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# Credibility Assessment of Testimony in Asylum Procedures: an Interdisciplinary Analysis

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# Summary

Credibility assessment of testimony is a very important part in the asylum adjudication procedure. The credibility assessment is intended to tell decision-makers whether they should accept the facts as supported by the applicant's statement. Only those parts of the statement which are recognized as credible will then be considered in determining the validity of the asylum claim.

This thesis examines the legal standards: consistency and coherence, sufficiency of detail and specificity, plausibility, and demeanour. It also examines the relevant psychological research and analyses whether or not these two disciplines are compatible. The general finding is that, largely, the credibility indicators that are used in the asylum procedure are based on assumptions about human memory, behaviour, attitudes, values etc. that have little or no certain basis in scientific research. Psychological research also shows that very much is subjective and differs from individual to individual.

There are also other factors regarding the credibility assessment which can question the accuracy and adequacy of the procedure: There are no instructions on how to weigh the individual indicators and no explanation of their inter-relationship. As a result, decision-makers can pick and choose from the different criteria as they see fit and in addition, these indicators are not clearly defined which can lead to different subjective interpretations, resulting in an arbitrary procedure.

Lastly, this thesis recommends measures that need to be taken in order to improve the accuracy and legal certainty of credibility assessment of testimony, both in the long-term aspect within the framework of the European Union, as well as within the more immediate context which is possible within the domestic sphere.

**Keywords:** *credibility assessment, veracity of testimony, asylum procedure, CEAS, Swedish asylum procedure*

# Preface

During the process of writing this thesis, I have learned a lot: I've learned about the law and policies of different European states in relation to credibility assessment in asylum procedures; about the science of psychology, especially in relation to how the human memory works; and I've also had the chance to reflect upon my own assumptions and prejudices about the human mind. Hopefully, the prospected readers of this thesis will do as well.

I would like to thank Lund University and the Raoul Wallenberg Institute for enjoyable learning and for turning me into a full-fledged human rights lawyer. I would also like to extend this gratitude to my fellow students who made this journey a fun one. I'm especially grateful for the course in International Migration Law that was held during the spring term of 2014 and I would like to give a special thanks to the doctoral candidates Vladislava Stoyanova and Matthew Scott who taught me a great deal and with whom I have had valuable discussions relating to asylum law. It was also in this course that I got to know Professor Gregor Noll, who I have had the honour of having as a supervisor and he of course, deserves the biggest of thanks.

My family shall also be mentioned and thanked for their big support during this tough period, and a very special thanks to my boyfriend Viktor Tornborg who has stood by my side from my very first day in law school five years ago. Lastly – as the crazy cat lady that I am – it would not be fair to end this note without also thanking my two cats. For those of you who are not yet aware of the astonishing qualities of these creatures, there are no better stress-relievers in the world, something that is of utter importance during thesis writing.

*Hominum causa omne ius constitutum est*  
(“All law is created for the benefit of human beings”)

# Abbreviations

CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
COI	Country of Origin Information
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
LGBTI	Lesbian, Gay, Bisexual, Transsexual and Intersexual
PTSD	Post-Traumatic Stress Disorder
UNHCR	United Nations High Commissioner for Refugees

# 1. Introduction

## 1.1 Background

People fleeing persecution, war, risk of torture or the death penalty can claim international protection/asylum in the European Union (EU).<sup>1</sup> But how do you know whether someone is telling the truth, and is actually fleeing because of that and not because of mere economical or other reasons? Linguistically, the conventional meaning of *credibility* is whether a person is capable of being believed, or whether he/she is reliable or trustworthy.<sup>2</sup> The term *credibility assessment* refers to the procedure of firstly gathering the relevant information from the applicant; secondly, examining it in light of all the other available material; and thirdly determining whether the statements of the applicant that concerns the relevant features of the asylum claim can be approved, for the purpose of the determination of qualification for protection status.<sup>3</sup>

Accordingly, *credibility assessment of testimony* plays an important role in the adjudication of asylum applications. The first step in deciding on a claim for international protection requires the decision-maker to establish the material facts in the case, and this credibility assessment is an essential part of this process. The decision-maker must determine whether and which parts of the applicant's accounts relating to the material elements of the claim can be accepted as a truthful fact. Only those parts of the statement which are recognized as credible will then be considered in determining whether those *facts* are enough to generate a valid asylum claim.<sup>4</sup> That is to say, whether

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<sup>1</sup> Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L. 337/9; see also section 2.1, below.

<sup>2</sup> UN High Commissioner for Refugees (UNHCR), 'Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report' (May 2013) <<http://www.refworld.org/docid/519b1fb54.html>> accessed 24 May 2015 (Beyond Proof) p. 27.

<sup>3</sup> Ibid.

<sup>4</sup> Madeline Garlick, 'Selected aspects of UNHCR's research findings and analysis in the 'Beyond Proof' report', in Carolus Grütters, Elspeth Guild & Sebastiaan de Groot,

the asylum-seeker has a well-founded fear of persecution in terms of the 1951 Convention relating to the Status of Refugees (Refugee Convention)<sup>5,6</sup> or if he/she faces a real risk of suffering serious harm<sup>7</sup> if returned. The credibility assessment thus assist in answering the decision-makers' question of how to know *whether they should accept the facts* as supported by the applicant's statement.<sup>8</sup>

In some cases, this assessment of the veracity of applicants' statements may be a straightforward process, but in others it is a significant and challenging part of the procedure. Decision-makers have admitted to spend the majority of their working time on credibility assessments and they have also acknowledged that it is the most challenging aspect of their work.<sup>9</sup> Credibility is as such, to some extent, nearly always at issue. Actually, numeral studies in the EU and other regions indicate that a large proportion of decisions to deny asylum claims are based wholly or partially on negative credibility findings.<sup>10</sup>

However, what sets the asylum procedure apart is that this negative credibility finding must be a correct one because of the potentially deadly consequences of a wrongful decision. Nonetheless, there are examples that indicate that a substantial number of asylum claims that are overturned on appeal find that

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*Assessment of Credibility by Judges in Asylum Cases in the EU* (Wolf Legal Publishers, 2013) p. 51.

<sup>5</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

<sup>6</sup> See more in section 2.1, below.

<sup>7</sup> See more in section 2.1, below.

<sup>8</sup> *Beyond Proof*, (n2) p. 27.

<sup>9</sup> Audrey Macklin, 'Truth and Consequences: Credibility Determination in the Refugee Context', International Association of Refugee Law Judges 1998 Conference (2003).

<sup>10</sup> See e.g. Michael Kagan, 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination' (2002) 17 *Geo Immigr LJ* 367 (*Is Truth in the Eye of the Beholder*) p. 369; Liv Feijen & Emelia Frennmark, *Kvalitet i svensk asylprövning: en studie av Migrationsverkets utredning av och beslut om internationellt skydd* (UNHCR, Stockholm 2011) (*Kvalitet i svensk asylprövning*) p. 192; Rosemary Byrne 'Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals' (2007) 19 *Intl J Ref L* 609, pp. 609–638; Gregor Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martinus Nijhoff Publishers, 2005); Robert Thomas, 'Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined' (2006) 8 *Eur J Migr & L* 79, p. 79.



the initial credibility assessment was flawed.<sup>11</sup> This, alongside with the fact that the rate of overturns on appeal of initial decisions to refuse asylum can be as high as 25 percent,<sup>12</sup> clearly illustrates the level of concern that should be devoted to the risk of erroneous credibility assessments.

Having presented the problems and its introductory terminology, as well as the importance of the adjudication at hand, the author would like to submit the personal interest that gave rise to the thesis:

While previously working as an asylum case officer at the Swedish Migration Board, I developed a general interest in credibility assessments in asylum claims. We, as case officers – who wrote proposals for the decisions to the decision-makers – spent a lot of time on this important task and I got to experience the practical hardships that comes with it as well as the limited existing guidance. Being aware of the dreadful consequences of a flawed decision, it was frustrating to say the least. A year before my work at the Migration Board, I had completed a course in witness psychology and my brief encounters with both of these fields were enough to question the methods used. It was this combination of knowledge and experience that inspired my research questions for this thesis.

## **1.2 Aim of the Study**

The purpose of this thesis can be formulated into the following three research questions:

- What are the legal standards relating to credibility assessments of testimony in asylum procedures?
- Does the use of these standards have scientific support in the field of psychology?
- If not, what measures should be taken in order to improve the accuracy and legal certainty of credibility assessments of testimony?

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<sup>11</sup> Amnesty International, ‘A question of credibility: Why so many initial asylum decisions are overturned on appeal in the UK?’ (April 2013)  
<[http://www.amnesty.org.uk/resources/question-credibility-why-so-many-initial-asylum-decisions-are-overturned#.VWIG\\_JWIrIU](http://www.amnesty.org.uk/resources/question-credibility-why-so-many-initial-asylum-decisions-are-overturned#.VWIG_JWIrIU)> accessed 25 May 2015, p. 12.

<sup>12</sup> Ibid. p. 4.

### 1.3 Method and Material

In order to answer the first research question, it is firstly necessary to examine the existing law *de lege lata*; what legal standards exist within the sphere of credibility assessments of testimony in the asylum procedure? Since the thesis is focused on the legal standards within the EU,<sup>13</sup> the legal sources that have been used have been selected based on those sources of law that are distinguishing the EU's *acquis* as a legal system of its own kind, *sui generis*.<sup>14</sup> As such the following legally binding sources have been used: primary law (meaning the foundational treaties and the EU Charter on Fundamental Rights),<sup>15</sup> binding secondary law (such as directives), case law from the Court of Justice of the EU (CJEU), international agreements, general principles of law and case law from the European Court of Human Rights (ECtHR).<sup>16</sup> The thesis also refers to case law from national jurisdictions because of its relevance as potentially emerging general principles of law.<sup>17</sup> Non-binding legal sources that works as a guidance for the hard EU-law<sup>18</sup> have also been used such as soft law documents and scholarly work.

This thesis also includes a case study of Sweden's legal practice relating to credibility assessment of testimony in the asylum procedure.<sup>19</sup> In this part the sources chosen have been based on the relevant Swedish legal sources, namely the case law from the Migration Court of Appeal, as well as the Migration Board's Judicial Position.<sup>20</sup> The purpose of the case study and the presentation of case law in particular is not supposed to be comprehensive in

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<sup>13</sup> See more in section 1.4, below.

<sup>14</sup> Jörgen Hettne, Ida Otken Eriksson (red.), *EU-rättslig metod* (Norstedts Juridik, 2005) pp. 24-29, 44.

<sup>15</sup> Treaty on European Union; Treaty on the Functioning of the European Union; Charter of Fundamental Rights of the European Union.

<sup>16</sup> ECtHR case law is regarded as general principles of law under the EU *acquis*, see *EU-rättslig metod* (n 14) pp. 64-65.

<sup>17</sup> *Ibid.* pp. 43-48.

<sup>18</sup> Ulf Bernitz & Anders Kjellgren, *Europarättens grunder* (Norstedts Juridik, 2010) p. 34.

<sup>19</sup> See more in section 1.4, below.

<sup>20</sup> See more in section 4.1, below.

any way, but is rather intended to shed light on the field through examples. I've chosen the cases – from a rather small amount of existing enlightening judgments in this area – that touch upon some of the issues explained in chapter 3, although in a very limited way, since the reasonings of the migration courts in Sweden tend to be extremely brief.

For answering the second research question, it is necessary to conduct an interdisciplinary analysis, comparing the legal standards to psychological research, since the aim of the thesis is related to the effectiveness of the law in external consistency terms – evaluating the difference between the “legal reality and the real reality”, meaning not the reality of whether the claimed events took place or not, but the reality of the human mind and behaviour – psychology.<sup>21</sup> The selection of psychological research has been primarily based on often-cited, peer-reviewed articles published in various prominent journals. If not contradicted by such well renowned sources, secondary material (e.g. national training modules/guidelines or such material from the UNHCR) has also been consulted in the process. It also has to be stated that the relevant research often consists of individual studies and they often point out that more research in the area is needed in order to be able to draw any general conclusions. Furthermore, a majority of the studies have been conducted within the area of criminal law, which is good to have in mind. These studies are however still relevant since they are concerning – just as in the asylum procedure – retelling of special events, and often such events which are emotionally challenging to recount. The question that the adjudicators have to ask themselves are the same in both types of procedures: Is the testimony believable or not?

The third question will be answered in a *de lege ferenda* perspective, and the thesis will discuss brief aspects of remedies that should be taken in order to improve the accuracy and legal certainty of credibility assessments of testimony.

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<sup>21</sup> See Wendy Schrama, ‘How to carry out interdisciplinary legal research: Some experiences with an interdisciplinary research method’ (2011) 7 Utrecht L Rev 147.

## 1.4 Scope, Definitions, Limitations and Assumptions

To begin with – and it might already be clarified – this thesis will only cover the credibility assessment of the applicant’s own testimony, and not any other evidence, such as any documentary evidence that the applicant may be able to present. It will therefore not discuss the credibility assessment of, for example, medical reports.

As already mentioned, this essay will focus on the European legal standards, more particularly, the legal standards within the sphere of the EU. I have chosen to delimit the paper to the EU mainly because of the limitation of time and resources given to conduct this thesis but also since the asylum law differs immensely from state to state and from region to region; thus another reason for choosing the sphere of the EU is because of its ambition of creating a Common European Asylum System (CEAS).<sup>22</sup>

The case study of Sweden has been chosen not only because of personal interest, but also because it is highly relevant – according to the United Nations High Commissioner for Refugees (UNHCR) it is undeniable that in a global as well as in a European perspective, Sweden’s asylum procedure holds a high standard. This has been affirmed by the UN High Commissioner for Refugees António Guterres who has stated that Sweden has one of the most stable asylum systems in the world. Sweden has for many years been a pioneer country as regards the interpretation of international refugee law and has a recognized legal certainty in its asylum procedures.<sup>23</sup> As such the case study is intended to serve as an example of “best practice”. Another reason why Sweden is relevant for a case study in this field is because of the numbers: of the industrialized countries around the globe, Sweden is fourth

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<sup>22</sup> See more, European Commission, Migration and Home Affairs, ‘Common European Asylum System’ <[http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm)> accessed 25 January 2015.

<sup>23</sup> Swedish Migration Board, Refusal Letter, cited in *Kvalitet i svensk asylprövning* (n 10) p. 6.

in the world in receiving asylum applications, receiving 75,100 in 2014; and when measured per capita, Sweden tops the list.<sup>24</sup>

As to the term credibility, besides the short explanation above, there is need for some further legal clarification. It has been found that the term is often used indiscriminately in two different contexts. While this may be correct in lay terms, it has been argued that it is not in legal terms<sup>25</sup> and the author of this thesis agrees with the argument. Consequently, the context that is legally correct relates to “the credibility of a claimant’s evidence, *presented as their past and present factual background*”,<sup>26</sup> (emphasis added) and it is within this setting that the thesis has been written. In the other way, which is as argued wrong in law – and therefore not within the sphere of the thesis – the term credibility is often roughly used to cover the “credibility of everything related to the *claim* for recognition as a refugee or protected person”.<sup>27</sup> (emphasis added) In this setting, the term is used as meaning *all the evidence* that is relevant to the claim, e.g. does the person have a well-founded fear of being persecuted for a convention reason if returned; or if the facts are not enough for granting of refugee status, are there substantial grounds for believing that the applicant would face a real risk of suffering serious harm upon return?<sup>28</sup>

## 1.5 Disposition

Chapter two will give the unfamiliar reader an overview of what is necessary to know about the asylum procedure before digging into the area of credibility assessment of testimony. Chapter 3 will examine the four credibility indicators from a legal and psychological perspective. Chapter 4 consists of a case study and will present and analyse Sweden’s soft law as well as examples

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<sup>24</sup> UNHCR, ‘Asylum Trends 2014: Levels and Trends in Industrialized Countries’ (26 March 2015) <<http://www.unhcr.org/551128679.html>> accessed 25 May 2015, p. 20.

<sup>25</sup> Allan Mackey, ‘Introduction to the Credo Project’, in *Assessment of Credibility by Judges in Asylum Cases in the EU* (n 4) p. 69.

<sup>26</sup> Ibid.

<sup>27</sup> John Barnes & Allan Mackey, ‘The Credo Document: Assessment of Credibility in Refugee and Subsidiary Protection Claims under the EU Qualification Directive: Judicial Criteria and Standards’, in *Assessment of Credibility by Judges in Asylum Cases in the EU* (n 4) p. 100.

<sup>28</sup> See more at section 2.1, below.

of relevant case law. Chapter 5 will sum up the main findings of the study, provide some further analytical discussion as well as a brief presentation of the author's suggestions on how to improve the credibility assessment procedure.

## 2. The Asylum Procedure

### 2.1 The Special Character of the Asylum Procedure

In 2004, the EU adopted a directive setting out rules governing minimum standards on conditions under which refugee status and subsidiary protection status is granted as part of the CEAS,<sup>29</sup> followed by a recast in 2011.<sup>30</sup> The refugee status is based on the member states' obligations under the Refugee Convention and the subsidiary protection status is based on their obligations under the European Convention of Human Rights (ECHR).

An applicant can be granted refugee status if he/she has a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group.<sup>31</sup> An applicant can attain subsidiary protection status if there are substantial grounds for believing there would be a real risk of 'serious harm' if he/she would be returned.<sup>32</sup> Such serious harm includes death penalty/execution, torture/inhuman/degrading treatment or punishment, or a serious threat to life or person due to indiscriminate violence in situations of armed conflict.<sup>33</sup> The Directive also obliges member states to "respect the principle of non-refoulement in accordance with their international obligations."<sup>34</sup> This obligation also emanate from the Refugee Convention<sup>35</sup> and the case law of the ECtHR,<sup>36</sup>

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<sup>29</sup> Council Directive 2004/83/EC of 29 April 2004 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] OJ L. 304/12.

<sup>30</sup> Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L. 337/9 (Qualification Directive).

<sup>31</sup> Ibid. article 2(d).

<sup>32</sup> Ibid. article 2(f).

<sup>33</sup> Ibid. article 15.

<sup>34</sup> Ibid. article 21.

<sup>35</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) article 33.

<sup>36</sup> Jacobs, White & Ovey, *The European Convention on Human Rights*, (5<sup>th</sup> edn Oxford University Press, 2010) pp. 144, 179-182.

forbidding states to expel or return (*refouler*) persons in need of international protection.

The asylum procedure is clearly different from almost all other areas of the domestic law of the EU's member states, which its lawyers and judges in their respective jurisdictions are familiar with. Today, this field of law is rather extensive and specialized but it is still a young branch of law, having only developed in the last 25 years. As a result, formal training in the field of lawyers and judges is often either poor or completely absent, leading them to rely on principles of domestic administrative law. Evidently, what is quite unique is that within the asylum procedure one party is an individual who is a non-national and the other is a state, and significance is put on the future (risk assessment) instead of the past. Also, the factual substance of the claims will be very hard to check and thus reference to the country information in other states is needed and in many cases, the testimony of the applicant is the only source.<sup>37</sup>

Another striking feature is that the Refugee Convention and the ECHR, are so called 'living instruments', like many other related human rights treaties, and should be interpreted in light of social and political development together with a liberal interpretation of rights contra a narrow interpretation of restrictions. This means that the application of the instruments is constantly evolving and changing over time to meet the new needs and circumstances of today's reality.<sup>38</sup>

The asylum procedure is also set apart from other domestic immigration procedures. The asylum decisions are made in the field of 'rights-based' law and not the domestic 'privilege-based' immigration law. Each state is entitled to police its own borders and thereby domestically decide whether or not to

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<sup>37</sup> John Barnes & Allan Mackey, 'The Credo Document: Assessment of Credibility in Refugee and Subsidiary Protection Claims under the EU Qualification Directive: Judicial Criteria and Standards' (*The Credo Document*) in *Assessment of Credibility by Judges in Asylum Cases in the EU* (Wolf Legal Publishers, 2013) (*Assessment of Credibility in the EU*) p. 102.

<sup>38</sup> *Ibid.* p. 103.



grant the privilege to non-nationals to enter and remain in that state. Asylum decisions on the other hand, are derived from the international treaty obligations of the host state which are reinforced by the requirements of the CEAS.<sup>39</sup> Furthermore, when an asylum-applicant enters a member state, they must be treated as potential refugees, as set out in the Refugee Convention, and thereby they are possessing certain rights on arrival. This is so because refugee and subsidiary protection statuses are declaratory, and not constitutive.<sup>40</sup> By contrast, domestic immigration law decisions are made in a constitutive manner.<sup>41</sup>

Another particularity with the asylum procedure is that its judicial independence and impartiality is at risk of being put under pressure from anti-refugee/migrant pressure or other social pressures. This has been illustratively articulated by Sir Stephen Sedley:

*“Asylum law, however, has an aspect which I think makes it unique: the need for it to deal in outcomes which are publicly perceived as having a direct and often unwelcome effect on the lives of the settled population. Asylum judges consequently handle facts and topics which, unlike those addressed by any other branch of the law except crime, are a matter of often vitriolic daily public debate. You can attend fifty social gatherings, you can drink in a hundred bars, where the conversation never comes remotely near the problems of eviction or bankruptcy; but it’s unusual to be in any gathering where immigration does not sooner or later come up, and with it the view that asylum is a tolerated gateway for illegal economic migrants. ... What affects judges in such a situation is not a targeted critique of their own role but an ambient pressure to put a finger in the dyke, to stem the tide, to stop the rot; to reject the stories they hear from asylum-seekers so that they can be sent home. At times this becomes nationality- or ethnicity-specific. ... It does not mean that adjudicators will all lurch in the same direction. There is just as much risk that conscientious judges will overcompensate for the pressures they sense around them. But the hothouse itself is, I think, peculiar to asylum law adjudication.”<sup>42</sup>*

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<sup>39</sup> Ibid. at p. 104.

<sup>40</sup> UNHCR, ‘Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’ (December 2011) (*Handbook*) <<http://www.unhcr.org/3d58e13b4.html>> accessed 25 May 2015, para 28.

<sup>41</sup> *The Credo Document* (n 37) p. 104.

<sup>42</sup> Sir Stephen Sedley, ‘Asylum: Can the Judiciary Maintain its Independence?’ (International Association of Refugee Law Judges World Conference, April 2002)

Also, in the asylum procedure – and arguably more so than in other areas of the law – many applicants will have vulnerabilities inherent in their situation, thus the judge must take into consideration psychological and trauma dimensions affecting them.<sup>43</sup> All judges must recognize – particularly as part of credibility assessments – that not only are some applicants better in articulating their story and background than others, but also that a psychological impairment – often as a result of past persecution or serious maltreatment – will often affect the presentation and evidence of genuine applicants.<sup>44</sup>

Normally, lawyers, judges and government officials in most domestic case law situations are inclined to request for corroborative documentation of a certain claim.<sup>45</sup> By contrast, those genuinely in flight from the risk of being persecuted or severely maltreated, and often directly so by the state, may not be able to access their personal documentation such as passports, medical reports etc. that would be expected as corroboration in the immigration context.<sup>46</sup>

Lastly, another difference worth mentioning is that by its very nature, asylum procedures will usually involve both cross-cultural and language interpretation and translation. This in turn extends to a need to understand subtle cultural, demeanour, gender and linguistic matters. While such issues can arise in other areas of domestic law litigation, they are certainly more the exception than the norm.<sup>47</sup>

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[http://www.iarjl.org/general/images/stories/Credo/S\\_Sedley\\_article\\_IARLJ\\_publication\\_2002.pdf](http://www.iarjl.org/general/images/stories/Credo/S_Sedley_article_IARLJ_publication_2002.pdf)> accessed 2015-04-21, p. 3.

<sup>43</sup> See more in section 3, below.

<sup>44</sup> *The Credo Document* (n 37) p. 107.

<sup>45</sup> *Ibid.* p. 108.

<sup>46</sup> See Qualification Directive (n 30) article 4(5); *Handbook* (n 40) para 196.

<sup>47</sup> *The Credo Document* (n 37) p. 109.

## 2.2 Four Evidentiary Principles

There are four basic evidentiary principles that are necessary to have in mind in order to understand the reasons behind the procedure of credibility assessment in asylum adjudication. Firstly, the burden of proof lies principally on the applicant, but is at the same time shared with the state. Secondly, this does not mean that the applicant has to ‘prove’ his/her case but rather to substantiate his/her application. Thirdly, in some situations, the applicant is granted the ‘benefit of the doubt’, and fourthly, unless the applicant has been provided a chance to comment on adverse evidence, that piece of evidence cannot be used against him/her. These principles are established in Article 4 of the Qualification Directive and in member state’s case law and will be explained below:

While Article 4(1) of the Qualification Directive gives Member States the option<sup>48</sup> to “consider it the *duty of the applicant* to submit as soon as possible all elements needed to substantiate the application”,<sup>49</sup> (emphasis added) it also states that it is the *duty of the Member state in cooperation with the applicant* to assess the relevant elements of the application.<sup>50</sup> The CJEU has explained this shared duty as follows:

*“This requirement that the Member State cooperate therefore means, in practical terms, that if, for any reason whatsoever, the elements provided by an applicant for international protection are not complete, up to date or relevant, it is necessary for the Member State concerned to cooperate*

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<sup>48</sup> The Qualification Directive provides minimum standards, thus any other standard adopted by Member States must be of a ‘more favourable’ nature. For full discussion See the section called ‘Residual doubts and Article 4 QD’, in International Association of Refugee Law Judges, ‘Assessment of Credibility in Refugee and Subsidiary Protection claims under the EU Qualification Directive: Judicial Criteria and Standards’ (March 2013) (*Residual doubts and Article 4 QD*) <[https://www.iarlj.org/general/images/stories/Credo/Credo\\_Paper\\_March2013-rev1.pdf](https://www.iarlj.org/general/images/stories/Credo/Credo_Paper_March2013-rev1.pdf)> accessed 24 April 2015, pp. 48-50.

<sup>49</sup> Qualification Directive (n 30) article 4(1).

<sup>50</sup> Ibid.

*actively with the applicant, at that stage of the procedure, so that all the elements needed to substantiate the application may be assembled.”<sup>51</sup>*

As a result of the inherent peculiarities of the asylum procedure, it is not required that the applicant can prove the asserted facts. Article 4 of the Qualification Directive does not use the term ‘proof’ or ‘prove’, rather it specifically refers to the duty to “substantiate the application”. The wording in Article 4(1), (2) and (3)<sup>52</sup> suggest that this means, simply to provide statements and submit documentary or other evidence in support of an application.<sup>53</sup> The ECtHR has acknowledged the hardships that applicants are faced with in relation to obtaining direct documentary evidence, and has stated that they should only be required to do so “to the greatest extent practically possible”.<sup>54</sup>

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<sup>51</sup> Case C-277/11, *M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, [2012] ECR I-0000, para. 66; See also *R.C. v. Sweden* (App no 41827/07) ECHR 9 March 2010, para. 50; *Handbook* (n 40) paras 195-197.

<sup>52</sup> Wording as follows:

*“1. Member States may consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection...*

*2. The elements referred to in paragraph 1 consist of the applicant’s statements and all the documentation at the applicant’s disposal regarding the applicant’s age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection.*

*3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:*

*(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied;*

*(b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;*

*(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant’s personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;*

*(d) whether the applicant’s activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether those activities would expose the applicant to persecution or serious harm if returned to that country;*

*(e) whether the applicant could reasonably be expected to avail himself or herself of the protection of another country where he or she could assert citizenship.”*

<sup>53</sup> UNHCR, ‘Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report’ (May 2013) <<http://www.refworld.org/docid/519b1fb54.html>> accessed 24 May 2015 (*Beyond Proof*) p. 85.

<sup>54</sup> *Said v. The Netherlands* (App no 2345/02) ECHR 2005-VI 275, para 49.

Article 4(5) of the Qualification Directive also contains a clause giving the applicant evidentiary relief, a principle called ‘benefit of doubt’,<sup>55</sup> stated as follows:

*“... where aspects of the applicant’s statements are not supported by documentary or other evidence, those aspects shall not need confirmation when the following conditions are met:*

*(a) The applicant has made a genuine effort to substantiate his application;*

*(b) All relevant elements at the applicant’s disposal have been submitted, and a satisfactory explanation has been given regarding any lack of other relevant elements;*

*(c) The applicant’s statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant’s case;*

*(d) The applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and*

*(e) The general credibility of the applicant has been established.”*

Another evidentiary principle that is beneficiary for the applicant is that of *audi alteram partem* or ‘equality of arms’. This means that ‘the other side’ must be heard and as such, that if the applicant has not had the opportunity to explain, refute or provide mitigating circumstances in respect of contradictory or confusing evidence that is material and could potentially undermine core elements of his/her claim, that piece of evidence should not be taken into account in the credibility assessment.<sup>56</sup>

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<sup>55</sup> See also, *R.C. v. Sweden* (n 51) para 50; *N. v. Sweden* (App no 23505/09) ECHR 20 July 2010, para 53; *F.H. v. Sweden* (App no 32621/06) ECHR 20 January 2009, para. 95; *Handbook* (n 40) para 203-204.

<sup>56</sup> See *Residual doubts and Article 4 QD* (n. 48) p. 36, citing several Member State cases from Germany, Hungary and the Czech Republic.

# 3. Credibility assessment: legal standards and psychological research

## 3.1 Introduction

Despite the EU's aim of establishing a CEAS, a common understanding of, or approach to the credibility assessment is absent among Member States. Article 4 of the Qualification Directive together with some relevant provisions in the Asylum Procedures Directive<sup>57</sup> provide very limited guidance, and apart from that, the EU asylum *acquis* is silent on this core aspect of the asylum procedure.<sup>58</sup>

Even so, some judicial guidance can be drawn based on principles of EU administrative law, including the right to a fair and public hearing, proportionality, legal certainty, equality of arms and the right to effective remedy.<sup>59</sup> These principles have together with already existing state practice in the asylum area formed the following basic criteria that are relevant to credibility assessment of testimony: Consistency and coherence, sufficiency of detail and specificity, plausibility, and demeanour. They will be described below, accompanied with relevant psychological research.<sup>60</sup>

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<sup>57</sup> Council Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L. 180/60 (Asylum Procedures Directive).

<sup>58</sup> Madeline Garlick, 'Selected aspects of UNHCR's research findings and analysis in the 'Beyond Proof' report', in Carolus Grütters, Elspeth Guild & Sebastiaan de Groot, *Assessment of Credibility by Judges in Asylum Cases in the EU* (Wolf Legal Publishers, 2013) p. 51-52.

<sup>59</sup> These judicial principles can be found in the core instruments of the EU – both in primary legislation such as the Charter of Fundamental Rights of the European Union; and in secondary legislation consisting of regulations and directives relating to the implementation of the CEAS, in particular the already mentioned Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L. 337/9 (Qualification Directive), the Asylum Procedures Directive (n 57), and the ECHR, as well as in case law from the domestic courts of EU Member States, see John Barnes & Allan Mackey, 'The Credo Document: Assessment of Credibility in Refugee and Subsidiary Protection Claims under the EU Qualification Directive: Judicial Criteria and Standards' (*Credo Document*) in *Assessment of Credibility by Judges in Asylum Cases in the EU* *ibid.* p. 126.

<sup>60</sup> See section 3.2-3.6, below.

From a psychological perspective, the indicators that are used to assess the credibility of the applicants' statements, are based on several assumptions on how people function, including those about human memory, behaviour, attitudes, values, how a genuine account is presented and perceptions of and responses to risk.<sup>61</sup> Undeniably, it is commonly assumed that human memory, perceptions and behaviour conform to a certain norm, and that an applicant who deviates from this norm may indicate that he/she lacks credibility. Conversely, psychological scientific research has shown that these assumptions that decision-makers and interviewers usually make may not be in harmony with what is now known about human memory, perceptions, and behaviour. The research actually indicates that there is no such norm, and that human memory, perceptions and behaviour come within a wide variety and unpredictability, and that these elements are affected by many different factors and circumstances.<sup>62</sup>

In order to substantiate their application, applicants are required to recall relevant past (and present) facts to substantiate their application and to do so, they must rely on their memory. Therefore, it is important that decision-makers have realistic expectations of what an applicant should be able to remember.<sup>63</sup> Scientific research in the field of psychology reveals that the variability in a person's ability to record, retain, and retrieve memories is wide-ranging.<sup>64</sup> Many people struggle with recalling memories and facts of past events, and some people appear to simply be able to do this more easily than others. In addition, when it comes to memories of the most traumatic, important, or recent life events, psychological research has consistently

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<sup>61</sup> J Herlihy, K Gleeson, S Turner, 'What Assumptions about Human Behaviour Underlie Asylum Judgments?' (2010) 22 Intl J Ref L 351, p. 351.

<sup>62</sup> See generally J Cohen, 'Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers' (2001) 13 Intl J Ref L 293, pp. 293-309 (*Questions of Credibility*).

<sup>63</sup> See generally H Evans Cameron, 'Refugee Status Determinations and the Limits of Memory' (2010) 22 Intl J Ref L 469, pp. 469-511.

<sup>64</sup> *Questions of Credibility* (n 62).

shown that such memories can be difficult to retrieve and recall with any accuracy.<sup>65</sup>

It is more likely for asylum applicants to have experienced traumatic events than it is for the general population.<sup>66</sup> Memories of traumatic experiences differ considerably from normal memories,<sup>67</sup> and the need to cope with these experiences also affects the memory.<sup>68</sup> In addition, traumatic experiences also effects behaviour.<sup>69</sup> People who suffer from post-traumatic stress disorder (PTSD), show symptoms of sensory encoding of the events, conscious and unconscious avoidance of memories of the event, distressing re-experiences of the events, poor concentration, irritability and other hyper-arousal symptoms.<sup>70</sup> These difficulties can also be experienced by applicants not satisfying the full range of criteria that are necessary to receive a psychiatric diagnosis as PTSD.<sup>71</sup>

Persons who have experienced traumatic events may also experience dissociation.<sup>72</sup> If dissociated at the time of when the traumatic event takes

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<sup>65</sup> C A Morgan-III, et al., 'Accuracy of Eyewitness Memory for Persons Encountered during Exposure to Highly Intense Stress' (2004) 27 Intl J L & Psychiatry 265, pp. 265–729; T Valentine, J Mesout, 'Eyewitness Identification under Stress in the London Dungeon' (2009) 23 Applied Cognitive Psychology 151, pp. 151–161.

<sup>66</sup> See e.g. S Dahl, A Mutapcic, B Schei, 'Traumatic Events and Predictive Factors for Posttraumatic Symptoms in Displaced Bosnian Women in a War Zone' (1998) 11 J Traumatic Stress 137, pp. 137–145; C Gorst-Unsworth, E Goldenberg, 'Psychological Sequelae of Torture and Organised Violence Suffered by Refugees from Iraq. Trauma-Related Factors Compared with Social Factors in Exile' (1998) 172 British J Psychiatry, pp. 90–94; M Hollifield et al., 'Measuring Trauma and Health Status in Refugees: A Critical Review' (2002) 288 J Am Medical Ass, pp. 611–621.

<sup>67</sup> J Herlihy, S Turner, 'The Psychology of Seeking Protection' (2009) 21 Intl J Ref L, 171 p. 176; J Herlihy, L Jobson, S Turner, 'Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum' (2012) 26 Applied Cognitive Psychology 661, pp. 661–676 (*Just Tell Us What Happened to You*).

<sup>68</sup> *Questions of Credibility*, (n 62) pp. 293–309; see also Australian Government, 'Guidance on Vulnerable Persons' (June 2012) <<http://www.mrt-rrt.gov.au/Files/HTML/GuidelineVulnerablePersonsMarch15JUL.html>> accessed 25 May 2015, paras 64 and 92.

<sup>69</sup> *Just Tell Us What Happened to You*, (n 67).

<sup>70</sup> American Psychiatric Association, 'Diagnostic and statistical manual of mental disorders' (5<sup>th</sup> edn. APA, 2013) section II; see also *Guidance on Vulnerable Persons* (n 68) para. 79.

<sup>71</sup> J Herlihy, S Turner, 'Should Discrepant Accounts Given by Asylum Seekers be Taken as Proof of Deceit?' (2006) *Torture* 81, p. 86.

<sup>72</sup> Dissociation is described as the "disruption in the usually integrated functions of consciousness, memory, identity, or perception of the environment": *Diagnostic and statistical manual of mental disorders* (n. 70); D Bögner, J Herlihy, C Brewin, 'Impact of



place, it may hinder the person's encoding of the event in memory. The applicant may then in turn experience something called *dissociative amnesia*, which is, simply put, an inability to remember some or all aspects of the happening, because the event itself, or aspects of it, was never encoded to begin with.<sup>73</sup>

## 3.2 Consistency and coherence

*“It is considered inconsistent that in your screening interview you claimed that you surrendered at Vattuvakkal, then detained at Mullaitivu and then transferred to Omanathy, whereas in your asylum interview you claimed to have first surrendered at Mullaitivu. Your inability to remain consistent about where you were when you surrendered casts doubt on the veracity of your claim”<sup>74</sup>*

### 3.2.1 Legal standards

Consistency and coherence as credibility indicators have been used synonymously. While consistency seems to be a more clear concept and coherence a more elusive one, they tend to mean the same thing in practice.<sup>75</sup> Internal consistency – or coherence – means that all of the applicant's statements, including the statements presented by the applicant from their first meetings, applications, personal interviews and examination at all stages of processing, should be consistent within themselves and with each other. The applicant's statements should also be consistent with all the other external objective evidence, including duly weighted Country of Origin Information (COI), expert evidence and any other relevant evidence.<sup>76</sup> If discrepancies are

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Sexual Violence on Disclosure during Home Office Interviews' (2007) 191 *British J Psychiatry*, pp. 75–78.

<sup>73</sup> *The Psychology of Seeking Protection* (n 67) p. 178.

<sup>74</sup> United Kingdom Home Office Refusal Letter concerning an asylum seeker from Sri Lanka, cited in Amnesty International, 'A question of credibility: Why so many initial asylum decisions are overturned on appeal in the UK' (April 2013)

<[http://www.amnesty.org.uk/resources/question-credibility-why-so-many-initial-asylum-decisions-are-overturned#.VWIG\\_JWIrIU](http://www.amnesty.org.uk/resources/question-credibility-why-so-many-initial-asylum-decisions-are-overturned#.VWIG_JWIrIU)> accessed 25 May 2015 (*A Question of Credibility*) p. 21.

<sup>75</sup> See UNHCR, 'The Heart of the Matter - Assessing Credibility when Children Apply for Asylum in the EU' (May 2014) <<http://www.refworld.org/docid/55014f434.html>> accessed 25 May 2015 (*Heart of the Matter*) pp. 153-155.

<sup>76</sup> See Qualification Directive (n 59) article 4(5)(c); UNHCR, 'Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the

identified (internally or externally), these findings should be clearly explained to the applicant and he/she must be given the chance to respond. The responses and explanations given by claimants when challenged on the apparent contradictions must be taken into account.<sup>77</sup> Internal consistency is thus an indicator of credibility, and inconsistency is indicative of non-credibility. On the other hand, decision-makers may also equate consistency with a rehearsed testimony.<sup>78</sup>

Even though it has been recognized repeatedly – by international judicial and monitoring organs,<sup>79</sup> as well as by national jurisprudence<sup>80</sup> – that minor inconsistencies should not generally be seen to undermine the credibility of the asserted fact, there are still examples of cases from Member States of the EU where minor inconsistencies relating to precise figures have been used to

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1967 Protocol Relating to the Status of Refugees' (December 2011) (*Handbook*) <<http://www.unhcr.org/3d58e13b4.html>> accessed 25 May 2015, paras 42, 197; UNHCR, 'Note on Burden and Standard of Proof in Refugee Claims' (December 1998) <<http://www.refworld.org/docid/3ae6b3338.html>> accessed 25 May 2015, para. 11; International Association of Refugee Law Judges, 'Assessment of Credibility in Refugee and Subsidiary Protection claims under the EU Qualification Directive: Judicial criteria and standards' (2013) <[https://www.iarlj.org/general/images/stories/Credo/Credo\\_Paper\\_March2013-rev1.pdf](https://www.iarlj.org/general/images/stories/Credo/Credo_Paper_March2013-rev1.pdf)> accessed 24 April 2015 (*Assessment of Credibility: Judicial Criteria and Standards*) pp. 33-35.

<sup>77</sup> *R.C. v. Sweden* (App no 41827/07) ECHR 9 March 2010, para. 52; *Said v. The Netherlands* (App no 2345/02) ECHR 2005-VI 275, para. 51; *M. v. Sweden* (App no 22556/05) ECHR 6 September 2007; UN Committee Against Torture, 'General Comment No. 1' (1997) UN Doc A/53/44, annex IX; United Kingdom Home Office, 'Asylum Policy Instruction: Assessing credibility and refugee status' (January 2012) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/397778/ASSESSING\\_CREDIBILITY\\_AND\\_REFUGEE\\_STATUS\\_V9\\_0.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/397778/ASSESSING_CREDIBILITY_AND_REFUGEE_STATUS_V9_0.pdf)> accessed 25 May 2015, sections 6.6.2-5.6.3; *Assessment of Credibility: Judicial Criteria and Standards* (n 76) pp. 33-35, citing the following cases: United Kingdom, *Y v. SHHD* [2006] EWCA Civ 1223; Poland, Sacp File 11OSK 902/10 (20 April 2011); Croatia, *Re. Miroshnikov* (15 June 2012) ACZ No Usl-1287/12; Norway, *Case HR-201102133-A* (16 November 2011) Norwegian Supreme Court, 2011/817; Netherlands: *Malumba* ABRvS (27 January 2003), No. 2002062971, JV 2003/103.

<sup>78</sup> UNHCR, 'Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report' (May 2013) <<http://www.refworld.org/docid/519b1fb54.html>> accessed 24 May 2015 (*Beyond Proof*) p.164.

<sup>79</sup> See for example *R.C. v. Sweden* (n 77) para. 52; ICTY, *Prosecutor v. Dragoljub Kumarac, Radomir Kovac and Zoran Vukovic* (Trial Judgment), ICTY-96-23-T and 96-23/1-T (22 February 2001), para. 564.

<sup>80</sup> See *Beyond Proof* (n 78) p. 151 citing the following cases: *A v. the head of the State Agency for Refugees*, Supreme Administrative Court of Bulgaria (Върховен административен съд) (30 June 2008) 11774/2007; *L. O. v. Ministry of Interior*, Supreme Administrative Court of Czech Republic (Nejvyšší správní soud) (28 July 2009) 5 Azs 40/2009-74.

reject the core aspects of an applicant's account.<sup>81</sup> It has also been observed that one of the most common inconsistencies cited as an indicator undermining credibility, related to temporal information such as frequency, dates and duration of events.<sup>82</sup>

### 3.2.2 Psychological research

The practice of using 'consistency' as an indicator is based on the assumption that liars are more likely to be inconsistent in their testimony, seemingly because it is assumed that it is difficult to remember and sustain a story that is fabricated. Also, when challenged, it is supposed that persons who are lying try to save the situation and conceal their inconsistencies by altering the facts. Simultaneously, it is also assumed that if applicants actually are genuine in their statements and actually have experienced what they recount, then they will be able to, largely, recall these events in an accurate and consistent manner.<sup>83</sup> By contrast, research in the field shows that deceptive consecutive accounts are consistent to at least the same extent as truthful statements.<sup>84</sup> That alone raises questions as to the adequacy of using consistency as an indicator of credibility.

It is important to note that memories are not a *record* of the event themselves – they consist of people's *experiences* of events. Thus, the content that has been stored as a memory, is reflecting the individual's conscious and unconscious experience of what happened and this can furthermore change with each recall of the memory.<sup>85</sup> When asked to recall memory, the reconstructive process itself demands a variety in content and output order. Simply put, no two recounts can be identical resulting in that some

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<sup>81</sup> Ibid. pp. 150-151.

<sup>82</sup> Ibid. p. 152.

<sup>83</sup> Ibid. p. 149.

<sup>84</sup> Pär Anders Granhag, Leif A. Stromwall and Maria Hartwig, 'Granting Asylum or Not? Migration Board Personnel's Beliefs about Deception' (2005) 31 J Ethn & Migr Stud 29, p. 43; See also *Should Discrepant Accounts Given by Asylum Seekers be Taken as Proof of Deceit?* (n 71) p. 83; *Questions of Credibility* (n 62) pp. 293–309.

<sup>85</sup> M Conway, E Holmes, *Guidelines on Memory and the Law: Recommendations from the Scientific Study of Human Memory* (British Psychological Society Press, Leicester 2008) (*Memory and the Law*) p. 2.

inconsistency is inevitable.<sup>86</sup> Since autobiographical memories are influenced by and reconstructed according to what is known, they change over time, sometimes significantly.<sup>87</sup>

Another psychological phenomenon that is present in repeated recalls, is known as *hypermnesia* and simply means that people remember more details for each time they get to repeat what happened during a certain event.<sup>88</sup> Studies have shown that a second recount of memory will elaborate the original version with much new detail added and few verbatim repetitions.<sup>89</sup> Because of this, if new information emerges in the applicant's testimony, that was not provided in an initial interview may not be an indicator of inconsistency and thus a lack of credibility – as the legal standards has it – but of the normal functional of memory.<sup>90</sup> According to certain studies, psychologists have considered that a person demonstrates a high degree of consistency when directly contradicting 20 per cent of the previous statement.<sup>91</sup>

The reconstruction of a memory is guided by the context in which it is recalled. Accordingly, when we retell events, we may take on different perspectives for different purposes and audiences.<sup>92</sup> Therefore, if the

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<sup>86</sup> S Black, L J Levine, T M Laulhere, 'Autobiographical Remembering and Hypermnesia: A Comparison of Older and Younger Adults' (1999) 14 *Psychology and Ageing* 671, pp. 671–682.

<sup>87</sup> *Refugee Status Determinations and the Limits of Memory* (n 63) p. 470. See also, *The Psychology of Seeking Protection* (n 67) pp. 171–192; J Cohen, 'Errors of Recall and Credibility of Testimony: Can Omissions and Discrepancies in Successive Statements Reasonably Be Said to Undermine Credibility of Testimony' (2001) 69 *Medico-Legal J*, pp. 25–34.

<sup>88</sup> D G Payne, 'Hypermnesia and Reminiscence in Recall: A Historical and Empirical Review' 101 (1987) *Psychological Bulletin*, pp. 5–27; *Refugee Status Determinations and the Limits of Memory* (n 63) p. 495.

<sup>89</sup> S J Anderson, G Cohen, S Taylor, 'Rewriting the Past: Some Factors Affecting the Variability of Personal memories' (2000) 14 *Applied Cognitive Psychology* 435, pp. 435–454; J Herlihy, P Scragg, S Turner, 'Discrepancies in Autobiographical Memories: Implications for the Assessment of Asylum Seekers: Repeated Interviews Study' (2002) 324 *British Medical J*, pp. 324–327.

<sup>90</sup> *Refugee Status Determinations and the Limits of Memory*, (n 63) p. 496

<sup>91</sup> *Ibid.* p. 510.

<sup>92</sup> Marita Eastmond, 'Stories as Lived Experience: Narratives in Forced Migration Research' (2007) *J Ref Stud* 248, pp. 248–264 (*Stories as Lived Experience*); B Tversky, E J Marsh, 'Biased Retellings of Events Yield Biased Memories' (2000) 40 *Cognitive Psychology*, p 1–38;

statements are delivered in different circumstances or to different people, the inconsistencies can be explained by this natural method of reconstruction.

When it comes to temporal information and the recalling of it, inconsistency between statements that regards those facts is not an indicator of non-credibility, rather, it is the opposite because of its likelihood of inaccurate estimates. For example, if we try to recall the date of an event or describe its frequency or duration, we estimate and this estimation is likely to be inaccurate. This does not mean that we are lying about the event itself, but rather that we are genuinely trying to recall this piece of information from our real memory. If asked to describe or date the same event again after a period of time, we will again estimate our answer, and it may be different from the last time.<sup>93</sup> Consequently, inconsistencies as regards temporal information may be indicative of the applicant trying to remember his/hers actual experience, rather than what he or she has said previously.

Separate specific instances may fuse to generic or blended memories, and this is called ‘schema’.<sup>94</sup> This kind of fusion may occur regardless of whether the events were significant, mundane or distressing.<sup>95</sup> As such, it can be very hard to accurately recall separate experiences that have been repeated, and it can also lead to entire instances being omitted in the applicant’s testimony.<sup>96</sup> Dissociation due to traumatic events, that results in the applicant being distracted or detached may also be explanatory to why there are gaps or incoherence in an applicant’s testimony.<sup>97</sup>

Lastly, there is undeniable evidence asserting that memories of traumatic events – such as sexual violence – differ from normal memories,<sup>98</sup> and that

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<sup>93</sup> *Refugee Status Determinations and the Limits of Memory*, (n 63) note p. 491; *Biased Retellings of Events Yield Biased Memories*, *ibid.*; *Stories as Lived Experience*, *ibid.*

<sup>94</sup> J A List, ‘Age and Schematic Differences in Reliability of Eyewitness Testimony’ (1986) 22 *Development Psychology*, pp. 50–57.

<sup>95</sup> *Refugee Status Determinations and the Limits of Memory* (n 63) p. 482.

<sup>96</sup> S Bidrose, G S Goodman, ‘Testimony and Evidence: A Scientific Case Study of Memory for Child Sexual Abuse’ (2000) 14 *Applied Cognitive Psychology* 197, p. 209.

<sup>97</sup> *The Psychology of Seeking Protection* (n 67) p. 178.

<sup>98</sup> *Ibid.* p. 176; *Impact of Sexual Violence on Disclosure during Home Office Interviews* (n 72) pp. 75–81; M Fazel, J Wheeler, J Danesh, ‘Prevalence of Serious Mental Disorder in

the need of coping with such experiences affects the memory.<sup>99</sup> Symptoms of PTSD include dissociation, sensory encoding, recall deficit, circumscribed memory retention, poor concentration and avoidance.<sup>100</sup> Also, other forms of mental illness effects the ability to recall memories. Applicants suffering from depression or an anxiety disorder may experience difficulty in recalling past events or recalling events consistently.<sup>101</sup> It could also be the case that the applicant has not memorized verbal narrative of the occurred trauma, but instead only memorized sensory impressions such as sounds, smells, emotions, sensations, or visual images like flashbacks and nightmares.<sup>102</sup> Usually these memories cannot be disclosed voluntarily, but are provoked by reminders or triggers of the traumatic experience. When this happens, the applicant may relive an aspect of the event as though it is presently occurring.<sup>103</sup> Because of this, such applicants may be incapable of producing a coherent verbal narrative because there exists none, resulting in that only impressions or fragments of the experience may be conveyed.<sup>104</sup>

### 3.3 Sufficiency of detail and specificity

*“You were also vague about the details. At your substantive interview, you admitted that you do not know the dates or days of the week when he abused you. You said that he tried to abuse you in Syria but were unable to say when or provide any details. It is therefore not accepted that you were sexually abused”<sup>105</sup>*

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7000 Refugees Resettled in Western Countries: A Systematic Review’ (2005) 365 *Lancet*, pp. 1309–1314; *Questions of Credibility*, (n 62) pp. 293–309.

<sup>99</sup> *Questions of Credibility*, *ibid.*

<sup>100</sup> *Should Discrepant Accounts Given by Asylum Seekers be Taken as Proof of Deceit?* (n 71) p. 85.

<sup>101</sup> *Ibid.* p. 90; *Impact of Sexual Violence on Disclosure during Home Office Interviews* (n 72) pp. 75–81.

<sup>102</sup> C Brewin, J D Gregory, M Lipton, N Burgess, ‘Intrusive Images in Psychological Disorders: Characteristics, Neural Mechanisms and Treatment Implications’ (2010) 117 *Psychological Review* 210, pp. 210–232; *Questions of Credibility*, (n 62) pp. 293–309.

<sup>103</sup> *The Psychology of Seeking Protection* (67) p. 176.

<sup>104</sup> *Should Discrepant Accounts Given by Asylum Seekers be Taken as Proof of Deceit?* (n 71) p. 86.

<sup>105</sup> UNCHR’s review of EU Member State case file, cited in *Beyond Proof*, (n 78) p. 141.

### 3.3.1 Legal standards

To demonstrate that the claim is not manifestly unfounded, the applicant's statement should be sufficiently detailed and substantively presented, at least in respect of the most material facts of the claim, with rare exceptions based on the claimant's incapacity where factors such as age, gender, education or other vulnerabilities are relevant.<sup>106</sup>

There are examples of national cases, in which decision-makers have considered the applicant's inability to recall a date or duration as an indicator that is undermining their credibility. It has been considered as indicative of a lack of credibility in cases where the applicants have failed to provide detailed answers to questions that are relating to common objects, such as the design of coins or identity documents etc. There are also examples of when applicants have been expected to recall the details of repeated events. In general, sufficiency of detail and specificity is a credibility indicator that is commonly relied upon and decision-makers expect a high level of detail that the applicant should be able to provide as regards past events and facts. Superficial, brief, or vague responses are indicative of non-credibility and so is a failure to convey an impression that an experience has been 'lived'.<sup>107</sup>

### 3.3.2. Psychological research

Firstly, it has to be noted that research relating to cues to deception shows that in general, liars actually do include fewer details in their statements, than truth-tellers<sup>108</sup> and as such, this credibility indicator does have some scientific basis in psychological research. However, there are several situations in which this indicator is not applicable: When it comes to temporal information (such as dates, times, duration, frequency and sequence), verbatim of verbal exchanges; proper names; appearance of common objects; and peripheral

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<sup>106</sup> *Credo Document* (n 59) pp. 128, 133; See e.g. *Achmadov and Bagurova v. Sweden* (App no 34081/05) ECHR 10 July 2007, para 20.

<sup>107</sup> *Beyond proof* (n 78) p. 148. See also Sweden Migration Court of Appeal cases MIG 2007:12 and MIG 2013:25.

<sup>108</sup> *Granting Asylum or Not? Migration Board Personnel's Beliefs about Deception* (n 84) p. 43.

information, these are disreputably unreliable and may be difficult or even impossible to recall.<sup>109</sup> It has been proven that such details are extremely difficult for anyone – not to mention asylum applicants – to recall with any accuracy, if at all, even with regard to events that were significant or traumatic.<sup>110</sup>

An individual's recall of dates, duration and frequency is almost always reconstructed from guesswork and estimation, and is seldom accurate,<sup>111</sup> and this is the case when it comes to both autobiographical experiences and other events.<sup>112</sup> If we intentionally commit dates to memory and give them regular attention, as some persons do, for example when it comes to anniversaries and birthdays, we may be able to accurately recall these dates. However research shows that the dates that people commit to memory in this way are very personal and that we do not reliably or necessarily commit to memory the dates of events, including those emotionally significant or traumatic.<sup>113</sup>

According to research, it is also difficult to recall verbal exchanges verbatim, as well as proper names.<sup>114</sup> Although individuals differ widely in their ability to remember proper names, and it is common that we even forget the names of acquaintances and friends, some persons have an exceptionally poor ability of remembering proper names.<sup>115</sup>

As regards common objects such as identity cards, currency etc., studies demonstrate that our visual memory is particularly poor because we do not record information we deem not to serve any useful function.<sup>116</sup> This may also be applicable to larger everyday objects such as bridges or buildings. While a person's memory for an environment will be likely to be organized around

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<sup>109</sup> *Refugee Status Determinations and the Limits of Memory*, (n 63) p. 470; S A Christianson and M A Safer, 'Emotional Events and Emotions in Autobiographical Memories', in D C Rubin (ed.), *Remembering our Past: Studies in Autobiographical Memory* (Cambridge University Press, 1995) pp. 218–241.

<sup>110</sup> *Refugee Status Determinations and the Limits of Memory* (n. 63) p. 469.

<sup>111</sup> *Ibid.* pp. 470 and 475.

<sup>112</sup> *Ibid.* pp. 471–472.

<sup>113</sup> *Ibid.* p. 473.

<sup>114</sup> *Ibid.* p. 480.

<sup>115</sup> *Ibid.* pp. 486–488.

<sup>116</sup> *Ibid.* p. 480.



key landmarks such as a supermarket or monument, this can also distort memories of distance, spatial layout and estimates of size. If an applicant is failing to accurately or at all describe such common objects, this does not necessarily indicate a lack of credibility.<sup>117</sup>

Logically, we only tend to recall those aspects of an event that capture our attention, usually on a subjective basis. It is unlikely that we would accurately remember details diverging from the centre of our focus even if they occurred at such a close range so we could still see and hear them. It is therefore not reasonable for decision-makers to expect applicants to be able to recall every detail of an event, even if those details would be considered as memorable by the decision-maker.<sup>118</sup> This is especially so when it comes to people who have experienced traumatic events, they are likely to remember some details at the expense of others. They tend to have a reduced recall of peripheral details, and logically, better remember those central details, on which they have focused.<sup>119</sup> When it comes to peripheral details, scientific studies demonstrate that discrepancies may arise more frequently.<sup>120</sup>

When it comes to repeated events, it is neither reasonable to expect persons to accurately recall the details, as our memories of these repetitive happenings are likely to merge into a new generic or fused memories. In addition, in some cases earlier memories can be erased and replaced by a more recent, similar memory.<sup>121</sup>

Applicants who have lived through traumatic events often display symptoms of avoidance. Thus they can avoid situations that might trigger a recall, and

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<sup>117</sup> *Memory and the Law* (n 85) p. 21.

<sup>118</sup> *Refugee Status Determinations and the Limits of Memory* (n 63) pp. 483-484.

<sup>119</sup> J Herlihy, S Turner, 'Asylum Claims and Memory of Trauma: Sharing our Knowledge' (2007) 191 *British J Psychiatry*, p. 3.

<sup>120</sup> *Should Discrepant Accounts Given by Asylum Seekers be Taken as Proof of Deceit?* (n 71) pp. 86 and 88; *The Psychology of Seeking Protection* (n 67) p. 179; S A Christianson, E F Loftus, H Hoffman, G R Loftus 'Eye Fixations and Memory for Emotional Events' (1991) 17 *J Experimental Psychology, Learning, Memory and Cognition*, pp. 693-670.

<sup>121</sup> *Refugee Status Determinations and the Limits of Memory* (n 63) p. 481; *Questions of Credibility* (n 62) pp. 293-309.

avoid to talk and think about the trauma.<sup>122</sup> In order to disclose all relevant information in an asylum interview, one would need to suppress this perfectly normal coping mechanism and survival strategy and therefore it may be extremely distressing and potentially detrimental for the applicant to disclose such traumatic memories.<sup>123</sup> Besides, applicants may not even be aware of that they are avoiding situations or triggers that could cause traumatic memories to recur as this mechanism can be completely subconscious.<sup>124</sup> This survival strategy may be an explanation to e.g., why an applicant omits relevant information from his or her testimony, why an applicant is vague in relevant facts, and even why he or she apparently refuses to give an answer a question.<sup>125</sup>

Another explanation to why the testimony is vague or has a lack of detail can be that the applicant suffers from dissociation.<sup>126</sup> Not only can this happen during the traumatic event (and thus disturb the memory encoding as explained above) but it may also occur when the person is asked to recall a traumatic event. This results in the applicant appearing as detached and distracted and/or as unwilling of cooperation.<sup>127</sup>

Lastly, it is also important to have in mind that a lack of details can also be explained by the fact that the applicant may come from a culture where it is not valuable or taught to be detailed in memory recalls in the same way as it is in the Western cultures.<sup>128</sup> Likewise, it is also noteworthy that the theory that an individual who is recounting a genuine experience is more expressive

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<sup>122</sup> *Diagnostic and statistical manual of mental disorders* (n 71); See also Swedish Migration Board (Migrationsverket) 'Gender-Based Persecution: Guidelines for Investigation and Evaluation of the Needs of Women for Protection' (28 March 2001) <[http://www.refworld.org/publisher,SWE\\_MIGRATION,,SWE,3f8c1a654,0.html](http://www.refworld.org/publisher,SWE_MIGRATION,,SWE,3f8c1a654,0.html)> accessed 25 May 2015, p.14.

<sup>123</sup> *Should Discrepant Accounts Given by Asylum Seekers be Taken as Proof of Deceit?* (n 71) p. 83.

<sup>124</sup> *Just Tell Us What Happened to You* (n 67) pp. 661–676.

<sup>125</sup> *Impact of Sexual Violence on Disclosure during Home Office Interviews* (n 72) pp. 75–81.

<sup>126</sup> *The Psychology of Seeking Protection* (n 67) p. 178.

<sup>127</sup> *Impact of Sexual Violence on Disclosure during Home Office Interviews* (n 72) pp. 75–81.

<sup>128</sup> *Just Tell Us What Happened to You* (n 67) pp. 661–676.

and detailed is based on a Western gender and cultural perspective that may be completely alien to others.<sup>129</sup>

### 3.4 Plausibility

*“It is not accepted that a proscribed and illegal terrorist organisation, one which would of needed to rely upon secrecy in order to conduct its affairs in government controlled areas, would have brazenly walked up to complete strangers in order to ask them to join their terrorist organisation. It is therefore not accepted that you were contacted by the LTTE as claimed”<sup>130</sup>*

#### 3.4.1 Legal standards

The claims including explanations by the applicant of alleged past and present ‘facts’ should be plausible.<sup>131</sup> In the framework of the credibility assessment, the meaning of the term ‘plausible’ is not clear. A variety of explanations have been suggested such as that for statements to be plausible, they should be ‘believable and consistent’ and plausible with ‘common sense’.<sup>132</sup> Linguistically, the term means “seeming reasonable or probable”.<sup>133</sup> Similarly, it has been suggested to refer to ‘unlikely events’ or ‘strange or remarkable statements’.<sup>134</sup>

Notwithstanding all the cautions relating to the application of plausibility as a credibility indicator, it appears that jurisdictions are reluctant to discard it completely. There are examples of domestic case officer guidance and cases that demonstrates a widespread reliance on plausibility as a credibility indicator.<sup>135</sup>

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<sup>129</sup> Ibid.

<sup>130</sup> United Kingdom Home Office Refusal Letter concerning an asylum seeker from Sri Lanka, cited in *A Question of Credibility* (n 74) p. 17.

<sup>131</sup> Qualification Directive (n 59) article 5(4)(c); See also *Handbook* (n 76) para. 204; *Note on Burden and Standard of Proof* (n 76) para. 11.

<sup>132</sup> *Beyond proof* (n 78) citing the European Asylum Curriculum, Module 7, section 3.2.

<sup>133</sup> Oxford Dictionaries, ‘Plausible’ <<http://oxforddictionaries.com/definition/plausible>> accessed 25 May 2015.

<sup>134</sup> *Beyond proof* (n 78) citing the Immigration and Naturalisation Service (Netherlands) Working Instruction 2010/14, paragraph 4.1(c).

<sup>135</sup> *Beyond Proof* (n 78) p. 181; see also Swedish Migration Court of Appeal, MIG 2007:37.

### 3.4.2 Psychological research

According to psychology, we make judgments by referring to our own past experiences, and when faced with a new and complex situation, we make these judgments by comparing the new circumstances with another more simple set of circumstances, already known by us.<sup>136</sup> It is these mechanisms that are predominantly at work when we are relying on ‘common sense’ to make judgments.<sup>137</sup> The danger with this combination of our second-hand experiences and our past is that it can only give us a limited understanding of human behaviour and experience, leaving us at risk with considering the facts that do fall outside this personal sphere of experiences, background, values, views and culture as implausible.<sup>138</sup>

How we react to circumstances is often unpredictable and very wide-ranging, and this is particularly so for those who have had to face and endure situations that are extremely traumatic and stressful. Decision-makers within the asylum procedure, however, confront this wide spectrum of human behaviour and experiences from various unfamiliar cultures on a daily basis. Also, it has been proposed that some of our intuition is drawn on expertise and skills acquired through recurrent experiences.<sup>139</sup> Nonetheless, these intuitions are only accurate if applied in a context that is sufficiently regular to be rendered predictable, and when there is a chance to identify its regularities.<sup>140</sup>

You can only “learn-by-doing” when you get feedback on which decisions were correct, which incorrect, and on what grounds, which is not usually possible in the asylum procedure. Lacking this feedback, ‘expert decision makers’ tend to become more and more reliant on stereotypes and incorrect beliefs.<sup>141</sup> Therefore, in the particular context in which asylum decision-

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<sup>136</sup> D Kahneman, A Tversky, ‘Judgment under Uncertainty: Heuristics and Biases’ (1974) 185 *Science*, New Series, pp. 1124–1131; D. Kahneman, *Thinking Fast and Slow* (Allen Lane, London 2011) pp. 12 and 97.

<sup>137</sup> *The Psychology of Seeking Protection* (n 67) p.190; *Thinking Fast and Slow*, *ibid.*

<sup>138</sup> R Graycar, ‘The gender of judgments: an introduction’, in M Thornton (ed.), *Public and Private Feminist Legal Debates* (Oxford University Press, Melbourne 1991) pp. 262–282.

<sup>139</sup> *Thinking Fast and Slow* (n 136) pp. 12 and 97.

<sup>140</sup> *Ibid.* pp. 239–240.

<sup>141</sup> *Granting Asylum or Not? Migration Board Personnel’s Beliefs about Deception* (n 84) pp. 30–31.

makers work, there is a real risk that they may rely on judgments that are subjective and that are simply drawing on their own experiences in life.<sup>142</sup> If we resort to ‘common sense’ in our judgment, we do not have an effective means of actually judging the plausibility of events, and this is particularly so when it comes to countries, cultures and societies that differ widely from our own.<sup>143</sup>

### 3.5 Demeanour

*“You did not seem authentic regarding the way of speaking and gave the impression that you did not actually experience what you stated.”<sup>144</sup>*

#### 3.5.1 Legal standards

Demeanour as an indicator of credibility regards a person’s manner and outward behaviour, including his/hers manners of acting, expression or reply – for example if they are evasive, hesitant, confident, reticent, direct or spontaneous – modulation or pace of speech, eye contact, physical posture, tone of voice, facial expression, emotion, and other communication that is non-verbal. The use of this credibility indicator seems to be based on an assumption that specific demeanours are suggestive of credibility and truthfulness while others are indicative of non-credibility and deception, for example how the applicant stands or sits, the colouration of the skin during difficult questions, the pace of the speech, and the nervousness in general.<sup>145</sup>

Several courts have indeed regarded the applicant’s demeanour during the personal interview and the manner in which the applicant has conveyed his/her testimony as relevant to the credibility assessment.<sup>146</sup> Even the ECtHR

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<sup>142</sup> *Thinking Fast and Slow* (n 136) p. 185.

<sup>143</sup> W Kälin, ‘Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing’ (1986) 20 Intl Migr Rev 230, p. 236 (*Troubled Communication*).

<sup>144</sup> *Heart of the Matter* (n 75) p. 166.

<sup>145</sup> *Beyond proof* (n 78) p.185.

<sup>146</sup> R Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Hart Publishing, Oxford 2011) p. 149; *The Psychology of Seeking Protection* (n 67) p. 191; G Coffey, ‘The Credibility of Credibility Evidence at the Refugee Review Tribunal’ (2003) 15 Intl J Ref L 337, p. 414.

seems to implicitly accept that an applicant's demeanour is a factor to be taken into account as part of the assessment of credibility:

*“[The Court] accepts that, as a general principle, the national authorities are best placed to assess not just the facts but, more particularly, the credibility of witnesses since it is they who have had an opportunity to see, hear and assess the demeanour of the individual concerned”*<sup>147</sup>

Several member state's case officer-guidance manuals do include cautions signifying that the indicator is unreliable and highlights what factors that should be borne in mind. Nonetheless, in the long run they still do permit the application of demeanour as an indicator, often in combination with other credibility indicators.<sup>148</sup>

Despite the fact that it has been recommended that it should be avoided in virtually all situations to use demeanour as a factor in credibility assessments, it must be acknowledged that in reality, it can always have some influence in an oral hearing. Most of the European jurisdictions do have an oral hearing, and a major reason for this is so that the judges can 'see and hear' the applicant.<sup>149</sup>

### **3.5.2. Psychological research**

Extensive psychological research demonstrates that the things that people assume are clues of deception – such as being hesitant, gaze aversion and more hand movements – are not actually connected to lying.<sup>150</sup> In addition, while there is clearly always a risk of misinterpreting an individual's demeanour, this is particularly dangerous in the context of cross-cultural communication, since demeanour varies between cultures.<sup>151</sup> For example, in

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<sup>147</sup> *R.C. v. Sweden* (n 77) para. 52.

<sup>148</sup> *Beyond Proof* (n 78) pp. 189-190

<sup>149</sup> *Assessment of Credibility: Judicial Criteria and Standards* (n 76) p. 42.

<sup>150</sup> Global Deception Research Team 'A World of Lies' (2006) 37 *J Cross-Cultural Psychology* 60, pp. 60-74; *Just Tell Us What Happened to You* (n 67) pp. 661-676.

<sup>151</sup> *Beyond Proof* (n 78) p. 186 citing the European Asylum Curriculum Module 7, section 4.2.18: "There is a big risk to interpret the applicant's behaviours through our own cultural standards. Bad interpretation of demeanour is probably linked with gut feelings, when it is just one of the main objectives of this module to avoid the asylum applications to be assessed on gut feelings basis."; See also Asylum and Immigration Tribunal/Immigration Appellate Authority (United Kingdom) 'Asylum Gender Guidelines' (1 November 2000) <<http://www.refworld.org/docid/3ae6b3414.html>> accessed 25 May 2015, para 5.44.

Western culture, a lack of eye contact is often associated with dishonesty, while in fact an applicant may behave this way because of his/her fearfulness or shy personality. It could also mirror the applicant's culture – which may perhaps be connected to age or gender – and indicate deference or respect to an authoritative person.<sup>152</sup> Another classic example is that in some countries nodding the head can indicate affirmation, while in others it can indicate negation.<sup>153</sup>

Besides, research demonstrates that the behavioural signs that people are looking for when it comes to deception may equate those behavioural signs of anxiety (based on the assumption that someone who lies would be nervous).<sup>154</sup> This is clearly problematical in the asylum context, where the applicant may have a good reason to be and to seem nervous. An asylum seeker's manner of expression can appear to be confused or fragmented, not because he or she is not telling the truth, but because he or she is insecure, stressed or anxious. This is perfectly normal, considering that the stakes are so high. An applicant can be bewildered by the new cultural and social environment and by the process at large.<sup>155</sup> It is also important to have in mind that the interviewer's attitude can affect the applicant's manner, in the way that the interviewer structures and directs interaction with the applicant.<sup>156</sup>

Also, applicants who have traumatic experiences are prone to display many symptoms that might impact their demeanour. It may appear strange for those who are unfamiliar with psychological survival strategies, i.e. coping

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<sup>152</sup> US Citizenship and Immigration Services, 'Asylum Officer Basic Training Module on Gender-Related Claims' (October 2012)

<<http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Female-Asylum-Applicants-Gender-Related-Claims-31aug10.pdf>> accessed 25 May 2015, para 7.4: "In some cultures, keeping the head down and avoiding eye contact are signs of respect. For many women, making eye contact and speaking clearly and directly are considered highly inappropriate conduct and should not be viewed as indicators of lack of credibility."

<sup>153</sup> *Beyond Proof* (n 78) p. 186, citing the European Asylum Curriculum, Module 7, section 4.2.20.

<sup>154</sup> H Rogers, S Fox, J Herlihy, 'The Importance of Looking Credible: The Impact of the Behavioural Sequelae of Post-Traumatic Stress Disorder on the Credibility of Asylum-Seekers' (2015) 21 *Psychology, Crime & Law* 139, pp. 139-155.

<sup>155</sup> *Troubled Communication* (n 143) p. 232.

<sup>156</sup> *Ibid.*

mechanisms such as smiling, grinning, laughing or deep silence, when applicants react in this way to certain questions.<sup>157</sup>

Studies also show that decision-makers frequently base their findings of credibility on inaccurate, inappropriate and stereotypical perceptions about female applicants' demeanour.<sup>158</sup> Decision-makers tend to believe those asylum seekers who are expressing their emotions in expected manners, e.g., if a victim of rape is being visibly distressed.<sup>159</sup> However, the level and type of emotion that is revealed by female applicants during their recounting of their experiences should not be used as a credibility indicator of their statements.<sup>160</sup> It does not necessarily mean that a lack of displayed emotions equates that the person is not deeply affected or distressed by what has happened.<sup>161</sup> Those who have experienced traumatic events may demonstrate emotional numbing since they detach themselves emotionally from the events that they are recounting. They can appear as to be indifferent, which in turn could, without an understanding of this coping mechanism, be mistakenly interpreted as indicative of non-credibility.<sup>162</sup>

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<sup>157</sup> *Beyond Proof* (n 78) p. 188, citing the European Asylum Curriculum, Module 7, section 4.2.5.

<sup>158</sup> UNHCR, 'Women and Girls Fleeing Conflict: Gender and the Interpretation and Application of the 1951 Refugee Convention' (September 2012)

<<http://www.refworld.org/docid/504dcb172.html>> accessed 25 May 2015, p. 43.

<sup>159</sup> G Kaufmann et al., 'The Importance of Being Earnest: Displayed Emotions and Witness Credibility' (2003) 17 *Applied Cognitive Psychology* 21, pp. 21–34.

<sup>160</sup> UNHCR, 'Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees' (7 May 2002)

<<http://www.refworld.org/docid/3d36f1c64.html>> accessed 25 May 2015, para. 36 (xi).

<sup>161</sup> *Asylum Gender Guidelines* (n 151) section 5.44.

<sup>162</sup> *The Psychology of Seeking Protection* (n 67) pp. 177.



## 4. Case study: Sweden

### 4.1 Introduction and soft law

*“The Migration Board notes that there are credibility flaws in your case. In the interrogation report from the police you claimed to have had your own business within the construction crafts and in the pleading from your legal counsel you claim to have had a fast food-kiosk. At the personal interview you state that you have never claimed to have a company within the construction crafts and that what is stated in the pleading is the correct claim. The Migration Board finds it remarkable that you have changed these statements. Furthermore, you claimed in the interrogation report from the police that you would ask your uncles to send you your mother’s death certificate. At the personal interview you claimed that there was never issued a death certificate for your mother. The Migration Board finds it remarkable that you have changed these statements”<sup>163</sup>*

UNHCR conducted a study in cooperation with the Swedish Migration Board during 2009-2011 which included the field of credibility assessment. Their study revealed that 38% of their reviewed cases were rejected because of adverse credibility findings.<sup>164</sup> The study also revealed that the case officers often made their own subjective assumptions of what they thought would be plausible in the given situations and used so called speculative arguments.<sup>165</sup>

The Swedish legislation does not contain any provisions as regards the credibility assessment in asylum procedures. However during the incorporation process of the Qualification Directive from 2004, in 2006 the Department of Justice submitted a report that stated that the credibility assessment should not be focused on the applicant’s general credibility, but on the credibility of the applicant’s statements that are relevant in assessing the risk scenarios associated with *refouler*.<sup>166</sup> The Migration Courts have also

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<sup>163</sup> (Author’s own interpretation) Swedish Migration Board, Refusal Letter, cited in; Liv Feijen & Emelia Frennmark, *Kvalitet i svensk asylprövning: en studie av Migrationsverkets utredning av och beslut om internationellt skydd* (UNHCR, Stockholm 2011) (*Kvalitet i svensk asylprövning*) p. 195, where the UNHCR finds it noteworthy that the credibility assessment of several cases focused on irrelevant aspects.

<sup>164</sup> Ibid. p. 192.

<sup>165</sup> Ibid. pp. 192-193.

<sup>166</sup> Swedish Government Official Reports, SOU 2006:6, p. 234.

provided some guidance in their case law, as will be explained in the section below.

Up until recently, the Migration Board did not have any guidance document on the subject either.<sup>167</sup> Consequently, the Migration Board's Judicial Position concerning the method for examining reliability and credibility from 2013 (the Judicial Position) filled that gap. The Judicial Positions issued by the Migration Board are not legally binding, but are considered an authoritative guidance for staff of the Board.

The Judicial Position affirms what has been stated in the above mentioned report from the Department of Justice, i.e. that the credibility assessment should focus on the veracity of the applicant's statements, and not the general credibility of the applicant.<sup>168</sup> The Migration Board chooses to elaborate on this by referring to a terminology that has also been used in Swedish witness psychology, namely that credibility relates to the *way* in which the evidence is provided and that the *veracity of the testimony* is called reliability. The Judicial Position points out that in the Swedish case law the terminology is used interchangeably, but it clarifies that the Migration Board's assignment is to make an objective assessment of the reliability of the applicant's testimony. However while it also mentions that there might be a need to make an assessment of whether the claims have been conveyed in a credible way as a next step in the decision-making process, it states that the reliability assessment is superior to the credibility assessment. According to the Judicial Position, this second step in the decision-making process does not relate to the way in how the testimony is presented in the form of e.g. the applicant's gestures or gaze unless these indicators can be objectively assessed. On the other hand what the credibility assessment is supposed to take into account is e.g. whether the applicant does not answer certain questions that have been asked several times without him/her being able to explain why.<sup>169</sup>

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<sup>167</sup> Swedish Migration Board, 'Judicial Position concerning the method for examining reliability and credibility' (RCI 09/2013) (10 June 2013) p. 2.

<sup>168</sup> Ibid. at p. 3.

<sup>169</sup> Ibid.

Based on case law the Judicial Position states the following indicators of reliability:

- *“Is the story coherent or fragmented?”*
  - *Is the story concrete and detailed or is it vague and lacking in details?*
  - *Does the story consist of inconsistent statements or has it mainly been unchanged during the process?*
  - *Is the story supported by generally known facts and up-to-date COI or is the story externally inconsistent?”*<sup>170</sup>

The Migration Board also states that it is important that the method of evidentiary assessment never is based on subjectivity, arbitrariness and intuition. It also stresses the necessity of the decision-maker to have a good COI knowledge so that the decision-maker can put him-/herself in the cross-country situation and not assume that authorities and other actors would react in the same way as they would in a democratic state with a functioning rule of law. It is also noted that it is necessary to take into account the applicant’s personal circumstances and that a person who have lived through war, violence and serious threats can have a hard time in remembering certain details and have problems with coherent recounts.<sup>171</sup>

The Judicial Position also emphasizes that a decision should be made ‘in the round’, analysing all different evidentiary themes unless one particular theme would nullify the whole testimony e.g. that regarding identity/citizenship/home country. The Migration Board also states that if adverse reliability findings are made that regards the relevant parts of the story, the applicant should have the opportunity to explain them.<sup>172</sup>

It is noted that the final assessment should focus on the following core questions:

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<sup>170</sup> Ibid. p. 7 (author’s own translation).

<sup>171</sup> Ibid.

<sup>172</sup> Ibid. pp. 8-9.

- “a) Do the flaws concern the core aspects of the claim?  
 b) Are the explanations given to these flaws plausible?  
 c) Does the applicant’s conduct in the asylum procedure pose serious reasons to question the basis of the claim?  
 d) Is the applicant’s explanation to his/hers conduct plausible?”*<sup>173</sup>

It is also mentioned that those applicants whose decision contains adverse reliability findings have the right to a well-motivated decision. Therefore, if decision-makers choose to use expressions such as ‘vague and lacking in detail’, they must be supplemented with an explanation of what exactly was vague and lacking in detail, and why it is expected that the applicant should be able to provide more details in that specific part. Lastly the Migration Board points out that if the applicant is not credible because the claims have not been presented in a credible way, this could be a part of the assessment, but not without adverse reliability findings as well.<sup>174</sup>

Despite the issued Judicial Position, asylum lawyers have voiced concern that it has not been followed by the Migration Board, nor has it been given any particular attention in the Courts.<sup>175</sup>

## **4.2 Case law**

### **4.2.1. MIG 2007:12**

In this landmark case for Swedish credibility assessments in the asylum procedure, the applicant claimed that he was wanted by the authorities because he had been active in the opposition against the regime since he was driven by revenge after they had killed his brothers. He was first denied asylum at the first instance by the Migration Board, then granted asylum after appeal by the Migration Court – which stated that his account was credible –

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<sup>173</sup> Ibid. p. 10 (author’s own translation).

<sup>174</sup> Ibid.

<sup>175</sup> Rashin Fardnicklasson & Lars Fardnicklasson, ‘Dags för Migrationsverket att följa det egna ställningstagandet – så här ska det tillämpas’ *Dagens Juridik* (11 June 2014) <<http://www.dagensjuridik.se/2014/06/dags-migrationsverket-att-folja-det-egna-stallningstagandet-sa-har-ska-det-tillampas>> accessed 27 April 2015.

and lastly, his application was denied by the Migration Court of Appeal (The Court) because his statements were not considered to be credible.<sup>176</sup>

The Court first broadly asserted that when assessing the credibility in the applicant's testimony, weight should be given to whether the story is coherent and not characterized by conflicting statements. The Court further stated that it is important that the main features of the story remains unchanged during the different instances in the asylum procedure.<sup>177</sup>

When assessing the credibility of the applicant's statement, the Court asserted in general that his story was vague and remarkably lacking in detail. For example, the Court mentioned that he was not able to give any specific details as regards when or how he got his alleged physical injuries. The Court also noted that he was utterly vague as regards the circumstances of the protests that he allegedly participated in. It was also mentioned that the applicant in some respect had changed his story both during the interview at the Migration Board and during the Court proceedings. The Court also stated that he was inconsistent in his statements regarding his participation in the anti-regime organization: for example, at several times he had said that he always acted with caution and tried to stay away in order to not draw attention to his connections with the organization; this was contradictory to his statements regarding his participations in public protests and delivery of leaflets, which, according to himself, was associated with big risks. Additionally, the Court took note of the fact that the applicant stated not to have had any actual contact with the organization, but at the same time, he claimed that it was the organization that helped him escape.<sup>178</sup>

#### **4.2.2. MIG 2007:33**

This case concerned a Yezidi Kurd from Iraq who claimed to have been in love with his cousin and wanted to marry her, whereas the bride's father opposed to the marriage. The applicant claimed to have fled with his cousin

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<sup>176</sup> Migration Court of Appeal, Case No. UM 540-06, MIG 2007:12 (19 march 2007)  
<<http://www.notisum.se/rnp/domar/mg/MG007012.htm>> accessed 27 April 2015.

<sup>177</sup> Ibid.

<sup>178</sup> Ibid.

to another city where they got married but when the cousin's family found out, she was killed by her brother. The applicant said he fled to Sweden because he feared for his life. The applicant's claim was rejected by the Migration Board because of adverse credibility findings. When he appealed, the Migration Court accepted his testimony as credible and granted him asylum. However, at the Migration Board's appeal, the Migration Court of Appeal rejected his application because – as in the first instance – his testimony was not deemed to be credible.<sup>179</sup>

The Court stated that the applicant was inconsistent in his testimony in regards whether he and his girlfriend were married and on which date they had eloped. The Court also found it particularly remarkable that the applicant was floating in his answers to which day it was that the girl had been murdered. It was also noted by the Court that he was inconsistent as to where they had been living after they eloped, on the one hand he mentioned that they had stayed at different hotels and on the other hand he said that they had stayed in the same house but in different rooms. Furthermore, the Court noted that he had 'stepped up his story' during the oral hearing at the Migration Court by revealing for the first time that also his own family was against him and would not protect him. The last adverse credibility finding by the Court was based on the fact that he had several times submitted that he was analphabetic but that he had also stated that he went to school for two years, and that he was a businessman.<sup>180</sup>

#### **4.2.3 MIG 2011:8**

In this case, a woman claimed to risk persecution if returned to Somaliland. She claimed to be born and raised in Somaliland in a strictly religious family. She had two children, whose father was deceased. After the death of her husband she met another man with whom she initiated a sexual relation and became pregnant in 2002. When one of her half-brothers heard about the

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<sup>179</sup> Migration Court of Appeal, Case No. UM 837-06, MIG 2007:33 (15 June 2007) <<http://lifos.migrationsverket.se/dokument?documentSummaryId=16806>> accessed 27 April 2015.

<sup>180</sup> Ibid.

pregnancy he stabbed her since she was perceived as to have brought dishonour over the family. After this she claimed to have been persecuted and forced to move from place to place in order to avoid getting stoned. When she heard in 2009 that her relatives were looking for her together with Al Shabab in the area where she was currently living, she left the country.<sup>181</sup>

Both the Migration Board and the Migration Court strongly questioned the applicant's testimony and she was not deemed to be credible. In the last instance, the Migration Board pleaded that her testimony was unclear in several regards and that her claims of living in certain places could be questioned. The Migration Board also stated that it was not credible that her relatives allegedly first found her in 2009. However the Migration Court of Appeal disagreed, and stated that her testimony in general had been coherent and unchanged. Furthermore, the Court pointed out that the explanations given by her relating to the uncertainties supported that she had lived through what she had told. Furthermore, after a thorough review of COI, the Court concluded that the fact that her testimony was not externally inconsistent also contributed to why her claim was deemed credible.<sup>182</sup>

## **4.3 Analysis**

### **4.3.1 The Migration Board's Judicial Position**

In the 2009-2011 study that the UNHCR conducted in regards of Swedish practice in credibility assessment, what was most striking was that in several cases the claims were rejected because of minor inconsistency flaws not relating to the core aspect of the story, and also that the case officers often made their own subjective assumptions of plausibility using speculative arguments. Hopefully, the application of the recent Judicial Position will redeem these faults in the procedure since it states that adverse credibility findings should only be given weight if they relate to the core aspects of the

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<sup>181</sup> Migration Court of Appeal, Case No. UM 7851-10, MIG 2011:8 (21 April 2011) <<http://lifos.migrationsverket.se/dokument?documentSummaryId=25165>> accessed 27 April 2015.

<sup>182</sup> Ibid.

applicant's claim. When it comes to the application of plausibility as an indicator it is not mentioned in the list of indicators, however – implicitly – the Migration Board seems resistant in rejecting it completely since it mentions the necessity of decision-makers having a good knowledge in COI so that they can put themselves in cross-country situations and not assume that e.g. state authorities in Afghanistan would react in the same way as they do in Sweden. However even with a thorough COI-knowledge, plausibility is still a highly subjective factor to consider – as research has shown, the way that our mind works when it comes to ‘common sense judgments’, can only give us a limited understanding and this emanates in a risk of subjective judgments as to what is plausible and what is not. In addition ‘expert-decision-makers’ who have been working within the area for several years, and presumably has a very good knowledge in COI face the risk of giving the COI too much weight – just because a certain piece of information states that in general e.g. Afghan women tend to be very dependable on their male relatives and barely ever leave the house doesn't mean that there is no exception. Plausibility is also mentioned as a relevant factor in the final assessment where the applicant's explanations to the found credibility flaws should be plausible – but what is a plausible explanation and what is not? These kind of lacking definitions heighten the risk of arbitrary and subjective decisions.

A baby step in the right direction concerns the Judicial Position's view on demeanour, in which it states that the credibility assessment does not relate to e.g. applicant's gestures and gaze. However it is noteworthy that just as in other jurisdictions – the Swedish Migration Board is not ready of completely disregarding the indicator since it states that such indicators can be used *if they can be objectively assessed*. As has been demonstrated by psychological research indicators relating to demeanour cannot be objectively assessed. Another disappointing aspect of the Judicial Position is that it does not mention the dangers of using the credibility indicators in relation to temporal information since this is directly contradictory to psychological research.



It is positive that the Judicial Position stresses that the applicant's personal circumstances need to be taken into account and that it recognizes that persons who have lived through horrible events can have a hard time remembering details or present their story in a coherent way. While this is a step in the right direction, the question is how much of a difference this will make in practice, since the Judicial Position is still lacking clear definitions on e.g. how detailed a story is expected to be, and how much less detailed it is expected to be by people who are e.g. suffering from PTSD. This is, once again, paving the way to a risk of subjective and arbitrary decisions. The application of the Judicial Position might however partly redeem this flaw in the future since it also states that the decisions should be well motivated – with more well-articulated and well-motivated decisions, definitions of what the indicators really mean might subsequently appear. Hopefully this will be applied in the Courts as well, which are arguably short in their reasoning. The fact that asylum lawyers have voiced concern that the standards in the Judicial Position have not been applied yet is indeed alarming, however it is too early to draw any conclusions on that matter.

#### **4.3.2 Case law**

As for the case law, no comments on the substantive parts in the different cases will be made since this would need an in-depth analysis of the case facts. However some general comments will be made in order to contrast the court's findings with the psychological research that has been presented in chapter 3:

It is noteworthy that in *MIG 2007:12*, the Court saw it as a sign of non-credibility that the applicant could not give details as to when he got his injuries. Also in *MIG 2007:33*, the Court used inconsistency in relation to temporal information as an indicator of non-credibility, as regards the applicant's incapability of answering on which date they had eloped and on which date that his wife was murdered. This is contrasted by clear psychological findings stating that inconsistency of temporal information

could rather be a sign of credibility because of the high risk of truthful statements in this context to consist of inaccurate estimates.

Besides the Court referring to temporal information, other statements have been made that are in contrast to psychological research: In *MIG 2007:12*, the Court also states that the statements are not credible since the applicant had been inconsistent and in some respect changed his story both during the interview at the Migration Board and during the Court proceedings. As has been mentioned, because of the reconstructive process in memory recall, some inconsistency is inevitable, if asked to recall the same events several times. The fact that we adjust our recount to different types of audiences may also play an important part: surely, the context of the personal interview with the case officer at the Migration Board was very much different from the environment at the Migration Court of Appeal, in front of a judge.

In *MIG 2011:8*, the Court questioned the plausibility of the applicant's statement when she alleged that after her initial flight in 2002, it took seven years for her relatives to find her. The Migration Board does not give any further explanation as to why this could not be plausible. Did the Migration Board rely on some sort of subjective common sense or stereotypical assumptions evolved by 'expert-decision-makers'? Anyway, it was reassuring to see that the Court countered this with the fact that her testimony was not externally inconsistent with COI, and thus it based its assessment on objective facts, and not subjective speculations.

In *MIG 2007:33*, the Court argued for the applicant's non-credibility in relation to matters not relating to the core aspects of the applicant's case, i.e. that he claimed to be analphabetic but at the same time an educated businessman. How would this affect the truthfulness as regards the events he allegedly fled from?

It is also interesting that in all three cases, the credibility findings differed from instance to instance. While different findings in different instances certainly occur in other judicial procedures as well – as this is the whole point of an appeal system – the discrepant findings in these and other asylum cases

relating to credibility could very well be the result of a lack of definitions of the credibility indicators as well as a lack of guidance on how to use them in relation to one another. This in turn can lead to an increased risk of arbitrary procedures where similar cases are treated differently, on a subjective basis.

This lack of guidance in how to weigh the different indicators is also well displayed in the cases exemplified in the case study. In *MIG 2007:12*, the Court first states that the indicators to be used in credibility assessments are those relating to a coherent story that has been unchanged during the procedure and is without conflicting statements. With other words – consistency. However when assessing the particular facts of the applicant’s case, the Court also says that the level of detail is important. The Migration Board argues in *MIG 2011:8* that the applicant’s claims were unclear and certain facts implausible. The Court on the other hand, doesn’t even respond to the Migration Boards arguments in relation to these indicators, instead it states that the applicant’s statements were coherent and unchanged. In this sense, the Court fails to serve its purpose as an appeal court – while it corrects the previous decision, it should do so with a clear reasoning, otherwise, what is the value of the precedent? *MIG 2007:33* uses *only* inconsistency as an indicator in their argument as to why the applicant’s testimony is not credible. What about the other indicators? Were these ‘criteria’ fulfilled, and if so why does the indicator of consistency weigh more than the others? Those kind of explanations would be desirable to read from the Court’s reasoning.

Overall, hopefully the case study served its purpose – to show that examples of ‘best practice’<sup>183</sup> can also be flawed.

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<sup>183</sup> See section 1.4, above.

## **5. Main findings & further discussion**

### **5.1 Whether the indicators are compatible with scientific research and the dangers of inaccurate and inadequate assessments**

#### **5.1.1 Initial remarks: for the law to be just, it should take account of science**

What can be said to be the general finding in this project is that, largely, the credibility indicators that are used in the asylum procedure are based on assumptions about human memory, behaviour, attitudes, values etc. that have little or no certain basis in scientific research. To ignore relevant psychological research risks denying protection to genuine asylum-seekers, as well as granting asylum to those who do not meet the criteria for international protection status. This is not only detrimental for today's potentially flawed asylum decisions that may send a person back to his/hers certain death, but also for how future generations will look upon us. During the dark ages and the witch-hunts in Europe, the trials would determine if the woman was a witch or not by the water-test: the woman was thrown in the water with her hands and feet tied. If she would float, she was obviously a witch and would be sentenced to death. If not, she was not a witch, but she would still have drowned. Today we look back upon these procedures with detest. How will the European society in 100-200 years from now look back upon how we were adjudicating asylum claims? Today, in contrast to the witch-trials, we have science that in some instances directly contradicts what we are using as indicators of credibility, and these findings were not demonstrated yesterday, some of them are more than 30 years old! Yet, not much has changed – what is the excuse?

The indicators of credibility are based on assumed norms – rape victims cry; liars avoid eye contact; truth-tellers are consistent in their stories; but not too consistent because then they are potential liars with a rehearsed account etc. While the psychological research demonstrates that these assumptions are usually not true, it also shows that very much is subjective and differs from individual to individual – some people remember names and dates better than

others; some are more verbally gifted and can express their whole life-story in a coherent and chronological manner while others have difficulties describing yesterday's events; some people are afraid and nervous in front of authoritative figures, some are not; some of us react with crying when nervous, others by laughing; some decision-makers might find what happened to you as plausible while to others it might seem as highly unlikely, etc. If there is no norm, or no common denominator upon which our practice is based on, is it even valid to use these indicators at all? Arguably not, if the law does not take the science into account, then it is not justice, it is just as immoral and wrong as were the witch-trials. However what are the alternatives? Somehow, the decision-makers must assert the facts in the case by deciding what is true and what is not. As long as States want to maintain a controlled immigration, methods for distinguishing genuine protection seekers from fraudulent applicants are plainly needed as it cannot be denied that the asylum system can be abused by economic or other migrants who do not have the right to attain international protection.

### **5.1.2 Consistency and coherence: practices contradicting both psychology and legal standards**

What is most remarkable with this indicator is that according to the legal practices, truth-tellers are expected to be consistent but at the same time, so are liars if they have rehearsed their story enough. In a bizarre way, one could actually argue for that this is reflected in psychological research as it shows that truth-tellers and liars are quite equally consistent in their accounts. But once again since the science says that it's not one way nor the other, it is highly questionable that consistency should be used as an indicator, especially considering all the empirical evidence submitting several reasons to why an applicant could be inconsistent but still be telling the truth e.g. because of *hypermnnesia*, fused memories of similar events, and PTSD-symptoms.

The psychological explanation as regards the context-dependant reconstruction of memory is particularly interesting, since applicants are required to be internally consistent in the different instances. As it is described that we reconstruct our memory differently in different environments and in

front of different audiences this could very well explain why an applicant says one thing in e.g. a police interrogation and another in the asylum interview: it could simply be a result of the police officer being a more authoritative and intimidating figure than the asylum case officer. Another example is differences in testimony between the asylum interview and subsequent court proceedings, which could be explained by the totally different environments and persons involved. As has been mentioned above in chapter 4.3.2, this could very well explain the inconsistencies of the applicant in *MIG 2007:12*.

What is quite remarkable is the fact that the most common inconsistency that is cited as undermining credibility relates to temporal information and this is directly contradicting psychological research; it is also interesting that there are cases in which minor inconsistencies have been used in favour to reject the whole core aspects of an applicant's claim, not only because it is in contradiction to psychological research but also because it is in contradiction to what has been repeatedly stressed by international and national judicial organs.<sup>184</sup>

### **5.1.3 Sufficiency of detail and specificity: some scientific basis, but should still be used with caution**

There are cases in which lack of detailed explanations in how a certain currency looks like have been deemed as indicative of non-credibility. While psychological research has refuted the usage of this because our visual memory is particularly poor since we do not record information that we do not deem to serve any useful function, one may wonder, do we even need empirical evidence to establish that? With the risk of being speculative: probably most of us would not be able to describe what our state's 100 SEK/EUR/USD bill looks like in any detail, unless you're a collector or you're working in a bank.

While the indicator of credibility relating to sufficiency of detail, in general has a scientific basis since truth-tellers tend to be more detailed than liars, the example above and many more that were presented (e.g. regarding temporal

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<sup>184</sup> See footnote 79-80, above.

information, verbatim of verbal exchange and proper names) are arguably more than enough to voice for caution if we are supposed to keep using this indicator.

Another question that is worth looking further into relates to whether it is ethically correct to demand from people who have lived through the most horrific experiences and may suffer from PTSD and avoidance symptoms, to suppress their natural coping mechanism and survival strategy in order for them to disclose all relevant details, since this has been proven to be extremely distressing and even potentially harmful for people.

#### **5.1.4 Plausibility: highly subjective and risk of stereotypical judgments**

This indicator is probably one of the more controversial ones – except for demeanour – since it invites to a highly subjective assessment. And once again, despite of all the voiced concerns questioning the use of plausibility as an indicator, the legal sphere is as stubborn as always and jurisdictions are reluctant to discard it completely.

Firstly there is a risk that decision-makers would deem events to be implausible because of their judgment based on their own, westernized background. How can a person growing up in Sweden that haven't seen war in the last two hundred years have any clue of what is reasonable or not in war-torn Syria? Or how could a decision-maker – assuming there is lacking COI in the field – possibly know what is a plausible conduct of an Afghan woman suffering domestic violence? Secondly, as was mentioned, there is also a risk that 'expert decision-makers' that have been around for years instead base their judgment on stereotypes for certain ethnicities – Somalians act in this way while Iraqis tend to behave like that... Just as every Swede would not behave and act in the same way in a given situations, individuals from other countries react in different ways to similar situations.

#### **5.1.5 Demeanour: still used, despite caution**

The usage of demeanour as an indicator of credibility is clearly risky; there are cross-cultural factors to be taken into account; there are psychological

factors to be taken into account (for example coping mechanisms) and the behavioural signs that we tend to look for when it comes to deceptions are usually the same ones that indicate anxiety. Another factor shedding light on the inadequacy of the indicator is the fact that the case officer's attitudes, both consciously and unconsciously, can affect the applicant's manner: some case officers can come across as authoritative while others strike you as more friendly; and inexperienced or nervous case officers can in turn make the applicant even more nervous. Other factors relating to the case officer may also be of importance, e.g. the gender.

Just like plausibility, assessing the demeanour is highly subjective and while it is noteworthy that several Member State's case officer-guidance manuals include cautions signifying that the indicator is unreliable but still permits its usage; it is even more remarkable that the ECtHR accepted its usage in its case *R.C v. Sweden*. One could arguably expect more from the world's most developed human rights court in the 21<sup>st</sup> century.

#### **5.1.6 Concluding remarks regarding the credibility indicators and its pitfalls**

Besides the fact that the credibility indicators are largely incompatible with psychological research, there are other factors regarding the credibility assessment which can question the accuracy and adequacy of the procedure. For example, while the certain indicators can be identified, there are no instructions on how to weigh the individual indicators – are they all equally important? For instance if a testimony is very consistent and coherent but at the same time it is rather lacking in details in certain aspect, what do you do then? Do you even have to consider all of the indicators?

Because there are no guidelines on how the selection of credibility indicators should be made, the different adjudicators can pick and choose from the different criteria as they see fit, and since there is no guidance, chances are that the different adjudicators may choose different criteria if they were to – hypothetically – handle the same case and their decisions would then not rest on the same grounds, making the decisions highly subjective. The examples



of cases in the Swedish case study particularly highlighted this issue and consequently, the adjudicators may come to different conclusions about the credibility of the testimony which would make the procedure arbitrary. Another similar concern is that while the indicators are identified, they are not clearly defined – e.g. where do you draw the line between detailed and vague; what exactly is a coherent statement? – which, by the same logic as described above, can lead to different subjective interpretations and decisions about the same case, resulting in an arbitrary procedure.

Lastly, since a presumable large part of those who seek international protection suffer from different psychological problems like PTSD it is extremely questionable to use criteria of credibility that for them are almost impossible to achieve. This in turn could arguably result in that the state is systematically discriminating against this group of people.

## **5.2 Recommendations**

### **5.2.1 Regional level**

In order to improve the accuracy and legal certainty of credibility assessment in the asylum procedure, what is firstly needed is extensive psychological research within the specific area of asylum. A thorough investigation of what parts from the area of criminal law that can be analogically applied to the sphere of asylum is also need – but these aspects should also be compatible with psychological research.

After a thorough preparatory work consisting of these and other possible investigations and researches, it would be desirable to draft an instrument in addition to the already existing CEAS *acquis*. This instrument would need to lay down in well-defined and explicit forms, what indicators – with a scientific basis – of credibility that should be used, and how these indicators relate to each other. The instrument should also identify certain vulnerable groups such as applicants with PTSD, women, minors, LGBTI-people etc., and specify what special regards that needs to be taken into account when

faced with such cases. It would also be desirable to prepare some form of training module on an EU-level on this new instrument.

### **5.2.2 Domestic level**

What has been recommended so far, is a long-term project demanding both time, resources and political will. Until we reach that point, change can start in domestic jurisdictions, e.g. in ambitious asylum-countries like Sweden. In Sweden's case, the judgments regarding credibility assessment have, as stated, not provided an extensive guidance on how to use the different credibility indicators. This uncodified sphere gives room for the following possible recommendations:

- That as many credibility indicators as possible should be used in order to make 'in the round' judgments and only credibility flaws relating to the 'core' of the applicant's statements should be taken into account (not minor flaws relating to irrelevant facts).
- That credibility flaws relating to temporal information should be disregarded.
- That in cases regarding an applicant who claims to have been e.g. abused, tortured, interrogated etc. in repeated instances, the expectations of the level of consistency and detail when it comes to those separate instances should be lowered.
- That in cases regarding facts relating to the appearance of common objects, verbatim of verbal expressions, proper names and peripheral information, the expectation of the level of detail should be lowered.
- That speculative plausibility arguments should not be accepted – if plausibility arguments are made, they should be based on up-to-date COI.
- That demeanour should not be taken into account when assessing the credibility since this cannot be objectively assessed.

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