considering credibility as belief in the well-foundedness of fear seems closely related to the view which this chapter has described as the ‘objective’ approach, since it holds that it is not necessary for the applicant to prove a subjective fear element; the only thing to be settled in the asylum process is whether there exists an objective risk that the applicant will be persecuted. Consequently, decision-makers adopting the ‘objective’ approach have held that even if the applicant is not deemed credible in her testimony, a well-founded fear of being persecuted may nevertheless exists and it must be considered whether any other basis asserted leads to this conclusion. Potential problems arise, however, when we consider that even proponents of the ‘objective’ approach believe that what amounts to ‘being persecuted’ depends on the personal circumstances of the applicant. If the testimony of the applicant is not accepted as credible, it is hard to imagine how it can be established that she is at risk of experiencing a degree of harm that will amount to ‘being persecuted.’ Perhaps there are cases where the risk that the applicant is facing can objectively be deemed to be so grave that it undoubtedly amounts to persecution, but in many instances it will not be crystal-clear that a certain risk reaches that threshold. Thus, in those cases, even the ‘objective’ approach would require credible testimony from the applicant in order to satisfy all the criteria that the refugee definition entails.

A strict reading of the ‘combined’ approach, for its part, holds that when an applicant is found to be lacking in credibility, the decision-maker can legitimately find that there is no subjective basis for the claim. In such cases, it is practically impossible to find credible evidence of an applicant’s subjective fear, notwithstanding external evidence of human rights violations in her country of origin, and thus the application must fail. This is the dominant view in Canada, for example: the Credibility Guidelines issued by the Immigration and Refugee Board assert that following Ward, it is clear that “a lack of evidence going to the subjective element of the claim is in itself sufficient for the claim to fail.” Further, when deciding Ramsameachire in the US Court of Appeals Sotomayor J. held that “the [Board of Immigration Appeals’] adverse credibility determination precluded [the applicant] from establishing the subjective prong of the well-founded fear standard.” Thus, this thesis argues that credibility assessments are central to almost all refugee status determinations, irrespective of whether the decision-maker adopts a ‘combined’ or an ‘objective’ approach to ‘well-founded fear of being persecuted,’ for a kind of subjective

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108 Here understood as the subjective capacity to inspire belief: G. Noll (2005), supra note 75, p. 149.
109 G. Noll (2005), ibid.
110 G. Noll (2005), ibid, p. 150.
111 Abebe v. The Commonwealth; Re Minister for Immigration and Multicultural Affairs [1999] HCA 14, 14 April 1999, paras. 192 and 211.
113 Immigration and Refugee Board of Canada (2004), ibid, p. 17.
114 Ramsameachire v. Ashcroft, 357 F.3d 169 (2d Cir. 2004), para. 28.
evaluation is included in both. Certain elements of the refugee definition cannot be satisfied without establishing the effect that the risk of persecution has on the applicant, or on what amounts to persecution, respectively. Only the testimony from the applicant herself can demonstrate these circumstances, and such testimony will only be admissible as evidence if it is deemed credible by the decision-maker. Consequently, this chapter holds that credibility is important not only to bestow upon the applicant the benefit of the doubt, but also to enable her to produce the kind of evidence that is capable of demonstrating that she has a ‘well-founded fear of being persecuted.’ In short, it is highly unlikely that a claim for asylum will succeed in meeting the legal criteria set down in the Refugee Convention if the applicant is not found to be credible. Having demonstrated the central role that credibility assessments play in refugee status determination processes, the remainder of this thesis will explore how such evaluations are regulated on the domestic level, and how they are conducted in practice.
4. Domestic frameworks for credibility assessments

Before we embark on the main issue of this thesis – the ways in which negative credibility assessments are reached by decision-makers – this chapter will serve to provide a rough sketch of some of the domestic legislative frameworks within which such assessments are being made. Having already explained UNHCR’s approach to applicants’ credibility, it is further necessary to look at the domestic laws in place, since most refugee status determinations are conducted within domestic legal frameworks. As will soon become clear, there is little domestic legislative guidance for credibility assessments. Asylum decisions are often not bound by normal rules of evidence, and fact-finding is generally considered as a sphere in which the legislator should not interfere too much.

This chapter will explore the domestic laws governing credibility assessments, and in so doing it will put particular focus on whether decision-makers are obliged to confront applicants with negative credibility findings and what the effect of partial credibility findings is. In addition, it will investigate the possibilities to appeal negative credibility findings. These issues are all of great importance in order to understand how credibility assessments are conducted, how findings are evaluated, and the consequences that they have. The chapter will draw on the domestic laws of the US, the UK, Canada, Australia, and Sweden. Since most of the case law referred to in this thesis originates from these jurisdictions, it is useful to have a grasp of the domestic frameworks pertaining to findings of credibility. It remains outside the scope of this thesis to provide a comprehensive picture of all aspects of credibility assessments in all the above-mentioned countries; rather, the following descriptions will serve to paint a picture of the frameworks that domestic credibility assessments are conducted within.

4.1 Domestic laws governing the performance of credibility assessments

Following the enactment of the REAL ID Act of 2005, asylum decision-makers in the US are bound to comply with one of the most detailed statutory exposés of how credibility assessments should be conducted. The REAL ID Act stipulates that a trier of fact

…may base a credibility determination on the demeanour, candour, or receptiveness of the applicant or witness, the inherent plausibility of the applicant’s or witness’s account, the consistency between the applicant’s or witness’s written and oral statements [...] the internal consistency of each such statement, the consistency of such statements with other evidence on record [...] and any inconsistencies or falsehoods in such statements [...] or any other relevant factor.117

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116 See, for example, the Australian Migration Act, supra note 14, section 420(2)(a) and the Canadian Immigration and Refugee Protection Act, supra note 14, section 170.
Thus, the REAL ID Act explicitly endorses credibility findings based on demeanour, plausibility, internal consistency and external consistency. By including “any other relevant factor,” the provision also grants a wide discretion to the decision-maker with regard to what she may base her credibility determination upon. Melloy has argued that even though the REAL ID Act attempts to create uniform credibility standards, it may have the opposite effect: “it will give immigration judges the ability to make subjective, capricious determinations about the credibility of asylum applicants.”

Other common law jurisdictions have instead codified negative aspects of credibility findings. The Australian Migration Act of 1958 provides that if the decision-maker has reason to believe that the applicant was not sincere in the information she has given because of the manner in which she gave the oral statement or the applicant’s demeanour in relation to giving the statement, the decision-maker may draw any reasonable inference unfavourable to the applicant’s credibility. In most other ways, however, considerable discretion is left to Australian decision-makers and they are not under an enforceable duty to evaluate credibility evidence in any way other than how they believe the object of arriving at the correct decision will be furthered. UK law, for its part, has long contained provisions tending towards the negative assessment of credibility. The Immigration Rules are administrative rules which apply to first-instance decision-makers of the Home Office. One such rule stipulates that the decision-maker will have regard to matters which may damage an applicant’s credibility if no reasonable explanation is given. Among such matters are that the applicant has failed to apply for asylum forthwith upon arrival in the UK; that the applicant has made false representations; that the applicant has destroyed or damaged her passport; and that the applicant has launched concurrent applications for asylum. If the decision-maker concludes “for these or any other reasons” that an applicant’s account is not credible, “the application will be refused.” Tuit has commented that the “any other reasons” provision robs the procedure of any serious cohesion, and ensures that there is a residuary power of the decision-maker to make adverse credibility findings in a “secretive manner” which belies the supposed openness of harmonised procedures – this criticism is very similar to that presented by Melloy with regard to the REAL ID Act. Furthermore, section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act of 2004 states that decision-makers “shall take account, as damaging the claimant’s credibility” of a variety of different behaviours, including failure without reasonable explanation to produce a passport on request; failure to take advantage of a reasonable opportunity to make an asylum claim before being notified of an immigration decision. Following its status as primary legislation, the Act applies to the Asylum and Immigration Tribunal as well as to the initial decision-

119 Migration Act, supra note 14, section 91V(3).
125 Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, section 8.
maker. This provision has been criticised: Thomas has accused it of constituting the “culmination of legislative pressure on the independent appeal system to reach negative credibility assessments;” and the Asylum and Immigration Tribunal has held that it has the effect of “interfering [sic] the well-established rule that the finder of fact [...] should look at the evidence as a whole, giving each item of it such weight as he or she considers appropriate.” In JT (Cameroon), the Court of Appeal per Pill LJ recognised that section 8 “plainly has its dangers, first, if it is read as a direction as to how fact-finding should be conducted, which in my judgment it is not, and, in any event, in distorting the fact-finding exercise by an undue concentration on minutiae which may arise under the section at the expense of, and as a distraction from, an overall assessment.” Instead, Pill LJ suggested that section 8 should be interpreted as “potentially” damaging the applicant’s credibility, without dictating that relevant damage to credibility inevitably results – this would offend against constitutional principles such as the separation of powers between the judiciary and the legislature.

Considering the sensitivity of legislating on factual interpretation encountered in many countries, it is perhaps not surprising that Canadian assessments of credibility are wholly guided by provisions and principles found in the jurisprudence. One of the interesting particularities of the Canadian framework is the presumption of truthfulness that arises when an applicant swears that certain facts are true, unless there is valid reason to doubt their truthfulness. The presumption may be refuted by the presence of inconsistencies and contradictions, implausibility and where facts as presented are not what could reasonably be expected. Further, adverse findings of credibility must be based on reasonably drawn inferences and not conjecture or mere speculation. Likewise, Sweden has also refrained from legislating on more detailed guidance for credibility assessments. The Swedish Migration Court of Appeal has endorsed the criteria for credibility assessments laid down by UNHCR in its Handbook, and in a recent case the Court held that in assessing the credibility of an applicant’s statements emphasis should be put on consistency and the absence of contradictions. Further, the Court specified that the applicant’s submission is not to contradict commonly known facts, such as current country of origin information; and importance is also attached to that key characteristics of the story remain unchanged throughout the asylum process.

4.1.1 Confronting applicants with negative credibility findings
As will become clear from the following chapters, some findings of non-credibility are reached on dubious grounds. In such cases, the decision may turn on whether the

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126 R. Thomas (2006), supra note 121, p. 95.
127 SM v Secretary of State for the Home Department (Section 8: Judge’s process) Iran [2005] UKAIT 00016, para. 7.
128 JT (Cameroon) v. Secretary of State for the Home Department [2008] EWCA Civ 878, para. 19 per Pill LJ.
129 JT (Cameroon) [2008], ibid, para. 20 per Pill LJ.
130 Immigration and Refugee Board of Canada (2004), supra note 112, p. 2.
134 MIG 2007:12, Migrationsöverdomstolen (Swedish Migration Court of Appeal), UM 540-06, 19 March 2007.
applicant is given a chance to explain why her statements were inconsistent between two separate retellings; why country information paints a different picture than her testimony; or why her story is plausible although it may not appear as such to the decision-maker. It is therefore highly interesting to investigate whether domestic law grants the applicant such an opportunity, or whether it remains within the discretion of the decision-maker. The Australian legal system puts great emphasis on the requirements of procedural fairness. Its Migration Act dictates that the Refugee Review Tribunal must give the applicant clear particulars of any information that the Tribunal considers would be the reason, or part of the reason, for affirming the negative asylum decision, and must further invite the applicant to comment on or respond to it. According to one commentator, however, this does not mean that every doubt as to an applicant’s credibility need to be put to her prior to making a decision, and one immigration judge has noted that if the Tribunal were obliged to reveal its process of reviewing, this would give the applicant an opportunity to strengthen her case. Coffey has however argued that the Migration Act sets the disclosure requirement more narrowly than is defined in the common law. In Canada, too, the law is somewhat unsettled on this matter. While one prominent case has held that generally speaking there is no obligation on the decision-maker to signal its conclusions on the general credibility of the evidence, the Federal Court has also held that the decision-maker should afford the applicant an opportunity to clarify the evidence and to explain apparent contradictions or inconsistencies within the testimony. In a different case the Federal Court has declared that there is no obligation on the decision-maker to alert the applicant of its concerns about weaknesses of testimony giving rise to implausibilities. It may thus be that Canadian law makes a distinction between the obligation to confront an applicant with negative credibility assessments based on inconsistencies and contradictions, which should be brought to her, and between similar findings based on implausibilities, which decision-makers are not obliged to flag. Even if this distinction is a correct interpretation of the law, it cannot be said that a clear obligation exists on the part of the decision-maker to confront the applicant with negative credibility findings. Finally, a few words may be said about the Swedish law in this area. The Swedish Aliens Act does stipulate that applicants should be given an opportunity to express an opinion on the circumstances invoked in the case, but in practice it seems that information that is interpreted as having a negative effect on credibility is often not communicated to the applicant.

135 Australian Migration Act 1958, supra note 14, section 424A(1).
136 S. Norman (2007), supra note 30, p. 278.
138 G. Coffey (2003), supra note 120, p. 401.
142 Utlänningslag (Aliens Act), 2005:716, 13 kap 3 §.
4.1.2 Partial non-credibility and its effects

A further issue of great consequence for the outcomes of asylum claims is the relationship between findings of partial non-credibility and the overall credibility of the applicant’s testimony. Another way of inquiring into this relationship is to look at whether findings of non-credibility must concern central aspects of an applicant’s claim in order to dismiss all of her evidence as not admissible in building towards the standard of proof of a well-founded fear of being persecuted. The US REAL ID Act has adopted an extremely strict standard in this regard, stating that decision-makers can make credibility assessments “without regard to whether an inconsistency, inaccuracy or falsehood goes to the heart of the applicant’s claim.”144 This means that even more peripheral credibility flaws can be fatal to the whole of an applicant’s claim. This is not the prevalent approach in most of the jurisdictions being scrutinised here, though. In Sweden, for example, the Migration Court of Appeal has made a distinction between the general credibility of the applicant and specific findings of non-credibility. In one recent case, the Court held that the segments of the applicants’ statements which were found to lack credibility concerned only one separate event and therefore they did not constitute grounds for questioning the applicants’ general credibility.145 Likewise, a seminal decision by Canada’s Federal Court of Appeal held that even if there are inconsistencies or exaggerations, the decision-maker must still go on to assess the evidence which is found to be credible and determine the claim as the totality of the evidence warrants,146 thus clearly embracing the possibility of partial non-credibility while other aspects of the applicant’s testimony are accepted as evidence of a well-founded fear. Adverse finding of credibility based on contradictions in testimony must be based on real contradictions or discrepancies that are of a significant or serious nature;147 however, the Federal Court of Appeal has also emphasised that while discrepancies and contradictions considered individually might have seemed insignificant, when taken together and considered in context, they may support a finding of lack of credibility.148 Even so, it is nevertheless clear that the Canadian system takes a fragmented approach to credibility findings, accepting that an applicant whose statement is not credible in some parts may nonetheless be a credible source with regard to other information. The UK’s Asylum and Immigration Tribunal has taken a similar approach, saying that it is “perfectly possible for an adjudicator to believe that a witness is not telling the truth about some matters, has exaggerated the story to make his case better, or is simply uncertain about matters, but still to be persuaded that the centrepiece of the story stands.”149

4.2 Appealing credibility assessments

Since credibility assessments in asylum claims are fraught with pitfalls and ambiguities, yet so central that whole asylum decisions often hinge on them, the

145 MIG 2011:6, Migrationsöverdomstolen (Swedish Migration Court of Appeal), UM 3363-10, 9 March 2011.
opportunity to appeal a credibility finding may render a different outcome to a case. However, credibility findings are findings of fact, and thus not generally eligible for review on appeal in common law systems. Refugee status determination processes are often reviewed in separate courts and tribunals, and may not conform to the general appeals system in the legal system. This section will briefly look at the structures in place for appeals of asylum decisions, with particular regard to appeals of credibility assessments.

In the US, the first-instance decision-maker in asylum claims is an immigration judge. Immigration judges’ credibility assessments and other findings of fact will not be reviewed de novo, but are reviewed by the Board of Immigration Appeals using a ‘clearly erroneous standard,’\(^ {150}\) A decision is clearly erroneous if the Board is convinced that the immigration judge was mistaken.\(^ {151}\) Importantly, this means that an immigration judge’s fact finding is not to be overturned simply because the Board would have weighed the evidence or decided the facts differently from the judge.\(^ {152}\) Decisions on non-credibility must thus meet a rather high standard in order to be eligible for review, even on the first instance of appeal.\(^ {153}\) According to one commentator, this appellate system does not properly filter erroneous credibility determinations.\(^ {154}\)

In Australia, the Department of Immigration and Citizenship decides claims of asylum at the first instance. The Refugee Review Tribunal conducts merits reviews of such cases, making decisions within the same legislative framework as the primary decision-maker.\(^ {155}\) The entire evidence must be reconsidered in reviewing a decision.\(^ {156}\) The Tribunal’s decision may in turn be reconsidered on judicial review, however the Tribunal’s decisions are not frequently set aside on the basis of its treatment of credibility\(^ {157}\) since this requires an error of law. There are several ways in which a credibility finding could potentially constitute an error of law, for example, where there is no evidence for the finding.\(^ {158}\) This is a strict criteria, though, and any slight inconsistency in an applicant’s submission for which there is some evidence will render the finding immune to the no evidence rule.\(^ {159}\)

Canada’s first-instance decision-maker is the Refugee Protection Division of the Immigration and Refugee Board. Its decisions may be appealed to the Refugee Appeals Division – also within the Immigration and Refugee Board – on a question of fact, law or a combination thereof.\(^ {160}\) After this point, the only route of appeal is judicial review. Since credibility assessments are considered to be within “the

\(^{150}\) 8 C.F.R. § 1003.1(d)(3)(i).
\(^{153}\) Melloy notes that while a ‘clearly erroneous standard’ may be sufficient to review other legal actions, it is not sufficient for the review of decisions about whether to grant an applicant asylum or not: K. Melloy (2007), ibid, p. 671.
\(^{154}\) K. Melloy (2007), ibid.
\(^{157}\) G. Coffey (2003), supra note 120, p. 404.
\(^{158}\) G. Coffey (2003), ibid, p. 407.
\(^{159}\) G. Coffey (2003), ibid, p. 408.
heartland of the discretion of triers of fact,” they are entitled to considerable deference upon judicial review and cannot be overturned unless they are perverse, capricious or made without regard to the evidence.\(^{161}\) Just like in the US and Australia, it has been recognised that it is not the role of the appellate courts on judicial review to substitute its decision for that of the Board, even if they might not have reached the same conclusions.\(^{162}\)

In the UK, the first-instance decision-maker in asylum claims is the UK Border Agency, an agency of the Home Office. Decisions can be appealed to the First-tier Tribunal (Immigration and Asylum Chamber) of the Immigration and Asylum Tribunal, and they will try questions of fact anew. Leave to appeal to the Upper Tribunal is rare, and will in any case not make a new finding on the credibility issue. Further, just like in the other common law jurisdictions credibility assessments are difficult to overturn on judicial review, and the Court of Appeal only has limited possibilities to allow challenges to the Asylum and Immigration Tribunal’s findings of fact.\(^{163}\)

Finally, applications for asylum submitted in Sweden are first considered by the Swedish Migration Board. The decisions may be appealed to the Migration Court,\(^{164}\) which will reconsider questions of fact as well as of law. Leave to appeal to the Swedish Migration Court of Appeal may only be granted if it is of importance for the guidance of the application of the law that the appeal is examined, or if there are other exceptional grounds for examining the appeal.\(^{165}\) It is notable that compared to other appellate administrative courts on the same level, one ground of appeal is missing: leave to appeal to the Migration Court of Appeal will not be granted on the basis of there being reason for change in the decision that was reached, which is otherwise allowed in the Swedish administrative Courts of Appeal.\(^{166}\) The Swedish government has justified this distinction by reference to the Migration Court of Appeal being the senior court on migration matters, and thus responsible for setting precedence. In order for the Migration Court of Appeal to be able to fulfil this requirement, leave to appeal is only to be granted in exceptional circumstances.\(^{167}\)

In summary, it is clear that credibility assessments are not extensively regulated in the domestic frameworks that this chapter has looked into. Consequently, most decision-makers experience considerable discretion with regard to how they assess the credibility of applicants’ testimony. Against this background, this thesis will now move on to the main research question and investigate how decision-makers use this discretion in conducting evaluations of credibility, and what problems that arise in this exercise.


\(^{162}\) Immigration and Refugee Board of Canada (2004), supra note 112, p. 9.


\(^{164}\) Utlänningslag (Aliens Act), supra note 142, 14 kap 3 §.

\(^{165}\) Utlänningslag (Aliens Act), ibid, 16 kap. 12 §.

\(^{166}\) Förvaltningsprocesslag (The Administrative Court Procedure Act), 1971:291, 34 a §.

5. Internal consistency

In the refugee status determination process, it is presumed that a credible applicant will give an internally consistent account. For the purpose of credibility assessments in asylum claims, internal inconsistencies refer to situations where the applicant has rendered an inconsistent account or has changed the nature of the claim. This highlights two particular situations which are both common in asylum proceedings, namely when the applicant provides contradictory information in the factual account of her story – possibly from one interview to another or even within the same interview – and when the applicant adds important information with regard to her risk of being persecuted at a late stage in the refugee status determination process. Such inconsistencies and late disclosures often give rise to doubts about the applicant’s credibility, for, as Doornbos has explained, there is an assumption that a ‘genuine’ refugee is able to present her case without any inconsistencies and can reproduce it at any time during the process. In their study of beliefs about deception among Swedish Migration Board personnel working with asylum cases, Granhag and Strömwall found that “seeking contradictions” was the most frequent rule of thumb employed for distinguishing between liars and truth-tellers. The Migration Board personnel also believed that liars’ statements are less consistent over time than are truthful ones, thus explaining the considerable reliance placed on consistency in credibility assessments of asylum applicants. The notion that consistency implies truth whereas inconsistency implies deception has been termed the ‘consistency heuristic’, and it seems that judges and other professional lie-catchers rely on it in a rather mechanical way. However, another study by the same authors has shown that truthful and deceptive statements are about equally consistent over time.

The overwhelming reliance placed on inconsistency as a sign of non-credibility has enormous consequences in refugee status determination processes, since applicants often have to give rather detailed testimony of their experiences at several different occasions and in various settings. For example, Kagan has noted that by the end of the US immigration court hearing – which is only the first instance decision-making forum – the applicant has likely told her story at least three times separated by many months. Against this background it is not surprising that internal inconsistencies is the most widely cited reason for refusing applicants’ credibility. Various laws of

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171 P. Granhag et al. (2005), ibid, p. 43.
175 G. Coffey (2003), supra note 120, p. 388; Asylum Aid, Unsustainable: the quality of initial decision-making in women’s asylum claims, January 2011, p. 52; P. Granhag et al. (2005), supra note 170, p. 40; M. Kagan (2002), ibid, p. 386.
procedure also lend support to this criterion: for example, the EU Procedures Directive allows for accelerated examination procedures when an applicant has made inconsistent or contradictory representations which make her claim clearly unconvincing. But there is a whole range of explanations, quite apart from deceitfulness, that can justify internal inconsistencies in an applicant’s testimony. The following chapter will discuss some of these reasons under three sections: memory effects; the role of interpreters; and particular reasons for late disclosures. Of course, some ‘internal inconsistencies’ are also wholly derived from mistakes or outright ignorance on the side of the decision-maker: this will not be further discussed below, but one example will be provided which demonstrates the effect that a rather small inconsistency can have. One UK decision-maker wrote in the refusal letter to a Sri Lankan applicant that “[i]t is considered inconsistent that in your screening interview you claimed that you surrendered at Vattuvakkal, then detained [sic] at Mullaitivu and then transferred to Omanathy, whereas in you asylum interview you claimed to have first surrendered at Mullaitivu.” On appeal, the immigration judge instead noted that “[t]he [applicant] gave a reasonable explanation for the apparent inconsistency […] stating that Vattuvakkal lies within Mullaitivu district.”

5.1 Memory effects
Rejections of credibility – and, consequently, of refugee status – based on internal inconsistencies of an applicant’s testimony can spring from more or less any kind of contradiction in the applicant’s account. A typical example is when the applicant is inconsistent in specifying the point in time at which particular events occurred. In a recent case decided in the Australian Refugee Review Tribunal, for instance, the applicant gave inconsistent evidence as to when his friend had begun practicing Falun Gong. The reasoning merits a longer extract:

At one stage in the hearing [the applicant] stated that [the friend] had been practicing for seven or eight years. At another point in the hearing he indicated that he had been aware that [the friend] had been practicing since 2008. When this inconsistency was put to the applicant he replied that he had recently telephoned his wife and was worried that if he returned to China he would be arrested and that this was affecting his ability to recall details correctly. If the applicant’s ten year friendship with [the friend] was close enough that he hid him as a fugitive from the law […] the tribunal would expect that no matter how stressed the applicant would consistently remember whether [the friend] started practice in 2004/2005 just a couple of years after they met or in 2008.

This discrepancy with regard to when the applicant’s friend began practicing Falun Gong turned out to be one of the reasons for why the credibility of his testimony was rejected. Quite apart from showing a blatant disregard for the impact of fear of being

179 Some national systems specify that the inconsistency in question has to be central to the claim, rather than a peripheral detail, but the recent U.S. REAL ID Act, for example, reinstalled the latter as a valid basis for findings of non-credibility.
returned and for the difference between the applicant knowing of the practice since 2008 as opposed to the friend having been practicing since 2004, the extract also demonstrates the prominence that asylum decision-makers often put on remembering dates and other time-related information. However, a number of factors can be mentioned that preclude placing much weight on the ability to correctly remember such information in assessing the credibility of an applicant’s account. Studies have consistently shown that after about two weeks, individuals have difficulty accurately dating their past experiences, suggesting that date of occurrence information is not typically retained in our memories. It is also unrealistic to expect applicants to remember the dates of exactly those events that the decision-maker finds important, as the dates that a person will commit to memory are highly individual and often surprising.

Is it really that astonishing that the applicant in the above-mentioned case did not commit to his memory when his friend began practicing Falun Gong, when this did not even directly involve his own person? Furthermore, asylum decision-makers in Western countries of arrival must take care to remember the extensive emphasis that is put on time in our societies as opposed to many others. Linear time is a relatively new addition to our collective consciousness, and the absolute distance of an event in the linear past is “nearly always useless information” – except in a refugee claim, as noted by Cameron. Given the extensive research that points to the frailty of human memory for dates and times, it seems inherently wrong to place much emphasis on inconsistencies between statements designating different points in time for the occurrence of various events.

In addition to the particular difficulty of accurately dating our memories, the substance of those memories themselves are much frailer than many asylum decision-makers seem to think. It is not the purpose of this thesis to plunge into psychological research on human memory: however, it will take the opportunity to mention some findings which should inform assessments of credibility based on the internal consistency of an applicant’s account. The overarching fact which must be remembered is that “human memory is nothing like a video recording:” it is neither complete nor stable. Long-term memory is thought by researchers to be coded by meaning, and then linked to related information and associations. Thus, what is recorded is not an accurate copy of data but an interpretation. There are two particular reasons for why consistency in retelling our truthful memories is so difficult. Firstly, all memories are reconstructions, but certain kinds of information are not easily reconstructed and will need to be estimated or illustrated anew each time the memory is being described, thus easily leading to discrepancies with regard to specific facts. Also, when people are asked to repeat information that they have already given they tend to assume that the first account is unsatisfactory in some way and may try to rectify this by supplying different details of the events. Secondly, over time a memory may change owing to a number of memory effects.

References:

182 H. Cameron (2010), ibid, p. 473.
183 H. Cameron (2010), ibid p. 475.
185 H. Cameron (2010), ibid, p. 470.
188 H. Cameron (2010), ibid, p. 491.
that there is a more or less linear loss of autobiographic memory, but that mental rehearsal of related information may actually speed up the rate at which we lose information. If an asylum applicant has practiced his testimony, he may therefore be more prone to forget peripheral details relating to the events he tells about. In addition, ample research has made clear that “[i]t is not justified to assume that all details are well retained because they occurred within an emotional scenario.” But asylum decision-makers tend to regard richness of detail as an indicator of truthfulness, and will often ask specific questions about the circumstances which the applicant tells about. If the applicant cannot answer such questions, or gives inconsistent answers, this is all too often dismissed as an indication of deceitfulness. To complicate matters further, memories are not only lost but also regained. There is a difference between ‘storage failure,’ which denotes that a memory has been lost, and ‘retrieval failure’ which suggests that finding the right cues can result in successful recall. Memory blocks may persist for long times, but ‘pop-up’ recall can occur later on and open up for remembering specificities. ‘Hypermnesia’ is the term used to describe the observation that people remember more details with repeated recalls. It is a “consistent, robust and reliable” phenomenon and it commonly gives rise to up to a 50 per cent net gain in memory through repeated recall. Thus, repeated interviews where asylum applicants testify about their experiences over and over again may give rise to considerably more detailed accounts than initial interviews do, without this implying deceitfulness or that the latter information is any less accurate. Sadly, however, internal inconsistencies in an applicant’s account by way of providing considerably more information at later recounts are often taken to indicate that the applicant is not credible. By way of comparison, international criminal law has explicitly recognised the frailty of human memory and its limitations as reliable testimony. In Akayesu, the Trial Chamber stated that “[t]estimony is based mainly on memory and sight, two human characteristics which often deceive the individual […] Hence testimony is rarely exact as to the events experienced. To deduce from any resultant contradictions and inaccuracies that there was false testimony would be akin to criminalising frailties in human perceptions.”

All the aforementioned memory effects certainly raise doubts about whether inconsistencies in asylum applicants’ accounts can actually render such accounts not credible, especially so if the decision-maker is not trained in psychology and not able to assess the likely influence of such factors in the particular case. But the situation is even more critical when the applicant has been subjected to trauma.

190 H. Cameron (2010), ibid.
195 H. Cameron (2010), ibid.
defence used to cope with extreme trauma is dissociation, constituting a structured separation of memory, emotions, thoughts, and identity.197 Because time and ideas of the self are distorted, autobiographical memory is negatively affected. The result is that inconsistencies in autobiographical memory are almost the norm in trauma victims.198 Victims of trauma that continue to suffer symptoms such as distressing recall, flashbacks, irritability and social withdrawal for more than one month are diagnosed with post-traumatic stress disorder (PTSD), a condition which further complicates the capacity to communicate the trauma.199 Although trauma and PTSD are often mentioned as factors to take into consideration when assessing the credibility of asylum seekers’ testimony,200 in practice decision-makers may fail to attach much significance to them. For example, an Asylum Aid report tells of an applicant whose husband had been killed by Sierra Leonan rebels; who had herself been kidnapped together with her two children; who was raped on multiple occasions; and whose children were eventually killed, too.201 When she applied for asylum in the UK, she had with her a report from the Medical Foundation for the Care of Victims of Torture which specifically stated that it was extremely painful for the applicant to go over the deaths of her family members. During the interview itself, the applicant repeatedly stated how difficult she found talking about her experiences. Her claim was refused for lacking credibility, and the refusal letter picked up on contradictory information given with regard to when the applicant’s family members were killed: “In your screening interview, you claim that you husband and two sons all passed away in 1998, however, at two different points in your asylum interview, you claim that your eldest son and husband were killed in 2000, and your youngest son was killed in 2001 […] It is considered reasonable to expect you to recall with consistency the years in which your family members were allegedly killed.”202 Given the trauma that the applicant had been subjected to, it may not be so “reasonable” to expect her to accurately specify the time of these events on each occasion that she has to tell about them.

5.2 The role of interpreters
Language interpretation can substantially affect the accuracy of oral testimony and the assessment of the applicant’s credibility.203 Interpretation is almost inevitable in many asylum proceedings, but it results in the applicant’s removal from direct communication with the judge – “[t]he interpreter’s words become those of the applicant, her voice becomes that of the applicant, and interpreter errors may be attributed to the applicant.”204 In some central respects, the applicant’s credibility is essentially filtered through the interpreter. Notably, the translation offered by the interpreter may be markedly less consistent than the original version told by the

198 S. Sarkar (2009), ibid.
201 Asylum Aid (2011), supra note 175, p. 56.
204 D. Anker (1991), ibid.
According to Granhag and Strömwall’s study on Swedish Migration Board personnel’s beliefs about deception, nine out of ten believed that the interpreter causes trouble in this assessment. This points to high awareness of the problem among decision-makers – at least in this particular group – but even so it seems that many find it difficult to fully appreciate the role that the interpreter plays in rendering applicants’ testimony internally inconsistent. Below we will briefly discuss three central translation problems that may lead decision-makers to declare applicants not credible.

5.2.1 Choosing one translation over another
The importance of giving consistent information with regard to dates has already been pointed out. This is not only complicated by shortcomings of human memory, but also by translations from one language to another. In his study of asylum appeals in the UK, Good observed that considerable confusion surrounds the translation of dates from non-Gregorian calendars. He gives the example of a Tamil asylum applicant, whose credibility was contested because he variously stated that he had arrived in Colombo on 21 August and 21 September. Good explains why these contradictions arose: months in the Tamil calendar are out of phase with those in the Gregorian calendar, and the Tamil month called “Avani” begins in mid-August and ends in mid-September. If the interpreters used at the initial interview and subsequent court hearings translate “Avani” differently, an internal inconsistency will appear to have arisen – even if the applicant gave the same answer on both occasions. Similarly, an Estonian applicant belonging to a Russian minority had submitted in her written application that she had been “raped,” but in court she only testified that she had been “violated” by being fondled through her clothes. This particular applicant was lucky, for the decision-maker pressed counsel to find the interpreter from the first statement who then testified in court that the Russian word for ‘rape’ may also be used to denote a lesser violation of a woman’s body, and hence her credibility was not undermined by the discrepancy. As a final example, a selective translation of the Tamil word for ‘brother’ put one applicant’s credibility at jeopardy. At the hearing the applicant told the court that he had two brothers in the Tamil Tigers, but at the initial interview it had only been reported that he had one brother who was a member of the group. This inconsistency was likely based on selective translation: everyday Tamil has no composite term for ‘brother,’ instead it has one term denoting ‘elder brother’ and another denoting ‘younger brother.’ It is very likely that the asylum applicant started talking about his ‘younger brother’ at the initial interview and that this was simply translated as “one brother.”

5.2.2 Leaving out parts of testimony
Sometimes interpreters do not translate all the details that applicants include in their oral testimony. This can turn out to be of crucial importance. A striking example is the translation of an El Salvadorian woman’s testimony when she applied for asylum.

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205 D. Anker (1991), ibid, p. 513.
206 P. Granhag et al. (2005), supra note 170, p. 47.
208 A. Good (2007), ibid, p. 173.
in the US: to the question of whether her husband reported her to the military as a guerrilla she replied “No, but he threatened to;” however, her answer was reduced to a simple “No” by the interpreter. Many asylum applicants understand some of the language being spoken by the interviewer or decision-maker although they do not know it well enough to fully manage without an interpreter. Consequently, applicants have themselves drawn attention to situations where the interpreter has only translated part of the testimony. One applicant even tells of how the interpreter stopped her from talking, saying “Tell that to your solicitor.” Without a doubt, these kinds of subjective assessments by interpreters with regard to which information is important to pass on to the decision-maker can result in inconsistencies between how an applicant’s testimony is recorded at one occasion as compared to another. Notably, however, much more subtle exclusions may also influence how the applicant’s credibility is perceived. An experimental study by Berk-Seligson found that when interpreters omitted to translate the words spoken by a witness marking politeness, mock jurors’ perceptions of the witnesses’ convincingness and truthfulness were remarkably different from when such words were indeed translated.

5.2.3 Mistakes
The interpreters used in asylum proceedings are not machines, but human beings: consequently, they sometimes make mistakes. Anker witnessed a case with an Ethiopian applicant in which the applicant was asked if any of her family members had been killed. She answered that her grandfather had been killed, but the interpreter misinterpreted her response as “uncle.” Later during the cross-examination, the interpreter correctly translated her response as “grandfather.” The judge found that the applicant lacked credibility, and cited this error as one of the reasons for his decision. This type of trivial mistake should not under any circumstances be allowed to play a decisive role in the outcome of an asylum claim. It is one of the clearest examples of the oversimplification that reliance on internal inconsistencies as a basis for findings of non-credibility can lead to.

5.3 Particular reasons for late disclosures
It is quite common that asylum seekers provide more information at later interviews and hearings than they do at the initial screening interview. Such information may consist of additional details regarding events that they have already told about, and may be attributed not only to hypermnesia but also to the applicant having obtained more information of relevance to her claim at a later hearing. However, the new information that surfaces further into the refugee status determination process may also be of great importance for the determination of the claim. A common example is late disclosure of having been subjected to rape in the country of origin. Even though

213 D. Bögner et al. (2010), ibid.
216 For example, one applicant was asked how much the “agent” charged his father for transporting him to the UK and replied that he did not know. At a later hearing he instead answered that the “agent” charged £5,000, because he had been asked by his solicitor to find out in the meantime: C. Bohmer and A. Shuman (2008) Rejecting Refugees – Political asylum in the 21st century, London: Routledge, p. 140.
UNHCR has cautioned that applicants may be reluctant to reveal the true extent of the persecution they have suffered, especially in connection to gender-related claims. Late disclosure is sometimes interpreted by decision-makers as a sign of non-credibility. For instance, in the US case of *Mousa v. Mukasey* both the immigration judge and the Board of Immigration Appeals found the applicant’s failure to mention at her pre-testimonial written asylum application the fact that she had been raped to be a fatal flaw in her credibility. However, the Court of Appeals rejected this finding and held that “the assumption that the timing of a victim’s disclosure of sexual assault is a bellwether of truth is belied by the reality that there is often delayed reporting of sexual abuse.” The following sections will discuss two particular explanations as to why applicants do not initially choose to share all their experiences with the parties in the refugee status determination process.

5.3.1 Distrust in state authorities or interpreters

In many – if not most – countries of the world, state authorities are not synonymous with justice and trustworthiness. It must be remembered that many refugees are persons fleeing persecution committed or acquiesced by state actors. Consequently, it should not be surprising that they may find it difficult to entrust their life stories, the very reasons for why they fear being persecuted, to a state official in a foreign country. UNHCR recognises this complication, and Kagan has explained that applicants may have learned by experience in repressive political systems to be very hesitant about revealing information to strangers, especially if they are state officials. As an example, he refers to a Sudanese applicant for asylum in Egypt who had spent several months in a Sudanese prison lying to the jailers about his ethnic identity, since members of his tribe actively opposed the government. For this applicant to reveal all his personal details in an asylum claim to a foreign government which was at the time closely allied with the Sudanese government that he was fleeing from would understandably require a substantial leap of faith. Quite apart from the state officials conducting the asylum procedure, an even more suspect actor from the applicant’s point of view may be the interpreter that is often needed to convey the testimony. For the translation of widely spoken languages it may be possible to use interpreters from different nationalities than that of the applicant, but in many situations the applicant and the interpreter come from the same country. Kälin has pointed out that in such situations asylum seekers often suspect the interpreter of being a collaborator with the embassy of their country, who may pass on information to the persecuting government. Applicants may also find themselves having to tell their story to an interpreter from a rivalling tribe or group, making it

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219 “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 give a full and accurate account of his case.” UNHCR *Handbook* (2011), *supra* note 23, para. 198.
221 M. Kagan (2002), *ibid*.
hard for them to feel safe and have trust in the interview. These factors clearly complicate reliance on early disclosure as an indicator of the credibility of the applicant, as the credibility of the applicant’s account is wholly unconnected to the trust that she is able to put in the actors of the refugee status determination process.

5.3.2 Conceptions of privacy and shame
Experiences relating to sexual violence and rape are particularly prone to be revealed at late stages of asylum proceedings. This is without a doubt closely connected to the fact that sexual violence is a taboo subject in many cultural contexts. Individuals that have been subjected to such abuses may become stigmatised, but they may also bring great shame on their families. Against this background it is not surprising that many hesitate to reveal their sufferings, especially if the interpreter belongs to the same diaspora as the applicant and the latter perceives a risk that details of the testimony may reach this group. Furthermore, for many women it is absolutely unthinkable to talk to a male interviewer or interpreter about such matters. In a study of asylum seekers’ perceptions of UK Home Office interviews a female applicant is quoted describing her experience of telling about rape:

It was so hard to speak to men that were not related to me. I just can’t explain how hard it was. And I did not explain everything because I could not. I never talked about what happened to me in my whole life, not even to my mom. So suddenly I had to talk to three men I did not know. It was so hard. I just could not say what I wanted to say.

This passage captures the agony that the act of telling can amount to, and how the wrong circumstances (notably, using a male interviewer to hear the claim of a female applicant) can turn into an insurmountable hindrance to extracting the full testimony of the applicant. The importance of using female interviewers and interpreters for female applicants is widely recognised, for example in the UNHCR Guidelines on Gender-Related Persecution, which recommend that female applicants should automatically be provided with interviewers and interpreters of the same sex as themselves. Nevertheless, this is not always adhered to. It may be especially difficult to provide a female interpreter with regard to less widely spoken languages, but this can result in the applicant not telling her whole testimony at those occasions. For example, a Dinka woman who on appeal told about her rape said that she felt comfortable talking about it to UNHCR staff, but that she had not revealed it in interviews because the Dinka interpreters used were all male.

Das has written about the difficulty of talking about sexual violence in the aftermath of the Partition of India and Pakistan, where widespread rapes and abductions took place. It is one of countless examples where such methods have been used as a means of asserting dominance over enemy groups. Abducted women were considered

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223 This was the case for several of the asylum applicants interviewed by the authors of a study on disclosure in UK Home Office interviews: D. Bögner et al. (2010), supra note 212, p. 530.
224 D. Bögner et al. (2010), ibid, p. 521.
225 D. Bögner et al. (2010), ibid, p. 528.
228 V. Das (2007) Life and words: violence and the descent into the ordinary, Berkeley: University of California Press.
to have disgraced the family, and family narratives abound on men who were compelled to kill their women to save their honour. Many victims chose not to return at all, and those who did kept silent of their experience. Rather than bearing witness of the disorder, the violated women that did return to their families “drank their pain so that life could continue.”

When Das asked women about their experiences from this period she encountered a “zone of silence,” which was achieved either by the use of general and metaphoric language that evaded specific description of capture, or by describing the surrounding events but leaving the actual experience of rape or abduction unstated. One woman warned that it was dangerous to remember: she compared memories to poison that makes the inside of the woman dissolve, as a solid is dissolved in a powerful liquid. The situations described by Das differ from the experience of asylum applicants in that Das’ interviewees were attempting to reintegrate into society and conserve peace and stability, whereas asylum applicants have chosen to break with the setting in which the violations took place. Nevertheless, Das’ insights are of relevance to credibility assessments in refugee status determination processes in that they signal the difficulty and unwillingness that victims of traumatic events may experience in retelling their stories. Das points out that a “fractured relation to language” has been documented for many victims of prolonged violence, for whom it is the “ordinariness of language that divides them from the rest of the world.” It may take some time before asylum applicants find the words to describe their experiences. This may not be done voluntarily, but only at the point when it is made clear that they will not be granted refugee status if they do not reveal these events. It is indeed very difficult to reconcile the strict format of a legal process and its requirement for explicit and detailed testimony with experiences of human rights violations – in particular, rape, sexual violence and other types of torture – that perhaps cannot be conveyed by words. Legal processes must take extreme care to investigate such events without reproducing the violence that they try to atone for. Das argues that some narratives cannot be told unless we see the relation between pain and language that a culture has evolved:

It is certainly not obvious to all people to tell factual details about painful events in the setting of a legal process. On the one hand, the burden of proof rests mainly with the applicant and she is expected to present all the evidence that she holds in favour of her claim. On the other hand, decision-makers need to keep an open mind as to how evidence is presented in order not to violate the prohibition of refoulement, the other side of the coin of the right to be granted refugee status if an applicant fulfils the criteria under Article 1(A)(2). Non-refoulement thus implies an effort on the part of the decision-maker to discern the applicant’s experiences. Consequently, late disclosures of rape, sexual violence or other traumatic events must never be considered an irreproachable flaw of an applicant’s credibility.

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229 V. Das (2007), ibid, p. 84.
230 V. Das (2007), ibid, pp. 85 and 87.
231 V. Das (2007), ibid, p. 84.
232 V. Das (2007), ibid.
233 V. Das (2007), ibid, p. 76.
234 V. Das (2007), ibid, p. 88.
6. External consistency

In addition to requiring internal consistency, decision-makers routinely demand that credible asylum applicants should provide accounts of proceedings in their countries of origin that coincide with information about conditions in those same countries supplied by other sources. The external inconsistency of an asylum applicant’s account therefore refers to inconsistencies between the applicant’s factual account and the objective evidence concerning conditions in the country of origin.\(^{235}\) This is another well-established ground for assessing credibility, recognised by UNHCR in its *Handbook*;\(^{236}\) identified by Swedish Migration Board workers as the prime factor in making reliability assessments;\(^{237}\) and listed by Asylum Aid as the second most prominent reason for a negative credibility finding among female applicants in the UK.\(^{238}\) Coffey has argued that when it is accurate and relevant, country information is the “most reliable way of measuring the truthfulness of the applicant’s claims.”\(^{239}\)

Country of origin information (COI) is used within the refugee status determination process in two separate ways: first, to assess the risk on return for the applicant to her country of origin, and second, to assess the credibility of the applicant’s account.\(^{240}\) The following analysis will focus on the latter, that is, how COI is used to assess the credibility of asylum applicants’ testimony.

Decision-makers commonly base findings of external inconsistency on either a lack of objective evidence with regard to events that the applicant describes in her statements, or on COI providing a dissimilar or even a contradictory account of events as compared to that told by the applicant. An example of the first situation is provided by a British decision-maker who deemed an applicant’s account of being subjected to a large number of rapes and sexual assaults not credible. The decision-maker did not believe that such incidents would have gone unreported, asserting that “[t]here would have been numerous witnesses and something like that, particularly if repeated on many occasions would surely have been the subject of comment and report.”\(^{241}\) The problem with this approach is rather straightforward and will not require extensive analysis: suffice it to say that such reasoning grossly overestimates the informative value of country evidence. As will be further explored in the following sections, COI is invariably selective in its choice of materials and can never be expected to provide a complete account of the situation in a country as experienced by various individuals. Therefore, to base a negative credibility finding on the absence of COI corroborating

\(^{236}\) “A knowledge of conditions in the applicant’s country of origin – while not a primary objective – is an important element in assessing the applicant’s credibility” – UNHCR *Handbook* (2011), *supra* note 23, para. 42.
\(^{238}\) Asylum Aid (2011), *supra* note. 175, p. 52.
\(^{239}\) G. Coffey (2003), *supra* note 120, p. 392.
\(^{241}\) Immigration Advisory Service, *The Use of Country of Origin Information in Refugee Status Determination: Critical Perspectives*, May 2009, p. 49. The authors of the report commented on the immigration judge’s statement as follows: “Whilst one would hope that all incidents of sexual violence were cause for comment and report it is simply not the case that all incidents are. To deny the credibility of a survivor of serious sexual violence on the basis that the type of abuse she experienced is not mentioned in the international reports before the Tribunal is a gross misunderstanding of the scope and limits of COI.”
the applicant’s account constitutes fallacious reasoning. This is recognised by UNHCR, which has warned decision-makers from interpreting events referred to by an asylum applicant that are not well-documented as casting doubt on the applicant’s credibility.\(^{242}\) After all, “not being included in a country condition report does not mean that the person’s story is untrue.”\(^{243}\) It may be tempting for decision-makers to assume that events that they find dramatic or otherwise spectacular and which would have been publically acknowledged in the decision-maker’s own milieu must likewise have been widely reported in the applicant’s country of origin if they did in fact occur. However, to base a negative credibility assessment on the absence of such reporting cannot be an acceptable premise of deductive reasoning leading to judicially sound conclusions. The following sections will discuss the complex nature of COI and its limitations as a tool for decision-makers in assessing credibility, thus substantiating the inaccuracy of using external reporting as a condition and diverging reports as a litmus test of non-credibility.

### 6.1 Problematising country of origin information

In the context of the refugee status determination process, COI refers to accounts that detail the social, political, judicial and human rights profile of a given country.\(^{244}\) As noted by the Immigration Advisory Service, COI is a constructed field of knowledge that incorporates knowledge from a variety of disciplines and sources.\(^{245}\) It consists of studies and reports from a multitude of actors, such as governmental bodies, non-governmental organisations, UN organs, the media, and expert witnesses. Decision-makers often follow national or international guidelines as to how these different sources should be evaluated and what weight should be given to them as evidence in the asylum process. For example, UNHCR advises that it is important to ascertain who produced the information and for what purposes; whether the information producer is independent and impartial; and whether a scientific methodology has been applied.\(^{246}\) The International Association of Refugee Law Judges has raised other important considerations, such as the relevance of the COI to the case at hand; whether it adequately covers the relevant issues; and its temporal relevance.\(^{247}\) However, the tendency demonstrated by decision-makers is that once a source has been evaluated according to such criteria and has passed these tests, it is considered as ‘objective evidence.’ When COI attains this status as ‘objective evidence,’ the refugee status determination process appears to accept it as the one true account with regard to the circumstances it is describing, excluding other possible interpretations, explanations, or chains of events. Within this discourse, an applicant who offers a story that differs from the ‘objective evidence’ derived from COI is likely to be disbelieved. This acceptance of one particular paradigm at the expense of others is highly problematic, for several reasons.

Firstly, ‘facts’ are rarely straightforward, but more often qualified by the particular perspective adopted or question being asked. For example, in a recent Immigration


\(^{244}\) Immigration Advisory Service (2010), *supra* note 240, p. 7.

\(^{245}\) Immigration Advisory Service (2010), *ibid*, p. 8.


Advisory Service report a legal representative described how a client applying for asylum in the UK was disbelieved in his account to be a teacher from Zimbabwe, because he had said that he taught children aged 7 to 17 in a primary school. However, the Home Office country information report gave a much more restrictive band for ages of primary school children in Zimbabwe, and because of that the decision-maker found that the applicant was not actually a teacher. But the legal representative recounted that it only took him a few minutes to find a UN report saying that primary schools in Zimbabwe, particularly in the rural areas, are jam-packed with over-age children. The age of primary school children in Zimbabwe could be imagined as a simple query capable of producing a single accurate, factual answer. Yet, the aforementioned example demonstrates that there is a difference between de jure and de facto situations: the Home Office country report likely conveyed the primary school age as stipulated by law, either unaware of or not for its purposes concerned with the situation as it actually is in Zimbabwian classrooms.

This example shows that very few pieces of information should be regarded as uncontested ‘facts’ that exclude all other analyses of a given situation. The Home Office country report can be correct in its description of the statutory primary school age band, but from this it does not follow that an applicant for asylum is lying when he describes having taught children of other ages in precisely such primary schools. The refugee status determination process must recognise that different sources of knowledge providing seemingly contradictory accounts can all be honest and truthful, based on their own perspective and understanding of the situation. This is widely acknowledged in the social sciences. For example, in describing anthropologists’ views of ‘facts’ Good states that ‘facts’ are always a product of a particular theoretical approach, and ‘truth’ is at best provisional and contested. Without doubt, this view of facts as inherently contested could not be accepted in the legal sphere, for then the system would not be able to render judgments. Nevertheless, asylum law in particular could benefit from a greater awareness of the sceptical approach to facts adopted by the social sciences. Decision-makers need to be aware of the particular perspectives they are endorsing when choosing one factual interpretation over another.

Considering the grave consequences that an erroneous credibility assessment may have, ‘facts’ in the asylum process must always be handled with the greatest care.

Secondly, to label some sources of knowledge as ‘objective evidence,’ while maintaining that the applicant’s account is necessarily subjective, runs the risk of ignoring important considerations with regard to COI. This blunt distinction assumes that it is possible to step outside one’s own perspective and to ignore the paradigms and reference points by which all human beings assess the world. As noted by Good, the positivistic overtones of the phrase ‘objective evidence’ seem to reflect a general failure by the parties to the asylum process to recognise the “contextualisation and subjectivity to which all knowledge is subject.” In addition to such more or less unconscious selections being made about how we interpret and evaluate information, it must also be noted that the different actors that produce the reports being introduced as COI commonly have certain mandates and interests to look after. This is not always properly considered by judicial decision-makers. For example, commenting on

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248 Immigration Advisory Service (2010), supra note 240, p. 40.
the assessment of COI in its judgment *N.A. v. The United Kingdom* the European Court of Human Rights noted that through their diplomatic missions, states will often be able to provide highly relevant material. But diplomacy can also constitute a hindrance to extensive reporting: Bohmer and Schuman describe how legal representatives in the US believe that State Department reports are sometimes unduly kind to friendly or allied regimes, which means that they do not report the human rights abuses that are claimed by applicants for asylum. Moreover, non-governmental organisations such as Amnesty International or Human Rights Watch that specialise in human rights abuses clearly tend to focus on instances of mistreatment, rather than on describing situations in which abuses do not occur. In this context, applicants for asylum have been disbelieved for lacking external consistency with such reports of abuses in cases where the decision-maker expects that they would have been similarly abused. In one asylum appeal an Australian decision-maker held that since “independent evidence” indicates that Falun Gong practitioners are subject to considerable monitoring it was not accepted that the applicant would have avoided the scrutiny of the authorities over a period of 12 years given her claimed extensive involvement in the movement. As information about the source of the COI was lacking in the written judgment it is not possible to analyse this source in depth, but if the “independent evidence” did come from an organisation specialising in human rights abuses it is not surprising that it would only include reference to situations where Falun Gong practitioners are monitored, and not provide supporting evidence for instances when this would not be the case. This is a kind of subjectivity on the part of COI producers, which becomes even clearer when we consider that the primary sources of COI are not usually produced with the refugee status determination process in mind. Although many refugee-receiving countries put together vast COI reports – see, for example, the Country of origin information service provided by the UK Border Agency – such reports are usually compilations of information derived from other sources, including UN organisations, human rights groups, and media outlets. Again, such sources usually have other objectives than providing information appropriate for grounding asylum decisions upon: for example, the primary aim of non-governmental organisations reporting on human rights abuses is often to mobilise political support for reform, and media reports tend to focus on sensational events that are likely to interest its audiences. Reports produced by governmental bodies and UN organisations, for their part, both suffer from diplomatic restraints. Consequently, it would seem that very few of the sources that COI draw on can be considered ‘objective’ in any meaningful sense. They may be honest and truthful in the information that they do convey, but none of them can be expected to provide an untainted account since they will focus on issues that suit their own purposes. For this reason, decision-makers should approach ‘objective evidence’ with some scepticism, even when it stems from well-respected sources. It must always be open to them to find an applicant credible, even when her factual account differs from external sources.

251 *N.A. v. The United Kingdom*, Application no. 25904/07, Fourth Section, Judgment 17 July 2008, para. 121.
6.2 Evaluating applicants' testimony in light of external sources
While the foregoing section highlighted the complexity of the knowledge provided as COI, the following discussion will go one step further by analysing how decision-makers can use such information in the refugee status determination process for the purpose of credibility assessments. Within the legal sphere, it is generally assumed that specialised immigration tribunals or courts are well placed to assess and evaluate the factual background to asylum claims. In the British context, Barnes has maintained that the Asylum and Immigration Tribunal is “recognised as possessing its own level of expertise as a specialist tribunal, not only in the legal issues for its determination, but also in its knowledge of country situations.”

This view has been strongly contested by Good, a social anthropologist, who raises a very important point with regard to the skills amassed by decision-makers within the asylum process. Good argues that even though experienced asylum decision-makers become thoroughly informed at a factual level about, for example, the political histories of countries generating large number of asylum applicants, it is always necessary to distinguish between facts and their interpretation. His field research at an immigration tribunal in London led him to conclude that decision-makers were on far shakier ground when assessing the cultural significance of such ‘facts.’ As an example, Good recounts how one decision-maker told him that she had judged it implausible that a Hindu Tamil would have been helped by a Muslim as he claimed to have been, because the decision-maker thought that Muslims would have more in common with Buddhists than with Hindus. This assessment would likely be based on some form of COI which the decision-maker had drawn her own conclusions from. Being an expert on Sri Lanka with extensive research in that region, however, Good pointed out that Buddhists and Hindus worship the same deities, so there is no obvious reason why Muslims should prefer one to the other, while Sri Lankan Hindus and Muslims speak the same language whereas Buddhists speak a completely different one. This is an example of how the proper interpretation of facts about human behaviour requires a wider knowledge of their social setting.

Within social anthropology a distinction is famously made between ‘thin description’ and ‘thick description,’ expressions originally coined by Ryle, a philosopher. While ‘thin description’ refers to simple factual descriptions of information that plainly meets the eye, ‘thick description’ refers to the meaning afforded to this act within its given context. It is here suggested that these concepts can be used to demonstrate why decision-makers’ application of COI to evaluations of applicants’ external credibility is problematic. The COI presented in asylum processes rarely reaches beyond thin description of the situation in the country at hand. The much-quoted US Department of State Country Reports on Human Rights Practices provide good examples of this. They commonly contain very short descriptions of various human rights issues that focus on statistics and legal provisions. The 2012 report of The Gambia, for instance, describes the prevalence of female genital cutting (FGM) by reference to that the law does not prohibit the practice; that a UNICEF 2005-2006 survey found that almost 80 percent of girls and women between the ages of 15 and 19 had undergone it; that

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257 A. Good (2004:1), ibid.
258 A. Good (2004:1), ibid.
seven of the nine major ethnic groups practice FGM on girls from shortly after birth until age 16, and a few other similar pieces of information. Based on this source, it would surely be very difficult for a decision-maker to assess whether or not an applicant’s account of either being or not being subjected to FGM is consistent with the COI. Much more information – in particular, descriptions of a different calibre – are needed to assess the external consistency of such accounts. This was recognised in a recent country guidance case decided by the UK Upper Tribunal’s Immigration and Asylum Chamber, which heard evidence from two experts in order to gain a broader understanding of the factors that affect whether or not a girl or woman is at risk of being subjected to FGM. The experts in this case offered an understanding of the broader social context of the practice, and such knowledge is surely needed in order to grasp the prevalence of FGM, when it does or does not occur and why. ‘Thin descriptions,’ such as that found in the US Department of State Country Report, cannot achieve this. When knowledge and understanding about the social context of various occurrences is lacking, asylum decision-makers are not well placed to make qualified comparisons between the applicant’s account of her background and COI from other sources. As noted by Care, a former President of the International Association for Refugee Law Judges, “[c]ountry background material is only as good as the observers and rarely catches the local practices and nuances, which can be all important.” Consequently, decision-makers may not be equipped to assess whether an ‘inconsistency’ exists between the applicant’s account and external sources of information. It can certainly be argued that in order for such pronouncements to carry any validity, the decision-maker must have extensive knowledge of the intricate considerations and unstated norms that guide people’s behaviour in the given social setting. It is not enough to read a few pages of a COI report describing certain significant events in order to make a pronunciation to the effect that the applicant’s testimony is not consistent with generally known facts. A lot needs to be known about the background to these facts – the thick description – before that is acceptable as a step in assessing the credibility of an applicant who claims to fear persecution if she is returned.

An example will be provided to demonstrate this point. In a recent judicial review by the Irish High Court of an asylum decision, the Court upheld the Refugee Appeals Tribunal’s finding that the applicant’s account of being captured by Janjaweed militia who explained their actions to the people around the applicant but left them unharmed was inconsistent with COI. According to COI, the Tribunal and the Court asserted, the Janjaweed were a loose category of fighters who had adopted a scorched earth strategy, and there was no information conveying the impression that the Janjaweed would be disposed to engaging in conversation with a group of displaced villagers. Against this background, the High Court found it reasonable “to have regard to the vicious nature of the militia” and to draw the inference of external inconsistency that

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the Refugee Appeals Tribunal did.\footnote{I.A.Y. [2009], ibid.} Clearly, the country information that this decision is based on is a ‘thin description’ of the actions of the Janjaweed. The decision-makers’ reasoning ignores that the militia is acting according to some standards of their own, which may be abhorrent to the decision-maker, but which nevertheless exist. It is not enough to refer to the “vicious nature” of the Janjaweed: such subjective and general standards have absolutely no value in making assessments about how members of the militia would act in a given situation. Consequently, the decision-maker cannot dismiss the credibility of an applicant’s account by reference to COI pertaining to another situation, which may appear comparable but which may nonetheless be governed by completely different norms, unknown to the decision-maker because it is not relayed in the COI. The application of COI as part of a credibility assessment is therefore extremely delicate, and decision-makers must show much greater sensitivity to these problems than is currently the norm.
7. Plausibility

A third way of testing the credibility of the applicant’s account looks at the plausibility or apparent reasonableness of the claim.\textsuperscript{265} According to Macklin, plausibility usually refers to the relationship between what the applicant describes and what we think we “know” about how the external world works.\textsuperscript{266} The rationale is that plausible testimony depicts a realistic, possible chain of events\textsuperscript{267} and assessing plausibility has often been considered an exercise in common sense.\textsuperscript{268} Although this may seem a sensible criterion to include in credibility assessments, it has been described by commentators as the “most troubling” sort of findings of an applicant’s credibility,\textsuperscript{269} which “adds very little.”\textsuperscript{270} Assessments of the plausibility of an applicant’s account can be explained as being based on unspoken assumptions made by the decision-maker in question. In a qualitative study of a sample of UK asylum decisions, Herlihy et al. identified three broad categories of such assumptions on the part of the decision-maker. The categories in question referred to assumptions about how persons behave in the applicant’s country of origin; how the asylum system works in the country of arrival;\textsuperscript{271} and how a truthful account is presented.\textsuperscript{272} A further such category, not identified by Herlihy et al. but clearly very common in plausibility assessments, concerns assumptions about knowledge that the applicant should have if the account she is giving is indeed sincere. The tendency of decision-makers to base plausibility assessments on unstated assumptions, often without reference to any other tangible evidence, has also been noted by Sweeney.\textsuperscript{273} With regard to assessments about the plausibility of human actions in the applicant’s country of origin, decision-makers sometimes refer to what a ‘reasonable man’ would have done in the circumstances. In this evaluation, decision-makers tend to project their own cultural and political experiences onto the applicant.\textsuperscript{274} As will become clear from the following section, this reasoning is highly problematic and has received sharp criticism also from within the judicial ranks. Nevertheless, ideas of the ‘reasonable man’ or ‘common sense’ behaviour continue to feature in more or less concealed forms in a multitude of asylum decisions, and therefore merit extensive discussion in this chapter.

In addition to discussing assumptions about behaviour in the applicant’s country of origin, this chapter will also discuss assumptions about knowledge that credible applicants are expected to have, and it will end with a short examination of the role of demeanour in asylum credibility assessments. This thesis has chosen to include

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\item\textsuperscript{265} R. Thomas (2006), supra note 121, p. 81.
\item\textsuperscript{266} A. Macklin (1998), supra note 7, p. 138.
\item\textsuperscript{267} M. Kagan (2002), supra note 8, p. 390.
\item\textsuperscript{268} A. Weston (1998), supra note 58, p. 88.
\item\textsuperscript{270} M. Kagan (2002), supra note 8, p. 390.
\item This category will not be further discussed in this chapter, as it is not widely recognised in the academic literature nor in the case law surveyed as constituting a decisive or highly problematic issue.
\item\textsuperscript{273} J. Sweeney (2007), supra note 269, p. 26.
\item As one decision-maker put it: “The way I think about it, I think I’m a reasonable person and how I would react to that situation.” D. Anker (1991), supra note 203, p. 516.
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‘reasonable knowledge’ and ‘demeanour’ under the plausibility heading – although this is a somewhat unconventional division of credibility assessments – because these assessments, too, are essentially concerned with evaluations of plausibility and very much based on the decision-maker’s own framework of assessing what is reasonable and not.

7.1 Assumptions about behaviour in the country of origin

Decision-makers conduct plausibility assessments pertaining to all kinds of acts and actors featuring in asylum applicants’ stories. As previously explained, the refugee definition hinges on the future risk of the applicant being persecuted. Past persecution is not itself a prerequisite to being recognised as a refugee, but such events are regarded as important indicators of a future risk. Thus, even though a variety of different information may play a role in establishing a future risk of persecution, the most critical plausibility assessments tend to concern either the applicant’s actions in the face of persecution or the behaviour of the persecutor. Both these categories of plausibility assessments often take as their starting point the ‘reasonable man’ or ‘common sense’ standard, and the plausibility of the applicant’s account is judged according to these yardsticks. For this reason, the following discussion of decision-makers’ assumptions about behaviour in the applicant’s country of origin will begin with a discussion of the ‘reasonable man’ concept.

7.1.1 The ‘reasonable man’

In common law systems, the idea of the ‘reasonable man’ is often used as an analytical tool; civil law has a similar concept in the *bonus pater familias*. In particular, it is relied on when determining liability in negligence, both in tort and criminal law. The legal question to be decided is whether by his alleged negligence the defendant fell below the standard of care to be expected of a ‘reasonable man.’

The ‘reasonable man’ is thus used to illustrate the care that each person is obliged to show other people in order not to be liable in tort or criminal law, serving the purpose of specifying the behaviour that members of society can expect from others. However, in credibility assessments within the asylum process the determinative point is whether it was plausible that the applicant and the persecutor really did act in the way that the applicant claims. This version of the ‘reasonable man’ test, which is sometimes instead formulated as a ‘common sense’ criterion, dictates what can and what cannot be true in accordance with the common experiences of life. Kälin has argued that while ‘common sense’ may be useful for functioning and interpreting within a particular society, it is not an effective means for judging the possibility and probability of events in societies different from one’s own: ‘common sense’ is not universally valid, but culturally determined. Likewise, with regard to the use of the ‘reasonable man’ concept Lord Bingham famously declared that “[n]o judge worth his salt could possibly assume that men of different nationalities […] would act as he might think he would have done or even […] in accordance with his concept of what

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275 For example, Rousseau et al. describe a Canadian case in which the decision-maker held that the applicant’s uncle, an army official, could not possibly have been able to buy land in the Chiapas region of Mexico since, in his view, there was a clear-cut conflict between landless indigenous peasants fighting a repressive army: C. Rousseau, F. Crépeau, P. Foxen and F. Houle (2002) ‘The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board,’ *Journal of Refugee Studies* 15:1, p. 61.

276 J. Sweeney (2007), *supra* note 269, p. 27.


278 W. Kälin (1986), *ibid.*
a reasonable man would have done.’\textsuperscript{279} The reason for this is that the decision-makers in question base their conceptions of ‘common sense’ or the behaviour of the ‘reasonable man’ on their own understanding of what that entails. It is very difficult to fully grasp the extent to which such perceptions are coloured by the society in which the individual passing this judgment has been brought up. Geertz, a well-known social anthropologist, has described common sense as a cultural system whose fundamental pillars vary between societies.\textsuperscript{280} In his view, it is an inherent characteristic of common sense thought to affirm that its tenets are “immediate deliverances of experience, not deliberated reflections upon it,” and if we are to analyse common sense we must begin by drawing a distinction between the mere matter-of-fact apprehension of reality and colloquial wisdom.\textsuperscript{281} Just like myth and other cultural systems, common sense is essentially an interpretation of the “immediacies of experience” and consequently a historical construction subjected to historically defined standards of judgment.\textsuperscript{282} Ethnographic studies of scores of societies around the world have plainly demonstrated that ‘common sense’ beliefs are not universally accepted. Geertz gives one example of how a Javanese family explains that the reason a boy has fallen out of a tree is that the spirit of his deceased grandfather pushed him because some ritual duty towards the grandfather had been overlooked;\textsuperscript{283} the remainder of this thesis could easily be spent reciting similar ethnographic anecdotes. The point is that while an average Westerner would consider it ‘common sense’ that the boy fell because he was careless in his movements while climbing, or because a branch happened to give in under the pressure, it was equally obvious to the Javanese family that this happened because of the grandfather’s spirit. This example seems far removed from the plausibility assessments conducted by decision-makers in refugee status determinations, but in order to make such plausibility assessment in an equitable way it is crucial to accept this insight. ‘Common sense’ is not science; it varies between societies, but in some version it is the measuring stick that human beings tend to adopt their behaviour to. Asylum decision-makers must always be acutely aware that what they consider to be ‘reasonable’ is not necessarily so in the eyes of the applicant, especially not in her country of origin. Luckily, many actors in the refugee status determination process are well aware of the reasoning advanced by anthropologists such as Geertz and many other social scientists that have conducted research on similar issues. As a consequence, extensive warnings have been issued with regard to basing credibility assessments in the refugee status determination on implausibility assessments.\textsuperscript{284} Nevertheless, such decisions abound,\textsuperscript{285} for they are permissible within the wide discretion left to decision-makers with regard to how evaluations of credibility are to be conducted. Keeping in mind the foregoing inquiry

\textsuperscript{279} T. Bingham (1985), supra note 1, p. 14.


\textsuperscript{281} C. Geertz (1983), \textit{ibid}, p. 75.

\textsuperscript{282} C. Geertz (1983), \textit{ibid}, p. 76.

\textsuperscript{283} C. Geertz (1983), \textit{ibid}, p. 89.

\textsuperscript{284} See, for example, Laws LJ in \textit{JO (Nigeria) v. Secretary of State for the Home Department} [2009] EWCA Civ 318, who noted that what is reasonable in the UK is perhaps quite different in the eyes of the applicant, especially not in her country of origin.

\textsuperscript{285} According to a recent investigation by Asylum Aid of asylum refusal letters in the UK, lack of plausibility constitute the third most common reason for applicants being found to lack credibility: Asylum Aid (2011), \textit{supra} note 175, p. 52. Further, Granhag \textit{et al.} found that Swedish Migration Board workers ranked plausibility as the third most important factor in making a reliability assessment: P. Granhag \textit{et al.} (2005), \textit{supra} note 170, p. 40.
into the concept of ‘common sense’ and the ‘reasonable man,’ we will now continue our investigation by taking a closer look at the types of assessments being made by decision-makers.

7.1.2 The behaviour of the applicant
A surprising variety of actions, reactions, events and emotions have been deemed implausible by asylum decision-makers over the years and across the globe. A telling example is provided by an Asylum Aid report, citing a UK first-instance refusal letter which reads “[y]ou claim you ‘fell in love.’ This is not consistent with the fact that you only saw him three times in total.”

Assumptions about applicants’ emotions and the ways in which these guide their actions are of great importance in plausibility assessments. According to one US lawyer interviewed by Bohmer and Schuman, the people who face the greatest scepticism from judges are women who are not believed about actions they took vis-à-vis their children.

Many decision-makers find it inherently implausible that a woman would leave her children when she fled, even though this may have been her only hope of getting out. Based on extensive studies of the refugee status determination process in the Netherlands, Spijkerboer has also come to the conclusion that women’s behaviour towards their families is regarded as an indicator of their credibility. If the female applicant’s behaviour is considered inappropriate, this diminishes her credibility. According to Spijkerboer, the deciding norm in these determinations is specifically Western and often traditional by any standard. He illustrates this type of credibility assessment with the example of a Turkish female applicant whose decision contained the following lines:

It is surprising that the applicant has left her children behind in Turkey, as she has stated she left Turkey partly out of concern for the well-being of her children. It is not deemed probable that the children of the applicant will benefit from the departure of their mother abroad. This damages the statements of the applicant.

This kind of plausibility assessment is based on gender stereotypes and on culturally predicated assumptions about what kind of behaviour would be likely in that situation. They cannot be considered as reliable evaluations of whether the applicant in question is telling the truth about how and why she fled her country of origin.

Another example of decision-makers’ occasional inability to appreciate conditions in a foreign setting relates to the conception of the state and the role of state actors. Anker recognises as a major source of misunderstanding among decision-makers the view of governmental authorities as benevolent. She describes how decision-makers often are sceptical when an applicant had not reported abuses to the police. Further, Anker also notes the problematic decisions in the cases of several Nicaraguan and El Salvadorian applicants, who had testified that they unwillingly joined civil

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287 C. Bohmer and A. Schuman (2008), supra note 216, p. 156.
290 T. Spijkerboer (2005), ibid.
patrols. The decision-makers in these cases displayed an inability to transcend their own cultural conceptions of military service as something voluntary, and did not understand that such a duty could be imposed extra-legaly.\(^{292}\) It is clear that stories about distrust in state authorities and extra-legal obligations that the government cannot protect its people from do not accord with the Western conception of the state as founded on a mutual social contract between citizens and governmental authorities, whereby citizens can trust the ruling power to look after their interests. Since the institution of refugeehood is based on the inability or unwillingness of the state to protect the applicant from abuse, asylum decision-makers should be well aware that they cannot project their own expectations of state justice and the rule of law onto countries from which asylum seekers are fleeing. Nevertheless, plausibility assessments often construct the notion of ‘common sense’ behaviour in relation to the state according to the standards of a Western democracy. Falling below this standard may result in a finding of implausibility thus deeming the applicant’s statements not credible.

A third example of problematic plausibility assessments concerning the behaviour of the applicant in her home country relates to assumptions about the evaluation of the risk that the applicant is facing. This is evident primarily in the applicant’s delay in fleeing, delay in asking for protection in the country of arrival, and in returning to her home in spite of fear of persecution.\(^{293}\) The underlying assumption is that an applicant who truly fears persecution would not act in this way, and therefore the story being told by the applicant is not credible.\(^{294}\) By reference to research on human responses to danger conducted within a variety of disciplines, Cameron has argued that such findings of implausibility are fundamentally unsound. She discusses a whole range of factors that influence how we assess risk, such as familiarity with the risk,\(^{295}\) perceived controllability of the risk,\(^{296}\) and individual risk tolerance,\(^{297}\) making a good case for that asylum decision-makers need to be aware on current social science research pertaining to risk theory before pronouncing on the plausibility of applicants’ assessment of risk. This makes clear that both the personality of the applicant and the broader context of the society in which she is living play a part in how she assesses the risks she is facing, and this applies to persecution as well as to more mundane everyday risks. One example where the decision-maker failed to pay sufficient regard to the applicant’s assessment of the risk is provided by a Swedish asylum claim by an Iraqi applicant.\(^{298}\) The decision-maker questioned how the applicant’s girlfriend “dared to take pictures with her mobile phone camera of the two of you together if she was at risk of being murdered for the pictures, a risk that she should reasonably have

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295 As an example Cameron mentions that Canadian decision-makers find it implausible that Colombians were able to carry on with their lives after receiving threats of kidnapping: H. Cameron (2008), *ibid*, pp. 568-570.
297 Research has shown that this is a basic personal orientation, which is largely constant and habitual: H. Cameron (2008), *ibid*, p. 572.
298 Extracts from the claim were cited in a UNHCR report written by L. Feijen, and E. Frennmark (2011), *supra* note 143.
been aware of.”299 What may seem to the decision-maker in retrospect as an obvious risk – which a ‘reasonable man’ would not take – may have been evaluated by the applicant in a completely different way at the time. With regard to this particular decision, the decision-maker seemingly failed to consider that the applicant and his girlfriend were young, in love and together for the first time.300 The fact that the applicant and his girlfriend perceived of and assessed the risk in a different way from the decision-maker does not render the account of the event incredible.

7.1.3 The behaviour of the persecutor

Decision-makers’ assumptions about the plausible behaviour of persecutors can also constitute a sometimes insurmountable hindrance for asylum applicants. Credibility assessments of the stories told by applicants concerning the actions of persecutors can at times be rather absurd, for, as noted by Hathaway, “it is not in the nature of repressive societies to behave reasonably.”301 Rousseau et al. describe a claim by a Burmese applicant who testified that although her persecutors covered her eyes when kidnapping her, they failed to do so again upon her release. The decision-maker found this description to be contradictory, but Rousseau et al. argue that such a finding demonstrates the inability of the decision-maker to enter the ‘illogical’ atmosphere of terror and impunity.302 Sweeney also gives the example of an applicant’s account of his escape from his persecutors which the decision-maker found to be “inherently implausible,” because the applicant claimed to have gotten up from the ground and run away through the woods while three armed officials were shooting at him.303 As noted by Sweeney, though, there is nothing “inherently implausible” about this situation, because it could very well be that the police officers in question enjoyed watching their victim run away while scaring him with gunfire.304 It must be remembered that stories of persecution are by nature implausible, for trauma is defined as out of the ordinary and a disruption of everything that is usual.305

According to Sweeney, decision-makers have constructed a notion of the ‘reasonable persecutor.’ Its use is very different from that of the ‘reasonable man’, though, for if the ‘reasonable persecutor’ falls short of the standard expected by his ‘reasonableness,’ this results in the applicant being disbelieved.306 Sweeney argues that the ‘reasonable persecutor’ does not serve the same useful purpose that the ‘reasonable man’ does in setting community standards, for the ‘reasonable persecutor’ does not live up to community norms and has not been arrived at by the same process.307 Instead, the ‘reasonable persecutor’ tends to be based upon the decision-maker’s impression of how the persecution could have been better executed, but “[i]t is an impossibly high standard to require that to be believable the alleged persecutor must be described as having behaved with clinical ‘efficiency,’ because if they did so the [applicant] would not have escaped.”308 According to this analysis, the application of the ‘reasonable persecutor’ standard is based on a mistake between what Montrose

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300 L. Feijen and E. Frennmark (2011), ibid.
302 C. Rousseau et al. (2002), supra note 275, pp. 61-62.
306 J. Sweeney (2007), supra note 269, p. 27.
308 J. Sweeney (2007), ibid, p. 28.
termed particular propositions of fact and general propositions of fact.³⁰⁹ Whereas the applicant is only claiming that the persecution happened to her in this way – in Montrose’s terminology, a particular proposition of fact – by referring to the ‘reasonable persecutor’ standard the decision-maker is evaluating the statement as a general proposition of fact. Thus, the decision-maker can then easily come to the conclusion that the proposition is false because not all persecutors would behave in the way described.³¹⁰ The same analysis is also applicable to assessments about the plausibility of the applicant’s own actions: they constitute a particular, not a general, proposition of fact, and ought not need to represent the behaviour of all kinds of persons in the same situation in order to be accepted as evidence. The tendency identified by Sweeney for decision-makers to seek general propositions of facts in assessing the plausibility of asylum applicants’ stories constitutes a flawed approach to the evaluation of the admissibility of facts.

7.2 Assumptions about reasonable knowledge
The plausibility of asylum applicants’ testimony has often been tested as against information which decision-makers consider that the applicant should know if she is honest in her account. This assessment is thus not concerned with the inherent plausibility of the applicant’s account as such, but with the plausibility of the applicant not having information about certain things that the decision-maker considers that she should be aware of. Here, too, decision-makers’ assumptions often fail to take account of the different cultural setting that the applicant originates from. Examples of this abound: in one US case the first-instance decision-maker rejected the applicant’s credibility because it was not considered plausible that she did not know the last name of the person that provided the family with passports in preparation of their flight. This decision was reversed by the Court of Appeals, which sensibly took into account the applicant’s assertion that it is customary in Cameroon to only know and refer to acquaintances by their first names.³¹¹ It is understandable that a decision-maker in the US, with its widespread culture of referring to acquaintances by their last name, would find such a lack of information implausible in her own setting. However, the decision-maker is not judging the plausibility of this event in the US. Plausibility assessments in refugee status determination proceedings must be fully focused on the particular social setting in which the alleged event took place. If they fail to make this distinction, they loose all value and validity. A further example is drawn from a claim by a Sri Lankan applicant seeking asylum in the UK. The applicant’s father had fled their country of origin several years earlier and had been recognised as a refugee in the UK, but the applicant testified that he did not know the details of his father’s persecution. This, together with the assertion that he did not know how much his mother had paid in bribe to release him from army detention, was held by the decision-maker to lack credibility.³¹² With regard to this case Good notes that both dismissals of credibility made by the decision-maker depend upon assumptions about normal behaviour within families “which do not take cultural context into account, assumptions all the more questionable concerning

³¹⁰ J. Sweeney (2007), ibid, p. 29.
³¹¹ Agbor v. Gonzales, 487 F.3d 499 (7th Cir. 2007).
secret, shameful matters like paying bribes.” Again, we see that plausibility assessments based on assumptions about reasonable knowledge are highly unsuited to the ipso facto cross-cultural setting of the asylum process. Paying close regard to conditions in foreign countries include that decision-makers must not assume that the applicant has received a corresponding education to that of himself and that he pays attention to the same kinds of matters: one UK decision-maker found it incredible that a Syrian asylum seeker could not correctly answer which states had opposed a Security Council resolution for Syria’s president to resign.314 By contrast, on appeal the immigration judge held that “[i]f as claimed [the applicant] has never had any education and has lived in a rural area without the benefit of electricity, it is just plausible that his information about his home country, as regards matters and events not within his immediate area, would be limited.”315 Furthermore, as will become clear from the next example, it is not always the case that the asylum process actors demanding such knowledge from credible applicants would themselves be able to live up to the high standard they erect. Cameron describes a scene from a Canadian courtroom: to test the applicant’s assertion that she was a citizen from Somalia, the Tribunal Officer asked her to tell the court what is on the back of the Somali five shilling note. The applicant’s counsel intervened: “[b]efore my client answers, can you tell me, Officer, what’s on the back of the Canadian five dollar bill?” The Officer could not.316 This episode points to the difficulty in assessing the plausibility of an applicant’s account based on conceptions of what a person should reasonably know if her story is truthful. In addition to decision-makers being unsuited to judge what is considered reasonable knowledge to have in the applicant’s situation given the differing cultural relevance of various pieces of information, the Canadian Officer demonstrates that it is easy to presume knowledge to be reasonable but nevertheless it is of little value as a test of credibility.

7.3 Demeanour

The demeanour of the applicant refers to her manner and non-verbal behaviour.317 As explained in chapter 4, demeanour is explicitly recognised as a ground for credibility assessments in several domestic systems, even though its value has been questioned by many. This is because research in psychology has demonstrated that the ability to distinguish between truthful and untruthful statements of assessed individuals is of low reliability, even amongst professionals that often conduct such evaluations.318 There is also a gender aspect to such assessments: studies have shown that triers of fact identify typically male communication traits as traits of credibility.319 The problem of distinguishing between liars and truth-tellers is further complicated in a cross-cultural setting, where differing body language, gazes and manners of expression are often misinterpreted. Writing specifically about demeanour in the asylum process, Herlihy has observed that within a cross-cultural and psychologically complex context demeanour offers unreliable subjective indicators of credibility.

313 A. Good (2007), ibid.
314 Refusal letter, cited in Amnesty International (2013), supra note 11, p. 27.
315 Appeal, cited in Ammesty (2013), ibid, p. 27.
316 H. Cameron (2010), supra note 172, p. 479.
317 G. Coffey (2003), supra note 120, p. 386.
As noted by Macklin, it is not that demeanour says nothing; however, the messages conveyed are indeterminate and contingent.\(^{321}\) In the context of the asylum procedure, an Australian judge warned that it is all too easy for the “subtle influences of demeanour” to “become a cloak, which conceals an unintended but nonetheless decisive bias.”\(^{322}\) In spite of these warnings, it cannot be denied that assessments of applicants’ demeanour do play important roles in many credibility determinations, though the written decisions may not explicitly refer to it as one of the grounds. For this reason, it is very difficult to analyse the impact of demeanour in an essay wholly based on written sources, and consequently it will only be briefly touched upon in this chapter.

In the context of asylum credibility assessments, demeanour may have a bearing on the plausibility of the applicant being sincere in her statements, rather than on the inherent plausibility of the account as such. A rare example of a case where the decision-maker’s assumptions about the applicant’s demeanour were actually made explicit is provided by a US case deciding the claim of a Serbian applicant who sought asylum on grounds of being persecuted for his homosexuality.\(^{323}\) The first-instance decision-maker held that the applicant was not credible, and the first reason offered for this finding was that, although the applicant “says that he is singled out for persecution because he is gay in his home country […] the Court studied the demeanour of this individual very carefully throughout his testimony in Court today, and this gentleman does not appear to be overtly gay.” More specifically, the decision-maker observed that “it is not readily apparent to a person who would see this gentleman for the first time that [he is gay] since he bears no effeminate traits or any other traits that would mark him as a homosexual.”\(^{324}\) This decision was upheld on first appeal, but on further appeal to the Court of Appeals it was reversed, with the Court holding that “these stereotypes most assuredly are not substantial evidence.”\(^{325}\) In a sense, this particular applicant was fortunate in that the initial decision-maker explicitly set out his grounds of refusal, thus making them reviewable by the higher courts. It can only be speculated that many other decision-makers reach similar findings based on their interpretations of the applicant’s demeanour paired with their own stereotypes, but refrain from making explicit mention of this in their decisions and instead allow their judgment to swing against credibility on borderline assessments of some of the other credibility grounds.

Another kind of demeanour assessment which rarely makes its way to the written decisions but which nonetheless plays a role in credibility findings concerns the level of emotions demonstrated by an applicant in telling her story. This was another feature noted by Spijkerboer during his research of Dutch asylum claims, and he concluded that “[i]n order to be considered credible, applicants must show the appropriate emotions at the appropriate moments.”\(^{326}\) This can be particularly difficult for women who have been tortured or traumatised, since it is common for sufferers of


\(^{322}\) Kathiresan v. Minister for Immigration and Multicultural Affairs (unreported), Federal Court of Australia, 4 March 1998, para. 6, per Gray J, cited in G. Coffey (2003), supra note 120, p. 387.

\(^{323}\) Todorovic v. U.S. Attorney General, No. 09-11652 (11th Cir. 2010).

\(^{324}\) Todorovic (2010), ibid, p. 15.

\(^{325}\) Todorovic (2010), ibid, pp. 15-16.

\(^{326}\) T. Spijkerboer (2005), supra note 289, p. 69.
PTSD or depression to appear withdrawn, uninterested and detached.\textsuperscript{327} Ironically, Melloy notes that “as the woman asylum applicant is trying to prove that she has been tortured or persecuted, it is that same torture or persecution that will lead many [decision-makers] not to believe her.”\textsuperscript{328} The tendency among decision-makers in Western states to require such displays of emotions is more detrimental to women than to men, for Western culture presumes that women communicate through their emotions and men through their ideas.\textsuperscript{329} This, too, is clearly based on stereotypical assumptions about how human beings react in given situations. Personal dispositions as well as cultural norms guide such behaviour, however. Lacking in-depth knowledge of both the applicant herself and most often also the social environment from which she has originated, the decision-maker is not apt to draw any conclusions as to the applicant’s credibility as a provider of evidence in support of her asylum claim based on such impressions about her demeanour.

\textsuperscript{327} K. Melloy (2007), supra note 118, p. 653.
\textsuperscript{328} K. Melloy (2007), ibid, p. 654.
\textsuperscript{329} T. Spijkerboer (2005), supra note 289, p. 69.
8. Recommendations for improving the accuracy of credibility assessments

Thus far, this thesis has demonstrated that the criteria currently being used for assessing the credibility of asylum seekers’ claims are full of pitfalls. This is not to say that they should be discarded altogether: methods for distinguishing fraudulent applicants from genuine refugees are plainly needed, as it cannot be denied that the asylum system is open to abuse by economic or other migrants who do not have a well-founded fear of being persecuted. The prevalent criteria for assessing credibility need to be qualified, however, in order to improve the accuracy of credibility assessments and guard applicants from some of the worst-reasoned findings. Many of the problems that have been raised in this thesis could surely be remedied if there was greater awareness among decision-makers about the reasons for why such problems arise. But the fact is that many national agencies have issued guidelines for asylum decision-makers that warn of at least some of the problems raised in the course of this thesis, notably the effects of PTSD and troubles in assessing plausibility. In spite of such guidelines, however, unsound credibility assessments continue to flourish. The grave consequences that may follow from erroneous credibility assessment render this absolutely unacceptable: there must be stricter safeguards against flawed assessments being made in the first place. Therefore, this thesis will make a number of recommendations as to how credibility assessments should be conducted, which it argues should be legally binding and enforceable in court if breached or ignored by decision-makers. It is to be noted that recommendations intended to be legally enforceable are very different from guidelines: the latter can be employed in some cases but not in others, whereas legislative provisions must be clear and equally applicable to all asylum claims. Not all of the problems identified in the foregoing chapters will be addressed in the recommendations, for some are simply unsuited for the strict format that laws equally applicable to all cases require. For example, although it is highly desirable that decision-makers understand the difference between thin and thick description, and the limited use that they can make of the first category, it is not possible to stipulate a threshold of what constitutes thick description which is consequently acceptable to use in the refugee status determination. This thesis has raised some issues which it is not capable of solving through legal remedies. Instead, it will focus on a few recommendations which could nevertheless have a significant impact on the way that credibility assessments are conducted. The chapter will begin by outlining a number of such recommendations as to how accuracy could be improved, and will conclude with a discussion of how these recommendations should be implemented.

8.1 Improving the accuracy of credibility assessments

It has been suggested that refugee law stands to learn about credibility assessments from international criminal law. Credibility assessments in refugee law and international criminal law have much in common: irrespective of the subsequent dissimilarity between the legal significance of testimony, the preliminary task of

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See, for example, UK Border Agency (2011), supra note 200.
assessing the credibility of alleged victims or witnesses of human rights violations is “identical.”331 Both areas of law must transcend geographic, linguistic, cultural, educational, and psychological barriers in order to conduct such assessments,332 and in this exercise they are more or less unique, with the exception of some international human rights committees.333 Refugee law should therefore look to international criminal law, for the latter has developed much clearer procedural standards for how credibility assessments should be made.334 The judges of the international tribunals have also taken a more proactive role in redressing the potential distortions in testimony, and according to Byrne this serves as a corrective mechanism for the modes and methods of communication that characterise human rights testimony.335 Perhaps the main difference between the refugee law and international criminal law approaches lies in the “presumptive affirmation” view of the criminal judges,336 as compared to the “presumptive scepticism” which has been noted among asylum decision-makers by several commentators.337 Acknowledging the sharp contrast between the economic conditions of the administration of the two areas of law, it is nonetheless argued that asylum law could take on board some of the practices for assessing credibility that the international criminal tribunals employ. Some of the following recommendations will draw on practices adhered to in that area.

8.1.1 Internal inconsistencies should be put to the applicant
Internal inconsistencies in an applicant’s testimony may be the consequence of an ill-rehearsed lie which the applicant forgets from time to time, leaving the applicant vulnerable to detailed questions by decision-makers and unable to recite the same story without contradictions. However, as discussed in chapter 5 above, internal inconsistencies may also result from common memory loss, exacerbated in the cases of victims of trauma and sufferers of PTSD. They could also stem from troubled communication through an interpreter, attributable to errors and mistakes, selective interpretation or choice of exact translation. Finally, internal inconsistencies are commonly derived from late disclosures of more or less central aspects of an applicant’s background story. Some asylum seekers suffer from one of these setbacks in their efforts to retell their experiences during the refugee status determination process. Others, however, may very well suffer from all three. Imagine, for example, a female asylum applicant who fears persecution on the basis of having been subjected to sexual torture in a society where sexuality is taboo and extremely personal. She may have developed PTSD as a consequence of her horrific experiences, and upon arrival in the country of asylum she must tell her story through an interpreter, possibly male, from her own community. Inconsistencies in her statement should not be disbelieved; they should be expected. Research from psychology, linguistic studies, sociology and social anthropology all indicate that internal inconsistency is in no way a waterproof measure of an applicant’s

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332 R. Byrne (2007), ibid, p. 610.
333 Regional courts, such as the European Court of Human Rights or the Inter-American Court of Human Rights, are not at all to the same extent faced with the culture clashes of refugee status determination processes.
335 R. Byrne (2007), ibid, p. 637.
337 See, for example, D. Anker (1991), supra note 203, p. 451.
deceitfulness.\textsuperscript{338} Refugee law should take such insights very seriously, and therefore this thesis will recommend that internal inconsistencies should always be put to the applicant before the decision-maker reaches a final decision on the credibility issue. This will mean that the applicant is at least granted a chance to explain or comment upon the inconsistencies before they are used against her in a negative credibility decision. The confrontation when the applicant is asked to comment on any inconsistencies, and her reply to this, should be included in the written decision so that it can be confirmed that this requirement was adhered to. Once the inconsistencies have been put to the applicant and she has been given an opportunity to provide an explanation, it should be up to the decision-maker to decide whether the explanation is satisfactory or whether the inconsistency is so severe that it leaves those aspects of the applicant’s testimony not credible. This recommendation is similar to the general policy employed by UNHCR Eligibility Officers, which holds that negative credibility findings may not be based on inconsistencies that the applicant has not had the opportunity to explain.\textsuperscript{339} By way of comparison, international criminal law has held that the attachment of weight to inconsistencies from earlier hearings requires access to transcripts showing the questions posed,\textsuperscript{340} and the evidentiary consequence of this is that the courtroom testimony is considered as the point of departure.\textsuperscript{341}

It can be questioned, however, whether a requirement to put inconsistent statements to the applicant goes far enough. Applicants that suffer from PTSD or memory loss for some other reason may not be able to explain why they do not remember certain events on some occasions of telling their stories, but remember them perfectly on others. The law is not to assume that applicants are in the least bit aware of the psychological conditions that they suffer from or the effects that these can have. Therefore, it should not follow from the obligation to put inconsistencies to applicants that just because an applicant is not able to formulate an explanation for the inconsistencies in question, she is automatically not credible in this respect. This is a good example of why credibility assessments must ultimately remain flexible and discretionary. They can never be conducted according to a standardised questionnaire, for they must be able to take account of an infinite number of variables. Recommendations such as this one should help to explain why inconsistent applicants may nevertheless be credible, but they should not block applicants from being found credible if they are not able to capitalise on the opportunity for explanation afforded to them.

A requirement to put inconsistencies to applicants is much more relevant with regard to internal inconsistencies than external inconsistencies, and therefore this thesis only recommends that the former should be compulsory. Since the applicant is not responsible for, perhaps not even aware of, the external source, she cannot be expected to explain such a discrepancy, and the decision-maker should not put that

\textsuperscript{338} For example, one physician with extensive of the UK asylum system has recommended that the determination of the accuracy of recall is not a valid component of refugee status determinations: J. Cohen (2001), \textit{supra} note 186, p. 309.
\textsuperscript{339} UNHCR, \textit{Procedural Standards for Refugee Status Determination under UNHCR’s Mandate}, 20 November 2003, 4-10.
\textsuperscript{341} R. Byrne (2007), \textit{supra} note 331, p. 633.
pressure on her. On the other hand, there are certainly situations where the decision-maker should use her discretion to put an external inconsistency to an applicant nonetheless, for example in the case of the Zimbabwean applicant referred to above where a discrepancy as regards the age band of primary school students was found to be an inconsistency.

8.1.2 Right of decision-maker to conduct fact-finding and call expert witnesses

Chapter 6 discussed the assessment of the external consistency of applicants’ testimony, and noted some of the inherent difficulties of evaluating facts. This thesis argues that legal practitioners or administrative decision-makers are generally not well placed to make such assessments, because many do not possess a sufficient grasp of the wider social context in the country of origin where the ‘fact’ is located. For this reason, it is highly unfortunate that some decision-makers have hastily dismissed or disregarded the opinions offered by expert witnesses, and instead preferred to rely on their own interpretations of situations in countries of origin. The drawbacks of non-experts selecting between different COI and subsequently applying this COI to various contexts is a difficult problem to address, since it cannot realistically be expected that asylum decision-makers could attain a high level of knowledge about all the countries of origin that applicants stem from. Judges and other decision-makers are not required to be experts in other areas than the law and its application. However, they should be encouraged to see that they may need assistance in conducting evaluations of external inconsistencies between applicants’ testimony and COI from various sources. One way to promote this could be to create a right of asylum decision-makers to conduct their own fact-finding about the situation in the country of origin, including a right to call expert witnesses in order to clarify the significance of factual uncertainties or valid applications of certain COI. This would preclude complete reliance on the particular sources presented by the parties. A similar right seems to exist within international criminal law: in Kupreškić, the ICTY exercised its authority to call its own witnesses, and this allowed for the evidence of an anthropologist to be entered into the trial record. With the help of this witness, a range of cultural and linguistic issues were addressed which enhanced the capacity of the Trial Court to assess the evidence. Alas, this recommended right constitutes a potentially very expensive measure and in practical terms it would need to be circumscribed in order to be viable. In principle, however, a measure of this sort is needed in order to improve assessments of external consistency leading to decisions about the credibility of applicants’ testimony. It should once again be noted that experts are likely to disagree on a whole range of things. Just like COI more generally, they may present different kinds of information as being decisive for a particular issue. They may explicitly adopt different views on a certain matter. In the end, it will therefore always have to be the accountable decision-maker that reaches the ultimate conclusion on whether external consistency has been established or not. By undertaking her own fact-finding, she will be able to make a better-informed

343 Note that this is not the same as the decision-maker inquiring into the particular circumstances of an applicant, for example through diplomatic channels. This is very dangerous for the applicant and decision-makers should never conduct such investigations.
decision—especially after having heard the views of experts in the field. In the context of appeals of human rights claims, the European Court of Human Rights has noted the importance of conducting independent fact-finding.\textsuperscript{346} UNHCR has also recommended that all appellate bodies as well as initial decision-makers should have fact-finding competence in order to fully satisfy the requirement of rigorous scrutiny establishes by international human rights law.\textsuperscript{347}

\subsection*{8.1.3 Plausibility assessments should be limited and clearly reasoned}
As argued in chapter 7 above, assessments of what is plausible and what is not are not suitable for cross-cultural milieus. Thus, assessments of inherent implausibilities of an applicant’s testimony are not an accurate measurement of the credibility of the applicant’s statements. Again, the very particular situations of asylum claims have to be remembered, and plausibility assessments can never be based on tenets drawn from the decision-maker’s own social context. Because this context is more or less impossible to disregard and because the decision-maker usually does not possess extensive knowledge of the corresponding context of the applicant—this thesis maintains that COI cannot provide such knowledge—plausibility assessments are not a suitable tool for evaluating credibility in the refugee status determination process. Consequently, this thesis suggests that their use as a tool in assessing applicants’ credibility should be severely limited. They should not be considered as one of the main requirements that credible testimony must fulfill. In cases where they are nonetheless relied on, decision-makers should be required to spell out in the written decision the reasoning behind the implausibility finding.\textsuperscript{348} It should further be clarified that ‘reasonableness’ and ‘common sense’ are not appropriate concepts to be employed in assessing plausibility, since persecutors and frightened applicants cannot be expected to act as reasonable persons, and since ‘common sense’ inevitably varies over space and time.

\subsection*{8.1.4 Demeanour should not be an element of credibility}
It has been widely ascertained by psychological studies that assessments of demeanour are too unreliable to accurately assess whether a witness is telling the truth or not.\textsuperscript{349} In light of this, it is argued that evaluations of demeanour are not appropriate in assessing the credibility of asylum applicants, considering that the outcome of such assessments could be a matter of life and death. Consequently, they should be explicitly excluded from credibility assessments. The evidence on the unreliability of demeanour applications renders their explicit approval by several domestic frameworks more than a little surprising, and several commentators have argued for demeanour’s active exclusion from credibility grounds.\textsuperscript{350} Furthermore, negative findings of demeanour tend to influence the whole of an applicant’s testimony, thus diminishing the possibility of having some aspects of the testimony accepted as credible and reliable evidence whereas others are not. Higher courts have often held that this should be a possibility, since telling lies does not serve to exclude

\begin{footnotesize}
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  \item \textsuperscript{347} UNHCR Improving Asylum Procedures (2010), ibid, p. 62. This study found that in several Western European states the appellate bodies for refugee claims did not have such competence, p. 63.
  \item \textsuperscript{348} This has also been suggested by G. Coffey (2003), supra note 120, p. 415.
  \item \textsuperscript{349} See, for example, J. Herlihy (2005), supra note 320.
  \item \textsuperscript{350} G. Coffey (2003), supra note 120, p. 414; M. Kagan (2002), supra note 8, p. 378.
\end{itemize}
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an applicant from the scope of the Refugee Convention. An asylum seeker who embellishes her story in some aspects but tells it honestly in its main aspects should be able to have parts of her testimony accepted as credible. If a negative finding is reached on her demeanour, however, this is likely to impact the assessment of the totality of her testimony. This is a further reason for why demeanour should never be relied on as an indicator of credibility.

8.1.5 Credibility decisions should be reviewable on appeal

Based on the survey of a sample of domestic frameworks for credibility assessments conducted in chapter 4, it appears that most national systems do allow for reviews of the factual findings of asylum claims. Judging by the potential for inaccurate decisions which has been addressed earlier in this thesis, however, a de novo review of the facts should be a guarantee for all applicants. Therefore, this thesis recommends that all asylum applicants should be entitled to at least one appeal that tries the facts of the case anew, including an assessment of the applicant’s credibility.

8.2 Giving effect to the recommendations

In light of the extensive complications that follow from the practical application of the Refugee Convention with regards to assessing the facts by evaluating the credibility of asylum applicants, it is here suggested that there should be international laws in place to dictate some procedural standards of refugee status determinations. A proper application of the Refugee Convention requires effective procedures, too. The purpose of the Refugee Convention – to offer asylum to persons in need who meet the criteria laid down therein – cannot be fulfilled if applicants are not able to surmount the factual stage of the asylum application and render their testimony credible as evidence. As was discussed in chapter 3, in domestic systems where a ‘combined approach’ to well-founded fear of being persecuted has been adopted, decision-makers are often rather unwilling to assess an applicant’s claim in the absence of a credible testimony which can establish the subjective element of fear. To some extent, this applies to decision-makers that adopt the ‘objective’ approach, too, since ‘being persecuted’ also relies on a sort of subjective element. It can be argued that the absence of common standards for all parties to the Refugee Convention as to how credibility assessments should be conducted leaves contracting states a wide discretion in how they implement the Convention. First-instance asylum decision-makers, in particular, tend to be employees of governmental agencies and these agencies may be highly influenced by the immigration policies of the day. As noted by Taylor, administrative adjudication is not simply about deciding individual cases, but also a means to effectuate statutes in accordance with the priorities of the executive branch.351 For several decades now, immigration policies have grown more and more restrictive in most Western countries. Loosely regulated standards as to how credibility should be assessed can be used to give effect to societal attitudes to immigration more generally, and this can be done without any apparent violation of the Refugee Convention. In this way, credibility assessments can be employed to give effect to restrictive immigration policies; here, the culture of disbelief has been allowed to flourish. This is, of course, further exaggerated by statutory legislation such as the US REAL ID Act, which explicitly holds that demeanour is a grounds for

assessing credibility and that even small inconsistencies not going to the heart of the claim can affect overall credibility.

The UNHCR Handbook – a non-binding instrument which nevertheless commands substantial authority – has indeed set out some common procedural standards. But it has remained silent with regard to how credibility assessments should be conducted, noting in passing “the unlikelihood that all States bound by the 1951 Convention […] could establish identical procedures.” Of course, this is a highly realistic concern. One UNHCR report has observed that differences of terminology, procedural rules governing refugee status determinations, and between common and civil law systems make it more difficult to agree on international standards for assessing refugee status. Consequently, states have shown a reluctance to open the discussion on how the rules and standards on evidentiary questions are dealt with. Irrespective of these hindrances, it is clearly desirable that efforts are made to create common international standards for how credibility assessments should – and should not – be conducted. A consistent and accurate evaluation of asylum applicants’ credibility is important for several reasons. Firstly, the two principles of certainty and equal treatment require that an applicant should receive the same decision to her asylum claim no matter where she applies for asylum, and no matter who decides her case. Since the evaluation of fact is to some extent always subjective, this is almost impossible to achieve. But the legal doctrines of certainty and equal treatment require that such discretionary elements should be minimised. A better regulated international system for how credibility assessments are conducted would promote these principles. Secondly, disparate interpretations are contrary to international law. As noted by Lord Steyn in Ex parte Adan, the Refugee Convention must be given an independent meaning derivable from the sources mentioned in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, and without taking colour from distinctive features of the legal system of any individual contracting state. It is clear that the role that credibility assessments are allowed to play in refugee status determinations renders the application of the Refugee Convention open to interpretation in a way that international law is not supposed to be. Thirdly, the point of international laws pertaining to human rights is to progressively raise minimum standards in all contracting states, and thus international laws can serve to inspire better procedures in all states that are parties to the Refugee Convention. Effective procedures are an inherent element of the fulfilment of the international obligations that contracting states have already agreed to by ratifying the Refugee Convention, and thus it should not be a great leap to adopt laws for such procedures in order to further the application of the Convention.

353 ’An examination in depth of the different methods of fact-finding is outside the scope of the present Handbook’; UNHCR Handbook (2011), ibid., para. 200.
358 R. v. Secretary of State for the Home Department, Ex parte Adan, Ex parte Aitseguer, House of Lords (Judicial Committee), 19 December 2000, per Lord Steyn.
Since the Refugee Convention was adopted in 1951, international and national legal standards and practices have evolved significantly.\textsuperscript{359} International law may not have been ready for common procedural standards in the early 1950s, but the situation has changed and today our evolved knowledge and legal infrastructure should make it possible to adopt such standards. To some extent, this has already happened even in the field of refugee law by way of the EU’s Procedures Directive and the Qualifications Directive. This thesis will therefore suggest that certain procedural standards with regard to how credibility assessments are conducted should be incorporated in international law. Political reality would likely preclude the possibility of an amendment to the Refugee Convention, but an additional protocol could with time better align domestic asylum procedures and increase the accuracy of credibility assessments worldwide. In addition, an amendment of the UNHCR Handbook giving effect to the recommendations set out in the foregoing section could also serve as an important step in the right direction. However, in spite of the high regard that many decision-makers show towards the Handbook, its recommendations are not legally enforceable. Several countries of arrival have issued their own guidelines as to how credibility should be assessed, and the risk is that the Handbook would end up being treated as any other such document – much used by committed and caring decision-makers, but possible to ignore for others. The importance of refugee status demands that guidance on credibility assessments should not be possible to ignore. By turning some of its fundamental standards into international law, this would no longer be an option.

9. Conclusion

Credibility assessments are an integral part of refugee status determinations. Since the burden of proof in the asylum claim rests with the applicant, it is she that must adduce the evidence to meet the requisite standard of proof. In most refugee status determinations, this will be nearly impossible if the applicant’s own testimony is not accepted as evidence building towards that standard. In recognition of the difficult situation of the applicant, the principle of the benefit of the doubt is widely recognised to assist her when she has made a serious effort to substantiate her claim and when her account is “coherent and plausible.” This is the first and most widely recognised reason for why credibility is so central to refugee recognition, but this thesis argues that there is another reason, too. Irrespective of whether the decision-maker takes a ‘combined’ or an ‘objective’ approach to the elements of a ‘well-founded fear of being persecuted,’ in reality the claim for asylum is almost doomed to fail if the applicant’s testimony is not found to be credible and thus acceptable as evidence. A decision-maker who adopts a ‘combined’ approach is unlikely to be satisfied that the applicant fears being persecuted if she is not also credible, as ‘fear’ is based on the subjective feelings of the applicant, communicated through her own testimony. Further, a decision-maker who belongs to the ‘objective’ school will nonetheless not be satisfied that the applicant is ‘being persecuted’ if her testimony cannot be used to establish that the risk amounts to persecution in her particular case. Thus, credibility plays two central roles in refugee status determinations: it is essential both for producing the kinds of evidence that can establish some of the inherent elements of the refugee definition, and for giving the applicant the benefit of the doubt and thus helping her meet the general standard of proof where she is not able to conclusively prove her claim.

In spite of the central importance of credibility in establishing refugee status, there is little international guidance on how it is to be assessed. Domestic frameworks have developed some structures for how such evaluations are to be conducted, but in most cases these are rough guidelines that leave considerable discretion for the decision-maker and which are not enforceable in law if they are departed from. Three principal grounds of credibility can be deduced from the international and the domestic frameworks alike: internal consistency, external consistency, and plausibility. This thesis has demonstrated that all these grounds are highly problematic as bases for credibility assessments in the cross-cultural setting of the refugee status determination. The internal consistency of an applicant’s testimony is easily undermined by memory failures, which are frequently aggravated when applicants are suffering from PTSD. Furthermore, the widespread use of interpreters in asylum processes often gives rise to inconsistencies in applicants’ testimony from one interview or tribunal hearing to another. Late disclosures of central aspects of applicants’ background stories resulting in inconsistencies can also very often be rationally explained in the context of refugee status determinations: many applicants experience a profound distrust in state officials as a consequence of having been persecuted by such actors. In addition, applicants of both sexes that have been subjected to sexual torture or abuse are often reluctant to discuss such events with decision-makers and other parties to the asylum process. In spite of this range of

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360 UNHCR Note (1998), supra note 21, para. 12.
possible explanations for internal inconsistencies in applicants’ testimony, such inconsistencies continue to be used by decision-makers to cast doubt on applicants’ credibility, and may end up as decisive factors in dismissing it.

The problems of assessing the external consistency of applicants’ testimony are not as widely recognised. It is apparent that decision-makers do not routinely question their own ability to compare an applicant’s account of events in the country of origin with that of COI from other sources. Yet, this thesis argues that decision-makers are generally not well placed to conduct this task, since they lack the wider knowledge of the societies in question that is needed to make such assessments. Decision-makers commonly rely on ‘thin descriptions’ derived from COI, whereas access to and understanding of ‘thick descriptions’ – explaining the underlying structures of the societies in question – would be needed in order to authoritatively pronounce on whether the applicant’s testimony corresponds to information from other sources. Further, in the process of assessing external consistency many decision-makers place too much emphasis on ‘facts’ and commonly fail to recognise and take account of the contested nature of all types of knowledge. In this respect, the practical application of refugee law has much to learn from the social sciences.

Finally, the third ground of credibility constitutes the most problematic assessment of them all. Assessing the plausibility of an applicant’s testimony is a task that the decision-maker in the country of arrival is not fit to conduct, given her limited and culturally bound understanding of what plausibility, reasonability or common sense entail in the setting where the alleged events took place. In the view of the present author, this applies to demeanour assessments, too, and to most forms of knowledge tests. Asylum decision-making cannot be based on the assumption of the decision-maker, but in plausibility assessments, they commonly are.

In light of the importance that credibility assessments carry, it is easy to lose sight of the fact that credibility is not actually a criterion of the refugee definition. As Kagan reminds us, a person does not need to be credible in order to be a refugee.361 Based on the problematic nature of credibility assessments in cross-cultural asylum procedures, it is worth asking whether we need to engage in them at all. Sadly, it is clear that many people feel an incentive to manipulate the refugee protection system in order to gain access to, primarily, Western countries. In this situation, the credibility assessment as a part of the refugee status determination is indeed a “necessary evil.”362 Credibility assessments are needed to weed out fraudulent applicants from genuine ones, so that the refugee system can be kept intact and thus continue to protect persons in need of asylum for a Convention reason. If the status determination procedures were to accept all those whose testimony meet the legal refugee definition without having regard to the applicant’s credibility, we would likely experience a considerable surge in applications for and grants of asylum. This would probably lead to a loss of public confidence and support for refugee protection, which in the long run would threaten the whole institution. Having said that, the refugee status determination process clearly needs better and more stringent procedures for conducting credibility assessments. The ultimate goal must be that not a single applicant should be wrongfully disbelieved when she tells her story in her own

manner, as she has experienced events from her own perspective. With this objective in mind, this thesis has suggested that common international laws should be created in order to safeguard all asylum applicants’ rights to have their credibility assessed in ways that will delimit the risk of flawed and inaccurate evaluations. In addition to these specific recommendations, this thesis argues for an interdisciplinary approach to credibility assessments\textsuperscript{363} that better recognises the problems that legal formalism can lead to in the context of refugee status determinations and human rights testimony more generally. Hopefully, these recommendations could go some way towards guarding against what Thomas has described as the most intractable issue in the assessment of credibility: “the decision-makers’ own presence of self,” and the values they inevitably bring to the task of deciding whether a story is credible.\textsuperscript{364} Decision-makers must always take care to remind themselves of the role that their own persona play in assessing the protection needs of asylum applicants.

In a sense, the right to enjoy asylum\textsuperscript{365} is the ultimate human right: it holds that the individual has value beyond her own state and government in case they severely mistreat her. It proves that her worth is not confined by the social group she was born into. Simply put, it is a right that is to be respected, protected and fulfilled by other states than the applicant’s own. All states that take their human rights obligations seriously should be proud to play a part in upholding this right. It is true that the granting of refugee status and the costs of status determination procedures test international solidarity like few other international obligations do. Governments and decision-makers alike may feel a need to curb application success rates, and this could be part of the explanation why credibility assessments are not more strictly regulated. But the effect, intended or not, is that some applicants who genuinely have a well-founded fear of being persecuted are refused asylum. We must use all the knowledge that we have, from a broad range of disciplines and fora, to prevent this from happening.

\textsuperscript{363} This has been suggested by several commentators on the topic: see, for example, B. Einhorn (2009), supra note 209, p. 197.
\textsuperscript{364} R. Thomas (2006), supra note 121, p. 84.
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