

‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations

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Abstract

Credibility assessment has always been a major issue in refugee determinations and its importance increases in the context of widespread introduction of ‘fast-track’ processes and the manifest trans-national trend to truncate (or indeed remove) avenues for review. This article explores the practice of credibility assessment in lower level tribunals using a case study of over 1000 particular social group ground (PSG) decisions made on the basis of sexual orientation over the past 15 years. Credibility played an increasingly major role in claim refusals, and negative credibility assessments were not always based on well-reasoned or defensible grounds. The article uses this specific case study in order to ground recommendations for structural and institutional change aimed at improving the credibility assessment process in refugee determinations more broadly.

I. Introduction

[W]e should neither run away from credibility issues, nor pretend to be capable of knowing more than we can. We are all familiar with the barriers standing between us and “what really happened”. We were not there. The only witness is usually the claimant with whatever fragments of her life she puts before us. Country documentation and assorted governmental and human rights reports that we receive usually paint a canvas with broad, crude brush strokes. They rarely provide the kind of detailed information that would be necessary to corroborate a particular story.¹

Refugee determinations involve the most intensely narrative mode of legal adjudication. The hearing depends largely – sometimes entirely – on the story of the applicant; this story is told in writing, orally re-told in full or in part, questioned, believed or disbelieved to varying degrees, and finally weighed against an assessment of future risk based on available documentary sources of information about the sending country to determine if the applicant faces a well founded fear of persecution. The refugee determination is at once the smallest, most personal of inquiries: what

^φ Professor of Law, University of Technology Sydney. This research is part of a larger project devised in conjunction with Professor Catherine Dauvergne at the University of British Columbia. I am grateful for her input at every stage of the project since we began in 2000, and in particular for her comments on an earlier draft of this paper and for her pursuit of some of the Canadian data cited in this paper through Access to Information Requests. The first phase of the project examined refugee claims involving sexual orientation in Canada and Australia from 1994 – 2000. Phase 2 expanded the project to include cases from the UK and New Zealand and extended to the end of 2007. The research was supported through the second phase by an Australian Research Council Discovery Project Grant. Thanks also to Laurie Berg, Katherine Fallah and Marianna Leishman for their invaluable research assistance.

¹ Audrey Macklin, ‘Truth and Consequences: Credibility Determination in the Refugee Context’, Conference Paper, International Association of Refugee Law Judges, 1998 at 137.

happened to you? It is also a wide, speculative, political decision: is this government an on-going danger to (some of) its citizens?

Credibility assessment has always been a major issue in refugee determinations² and its importance increases in the context of widespread introduction of ‘fast-track’ processes³ and the manifest trans-national trend to truncate (or indeed remove) avenues for review.⁴ As refugee determinations become less reviewable, it is increasingly important to get them right the first time. Even within remaining avenues of review the ability to disturb findings on credibility is slight in many countries.⁵ Thus a general mission to improve first instance decision making must focus even more closely upon credibility aspects of decisions as they are the least reviewable.

This article explores credibility assessment in lower level tribunals using a case study of particular social group ground (PSG) decisions made on the basis of sexual orientation. The research examined over 1000 publicly available⁶ refugee decisions made on the basis of sexual orientation in Australia,⁷ the United Kingdom (UK),⁸ Canada⁹ and New Zealand¹⁰ over a 14 year period

² See eg Deborah Anker, ‘Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment’ (1992) 19 *Review of Law and Social Change* 433; Macklin 1998, *ibid*; Cécile Rousseau, François Crépeau, Patricia Foxen and France Houle, ‘The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-Making Process of the Canadian Immigration and Refugee Board’ (2002) 15 *Journal of Refugee Studies* 43; Susan Kneebone, ‘The Refugee Review Tribunal and the Assessment of Credibility: an Inquisitorial Role?’ (1998) 5 *Australian Journal of Administrative Law* 78; Michael Kagan, ‘Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination’ (2003) 17 *Georgetown Immigration Law Journal* 367.

³ See eg Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd ed) (2007) at 222, 392, 400 and 541 on acceleration procedures; see also Thomas Spijkerboer, ‘Stereotyping and Acceleration – Gender, Procedural Acceleration and Marginalised Judicial Review in the Dutch Asylum System’ in Gregor Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (2005) at 89, noting that 50 per cent of asylum applications in the Netherlands are processed in 48 working hours.

⁴ See Goodwin-Gill and McAdam, *ibid*.

⁵ See eg Guy Coffey, ‘The Credibility of Credibility Evidence at the Refugee Review Tribunal’ (2003) 15 *International Journal of Refugee Law* 377 at 400-411 regarding Australia. On the United States see Kristin Hoffman, ‘The Real ID Act: Challenging Reliability in Asylum Law’ (2006) 27 *Immigration and Nationality Law Review* 669.

⁶ Australian cases were all obtained from the Austlii case database (www.austlii.edu.au). UK cases were obtained from the Electronic Immigration Network case database (www.ein.org.uk), the Asylum and Immigration Tribunal website (www.ait.gov.uk) and LEXIS. Canadian cases were obtained from the QuickLaw, Canlii (www.canlii.org) and LEXIS databases. New Zealand cases were obtained from the Refugee Status Appeals Authority website (www.nzrefugeeappeals.govt.nz).

⁷ There was a total of 528 Australian decisions, made up of 369 decisions from the Refugee Review Tribunal (RRT) and 159 judicial review decisions from Federal Magistrates Court, Federal Court and Full Federal Court of Australia, and High Court of Australia.

from 1994 to 2007 inclusive.¹¹ In addition to their similar common law and human rights traditions, all of these countries utilise informal inquisitorial tribunal decision-making bodies at an early level in the refugee determination process.¹² A benefit of drawing upon a subset of cases as part of a broader inquiry into credibility determination is that it can provide a ‘complete’ set of cases on a particular issue to offer both comparative perspectives and information on longitudinal trends.¹³ Credibility assessment played an increasingly major role in negative

⁸ There were 116 UK decisions made up of 70 tribunal decisions and 46 judicial review decisions from the Queen’s Bench and Court of Appeal.

⁹ There were 396 decisions, comprising 274 tribunal decisions and 122 judicial review cases drawn from the Federal Court of Canada and Federal Court of Appeal.

¹⁰ There were 38 New Zealand cases made up entirely of tribunal decisions. No judicial review decisions were found.

¹¹ The US was excluded from the study due to the unavailability of lower level determinations. 1994 was chosen as the starting point for data collection as this was when sexual orientation was regarded as a settled basis for particular social group (PSG) claims in a number of major refugee receiving nations. See eg in Canada: *Re R (UW)* [1991] CRDD No 501 (7 October 1991); *Ward v Attorney-General (Canada)* [1993] 2 SCR 689; in the US: *Matter of Toboso-Alfonso*, 20 I&N Dec 819 (BIA 1990); in Australia: N93/00593 [1994] RRTA 108 (25 January 1994); *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225; in New Zealand: *Re GJ Refugee Appeal No 1312/93* (30 August 1995). Note that sexual orientation as the basis of a PSG remained contested in the UK until later that decade: *Vraciu v Secretary of State for the Home Department* [1994] UKIAT 11559 (21 November 1994); *R v Immigration Appeal Tribunal, ex parte Shah* [1999] 2 AC 629 (HL).

¹² In Australia, New Zealand and the UK the original decision on refugee status is taken by a delegate of the Minister, who is a bureaucratic officer. If this determination is negative, the applicant can apply for a de novo merits review of the decision. In Australia this review is undertaken by the Refugee Review Tribunal (RRT) which sits with a single member. In New Zealand this review is undertaken by the Refugee Status Appeals Authority (RSAA) which sits with two members. In the UK until April 2005 this review was undertaken by the Immigration Appellate Authority (IAA) in a two tier system: first, an immigration adjudicator reviewed the decision de novo and then leave could be given to the Immigration Appeal Tribunal (IAT) which until 2002 provided a second level of de novo review and after 2002 was limited to points of law by the Nationality, Immigration and Asylum Act 2002 (UK). From 2005 the two-tier structure was abolished and replaced by the Asylum and Immigration Tribunal (AIT): Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (UK). The AIT can only grant review based on an error of law. Canada is unique in that the tribunal makes the first determination. Until 2002 this body was the Convention Refugee Determination Division which sat in two member panels, with a difference between the members resulting in a positive determination. Since 2002 the new Refugee Protection Division sits with only one member. Note that a new three member Refugee Appeal Division, contemplated by the legislation to balance this loss, has not been implemented.

¹³ Of course even ‘complete’ case sets are only partial. Our set comprises all available decisions, but not every decision made is released. For instance in Australia, while all RRT determinations were released prior to 1999, after that point the target for release was only 20 per cent of decided cases, and in some years fewer than 10 per cent of decisions have been released: see Migration Review Tribunal and Refugee Review Tribunal Annual Report 2006–2007 (2007) at 18. In Canada prior to 2002 there was no obligation to provide reasons for positive determinations; since 2002 all decisions must have reasons but positive decisions may still be provided orally. An Access to Information Request A-2008-00035 (2 July 2008) to the Immigration and Review Board asking for the numbers of sexual orientation claims determined since 2002 revealed that in the years 2002-2006 there were 4161 such claims determined (the Board could not provide figures for 2007 as they ceased to track claim ‘types’ from December 2006). Our Canadian case pool contains only 202 decisions for 2002-2006, including 81 judicial review decisions; thus representing less than 5 per cent of actual determinations made on sexual orientation in that period in Canada.

determinations in Canada and Australia on the basis that the applicant was not actually gay.¹⁴ In later years, UK and Australian cases repeatedly described sexual orientation claims as ‘easy to make and impossible to disprove’.¹⁵ Unlike disbelief of other aspects of a claimant’s narrative (such as past persecution, where future fear of persecution may still be made out), disbelief regarding actual group membership will almost always doom the claim to failure: thus it is chosen as a key site to explore credibility assessment.

It is easy to characterise sexual orientation claims as specific or ‘exceptional’ because they make up a very small minority of refugee claims worldwide, even within the PSG ground. Moreover, sexuality based cases do manifest unique features as a result of homophobic prejudice. Specific features of sexual orientation claims have been explored elsewhere as part of this research project, for example the reluctance of decision-makers to recognise criminal sanctions on homosexual sex as persecutory,¹⁶ the expectation in some receiving countries that applicants avoid the possibility of persecution by concealing their sexuality in their country of origin,¹⁷ the particular difficulty of obtaining country information on sexuality,¹⁸ and - in common with gender claims - the role of non-state actors and persecution arising from the ‘private’ realm of

¹⁴ In Canada the proportion of decisions where the applicant’s claim of a gay, lesbian or bisexual identity was disbelieved rose from 7 per cent in the first phase of the study (accounting for 15 per cent of negative determinations) to 22 per cent of decisions in phase 2 (accounting for 28 per cent of negative determinations). Australian decisions where the applicant’s claim of a gay, lesbian or bisexual identity was seriously doubted or disbelieved rose from 16 per cent of available cases prior to December 2003 to 38 per cent in period following: see Jenni Millbank, ‘From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom’ forthcoming (2009) 13 (2/3) *International Journal of Human Rights*.

¹⁵ See eg *Krasniqi v Secretary of State for the Home Department* [2001] UKIAT 01TH02140 (30 August 2001) at para 2; N04/48510 [2004] RRTA 367 (17 May 2004) at page 11 of typescript; *WAIH v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FMCA 40 (4 March 2003); *SZIGI v Minister for Immigration and Multicultural Affairs* [2006] FMCA 1800 (20 November 2006) at para 25. Such statements did appear, although less frequently, in the first phase of the study: see eg, N97/16114 [1998] RRTA 4882 (2 November 1998) at 13.

¹⁶ See Jenni Millbank, ‘A Preoccupation with Perversion: the British Response to Refugee Claims on the Basis of Sexual Orientation, 1989-2003’ (2005) 14 *Social and Legal Studies* 115.

¹⁷ See Catherine Dauvergne and Jenni Millbank, ‘Before the High Court: Applicants S396/2002 and S395/2002, a Gay Refugee Couple from Bangladesh’ (2003) 25 *Sydney Law Review* 97; ‘From Discretion to Disbelief’ above note 14.

¹⁸ See Catherine Dauvergne and Jenni Millbank, ‘Burdened by Proof: How the Australian Refugee Review Tribunal Has Failed Lesbian and Gay Asylum Seekers’ (2003) 31 *Federal Law Review* 299. See also more recent research on Canada by Nicole LaViolette, ‘Independent Human Rights Documentation: A Lingering Challenge to Successful Refugee Claims Based on Sexual Orientation’ forthcoming (2009) 13 *International Journal of Human Rights*.

social and family contacts.¹⁹ Yet it is a mistake to view sexuality cases as inherently atypical or incapable of providing broader insights. This paper argues that sexual orientation claims can be utilised to explore general issues in the determination of credibility. In common with all refugee claims, sexuality claims rest largely upon personal testimony, involve a major cultural gulf between applicant and decision-maker, difficulties and errors in communication (including but not limited to translation) and the challenge of speaking about painful and intensely personal experiences. Because the claim to group membership often rests entirely upon the applicant's narrative in sexual orientation claims, with few if any external items of proof, issues of credibility are highlighted. Thus while this article explores credibility determination in the specific context of sexuality it invites consideration of how insights from this case set may be applied to refugee adjudication processes more broadly.

Tribunals in all of the jurisdictions under discussion make reference to the 'ring of truth' in numerous determinations, usually (but not exclusively) in assessing testimony that is disbelieved. What exactly it is that 'rings' true or untrue is rarely explicated. The term 'ring of truth' is a fascinating one because it posits the story itself as the active agent in the adjudication process and suggests that its truth is both self-contained and self-evident. It is the story that signals (or 'rings') its own truthfulness, rather than the decision-maker who is choosing (based on evidence, instinct, emotion, or a combination) to believe, or to disbelieve, in it or the person telling it. This notion of truth as objective and discoverable by a decision-maker who is a fact 'finder' — rather than, say, a probability estimator, one who knows that their state of knowledge can only ever be imperfect and who weighs various possibilities and decides to give or withhold the benefit of the doubt — is surprisingly prevalent given the well known vicissitudes of proof in the refugee context.

The UNHCR Handbook states that it is unlikely that refugees will be able to prove every aspect of their claim and that they should be given the 'benefit of the doubt'.²⁰ The Handbook adds that the benefit of the doubt should only be given if the examiner is 'satisfied as to the applicant's general credibility'; clarifying that the applicant's statements 'must be coherent and plausible, and

¹⁹ See Jenni Millbank, 'Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia' (2002) 26 Melbourne University Law Review 144; 'Gender, Sex and Visibility in Refugee Claims on the Basis of Sexual Orientation' (2003) 18 Georgetown Immigration Law Journal 71. A later article from this project will examine claims of forced marriage as a harm in refugee law.

²⁰ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (UNHCR Handbook) (1992 edition) at para 203.

must not run counter to generally known facts'.²¹ As a result, guidelines on credibility assessment in many receiving nations centre the idea of a 'coherent and plausible' account²² – although they have notably been less enthusiastic about importing the 'benefit of the doubt' standard upon which it rests.²³ (In fact numerous commentators contend that in practice there has been consistent neglect of the 'benefit of the doubt' principle in lower level decision-making.²⁴) Audrey Macklin, a refugee scholar and former member of the Canadian tribunal, contends that 'consistency, plausibility and demeanour' are the primary tools which decision makers use to determine credibility.²⁵ Although such factors are at times inter-related, the role that each of these three factors – demeanour, consistency and plausibility — has played in the case law is explored below in order to ground discussion of the issues with recent concrete examples. The article then goes on to examine avenues to improve the practice of credibility assessment, including measures such as structuring decision-maker discretion through the use of guidelines and other means, improved selection and training of decision-makers, and, most importantly,

²¹Id at para 204.

²² See Home Office (UK), Asylum Instructions on Assessing Credibility in Asylum and Human Rights Claims (c2007) at 3, available from <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/> (accessed 12 November 2008). The Canadian Guidelines state that, 'An important indicator of credibility is the consistency with which a witness has told a particular story. The RPD may also take into account matters such as the plausibility of the evidence and the claimant's demeanour': Refugee Protection Division, Assessment of Credibility in Claims for Refugee Protection (2004) at para 1.1. The Australian Guidelines refer to 'what is objectively or reasonably believable' and the 'overall consistency and coherence' of a claim: Australian Government, Migration Review Tribunal and Refugee Review Tribunal, Guidance on the Assessment of Credibility (2006, updated 2008) at paras 2.4 and 5.2. See also EU Council Directive 2004/83/EC 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 (29 April 2004) (the EU Refugee Qualification Directive), Article 4(5)(c).

²³ For example the UK Asylum Instructions state only that the decision-maker should consider giving the benefit of the doubt: id at 9. The reproduction of the 'benefit of the doubt' principle in the Canadian credibility guidelines is followed by a lengthy discussion of when that approach is not applicable: Refugee Protection Division, id at para 1.3. The use of double negatives in the Australian credibility guidelines is suggestive of a reluctance to embrace the principle: 'if the Tribunal is not able to make a confident finding that an Applicant's account is not credible, it must make its assessment on the basis that it is possible, although not certain, that the Applicant's account of past events is true': Australian Government, id at para 2.6. See also Robert Thomas, 'Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined' (2006) 8 European Journal of Migration and Law 79 at 91, critiquing the lack of the benefit of the doubt in the EU Refugee Qualification Directive.

²⁴ See eg Kneebone above note 2; Sophia Ceneda and Clare Palmer, "'Lip Service" or Implementation? The Home Office Gender Guidance and Women's Asylum Claims in the UK', Asylum Aid Report (2006) at para 6.1; Asylum Aid, Submission of Evidence to the Independent Asylum Commission, 2007, recommendation 6.

²⁵ Macklin, above note 1 at 137. See also Peter Showler's illuminating fictionalized accounts of refugee cases in Canada, Refugee Sandwich (2006).

through the creation of critical spaces of self-reflection in refugee adjudication processes and structures.

II. Demeanour

Although it is widely accepted that demeanour is an unreliable guide in assessing truthfulness,²⁶ most especially in instances of cross-cultural communication,²⁷ it is clear that decision-makers continue to rely upon it. The Canadian guidelines on credibility distinguish between subjective ‘impressions’ based upon physical appearance on the one hand (which it states ought not be relied upon), and what are characterised as ‘objective’ elements of demeanour such as ‘frankness and spontaneity’ in providing an oral narrative.²⁸ Yet it is not at all certain that a clear distinction between ‘subjective’ and ‘objective’ elements of demeanour can be drawn, or that the latter can justifiably be regarded as a reliable guide to truthfulness.

While overt reliance upon the applicant’s appearance as the basis upon which he or she was determined to be a member of the social group was far less likely to appear in written reasons in the later years of the study compared to the first few years in which claims were being made, physical appearance and perception of manner continue to play a role. When statements about appearance were made in decisions they were more commonly for the purpose of affirming the applicant’s claimed identity rather than disbelieving it.²⁹ Yet this does raise the possibility that decision-makers were also considering appearance for both negative and positive assessments of credibility without disclosing it in their reasons. (It is notable that in copies of expedited reports from the Canadian tribunal which, in contrast to reasoned decisions, are not intended for public release,³⁰ refugee protection officers made assessments in recent years such as ‘no signs of being gay,’³¹ ‘effeminate voice and manner’³² and ‘looked gay’³³.) Despite clear judicial guidance in

²⁶ The Australian credibility guidelines provide that the Tribunal should ‘exercise care’ if making adverse credibility findings on the basis of demeanour: Australian Government above note 22 at para 6.1.

²⁷ See eg Kagan above note 2.

²⁸ Refugee Protection Division above note 22 at para 2.3.7.

²⁹ See eg NZ Refugee Appeal No 71623/99 (13 April 2000) at 6; T99-04575 [1999] CanLII 14665 (20 December 1999).

³⁰ Obtained under an Access to Information Request A-2008-00037 (7 July 2008).

³¹ TA4-04080 (18 January 2005), Refugee Protection Office (RPO) Observations. Decision not publicly available, on file with author (ultimately positive to the claimant at hearing).

Canada and elsewhere on the error of using appearance as a basis for assessing group membership,³⁴ occasional negative determinations based on appearance continued to be made at tribunal level. For instance in a 2007 Australian case the tribunal decided that from their ‘manner towards each other’ the applicant and a claimed partner were friends and not lovers,³⁵ and in a 2003 Canadian case an applicant who self-identified as ‘effeminate’ was described as appearing ‘less effeminate’ at the end of the day than he was at the beginning.³⁶ However such decisions were exceptions to the general trend.

More commonly, the so-called ‘objective’ elements of demeanour were influential in determining credibility.³⁷ Decision-makers routinely interpreted hesitation or lack of detail in an applicant’s response to questioning as indications of falsehood.³⁸ This is particularly troubling when the questions being asked involve what one tribunal member acknowledged are:

private issues of self-identity and sexual conduct, and sometimes personal issues for individuals that may be stressful or unresolved. Social, cultural and religious attitudes to homosexuality in an applicant’s society may exacerbate such problems.³⁹

Claimants on the basis of sexual orientation will often have feelings of shame and self-hatred or internalized homophobia⁴⁰ and so may find answering questions about their sexuality very difficult. These difficulties are even more pronounced when questions are sexually explicit

³² TA4-13131 (29 July 2005), RPO Observations (also includes the comment ‘Female interpreter noted his great taste in colour coordination and fashion’). Decision not publicly available, on file with author (positive decision made on the papers, without hearing).

³³ TA5-02888 (26 July 2005), RPO Observations. Decision not publicly available, on file with author (positive decision made on the papers).

³⁴ *Herrera v Canada* [2005] FCJ No 1499 (6 September 2005) (holding that this finding gave rise to both appearance of bias and patent unreasonableness). See also *Lekaj v Canada* [2006] FCJ No 1151 (14 June 2006).

³⁵ *SZKIS v Minister for Immigration and Citizenship* [2007] FMCA 1223 (18 July 2007) at para 31, citing RRT decision of 13 February 2007 (not publicly available).

³⁶ *Re JWB* [2003] RPDD No 141 (17 March 2003) at para 40.

³⁷ This was also found by Guy Coffey in his review of 50 Australian tribunal decisions in which credibility was a serious issue: above note 5 at 386.

³⁸ See eg *Khrystych v Canada* [2004] RPDD No 339 (15 April 2004) and subsequent judicial review decision *Khrystych v Canada* [2005] FCJ No 624 (11 April 2005); *Nnaakirya v Canada* [2004] RPDD No 457 (7 July 2004); *Ochirkhuyag v The Secretary of State for the Home Department* [2002] UKIAT 02991 (24 July 2002).

³⁹ 071397909 [2007] RRTA 187 (15 August 2007).

⁴⁰ See Laurie Berg and Jenni Millbank, ‘Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants’ forthcoming.

and/or when being posed by an authority figure. Additionally, if the translator is a member of the same small community in the receiving country and/or is a member of the opposite sex, the applicant's willingness to make disclosures can be seriously compromised.⁴¹ All of these constraints profoundly affect the process of eliciting information. In our study we found that these issues, even if noted in argument or reasons, were not always adequately taken into account by decision-makers when assessing narratives that were 'halting', 'vague' or 'evasive'.⁴²

Disturbingly, there were numerous cases in which tribunal members asked the applicant questions during the course of the hearing that were specifically about sexual acts⁴³ and then made adverse credibility findings based upon a lack of detailed or free flowing response.⁴⁴ This approach was affirmed as acceptable on judicial review in some instances.⁴⁵ In a 2004 Canadian

⁴¹ See eg N01/37352 [2001] RRTA 381 (24 April 2001) at 4; N01/37891 [2001] RRTA 889 (16 October 2001) at 9. In 2008 the Australian tribunal amended its credibility guidelines to include sexual orientation as a reason to consider 'whether it would be appropriate for an interpreter of a particular gender to assist with the hearing': Australian Government, Migration Review Tribunal and Refugee Review Tribunal, *Guidance on the Assessment of Credibility* (2006, updated 2008) at para 4.5. Note, however, that there is no obligation upon the Tribunal to respond to a request that an interpreter (or Tribunal member) be a designated gender.

⁴² See cases above note 41; see also N04/50078 [2004] RRTA 778 (8 December 2004).

⁴³ See eg N01/37891 [2001] RRTA 889 (16 October 2001). In another Australian case the applicant was peppered with detailed questions about his visit to a male-male sex-on-premises venue, focusing upon the applicant's experience and recollection of the changing room because, in the tribunal's words, 'What happens after that is potentially sensitive and individual': N05/50659 [2005] RRTA 207 (17 May 2005) at 11. Yet it appears from the transcript submitted on judicial review that the tribunal did in fact proceed to ask repeatedly about what occurred 'after your shower': *SZGNJ v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FMCA 91 (24 February 2006) at para 11. See also the UK see *Sarfrazy v Secretary of State for the Home Department* [2002] UKIAT 00540 (1 March 2002) at para 25 where 'the appellant has never said what specific acts were recorded in the videos'. See also a recent Australian case in which the applicant claimed that he had met men in on-line dating websites; his reluctance to provide the tribunal member during the hearing with his login name and password (which would possibly have revealed on-line conversation of a sexual nature) was taken as adverse to his credibility: 071913999 [2008] RRTA 35 (18 February 2008).

⁴⁴ See eg *Leke v Canada* [2007] FCJ No 1108 (22 August 2007) stating the findings of the IRB: 'during testimony the applicant was reticent to describe explicitly the intimate sexual act he and Kunle Oba were performing when the landlord forced himself into the apartment and caught them in the act' (at para 10, judicial review granted on other grounds). In *NAIK v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FMCA 400 (1 September 2003) the applicant was disbelieved because he was 'halting' and 'evasive' when questioned about 'critical issues' in his testimony which appear to centre upon being discovered engaged in gay sex (RRT decision not publicly available). See also *Mahmood v Canada* [2003] RPDD No 636 (18 November 2003) at para 21, where the applicant's evidence of his first sexual experience (of male-male sexual assault) was not given in a 'straight-forward' or detailed manner.

⁴⁵ In an early Australian case the applicant claimed he had made a video involving himself and others in sex acts; this was discredited on the basis that his oral evidence 'lacks important detail, for example about the nature and type of sexual activity on the video, who was involved in specific activities': N97/15882 [1997] RRTA 3396 (5 September 1997) at 7; judicial review denied subsequently in *SZEOE v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FMCA 1096 (16 December 2004) and *SZEOE v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 694 (31 May 2005). See also *Magradze v*

case, a 45 year old male claimant from the Ukraine was found to be ‘vague and hesitant in his testimony with respect to his experiences as a homosexual person’.⁴⁶ In that case, it appears that the applicant was repeatedly questioned by a female tribunal member about ‘how the situation developed from an invitation to tea to that of sexual intimacy’.⁴⁷ (At the other end of the spectrum, in two cases decided in 2004 – one in Australia and one in Canada – an applicant and witness respectively were disbelieved in their claims to be gay because they were considered too relaxed and jovial in manner when giving evidence.⁴⁸) These findings are extremely problematic for sexual orientation claims and also do not augur well for the sensitivity or appropriateness of questioning and credibility assessment in other contexts, such as in claims involving sexual violence.

Findings correlating hesitation in responding to questions with dishonesty rest on the implicit faith of decision-makers in their own ability to read non-verbal cues in a highly stressful cross-cultural setting. In a 2005 New Zealand case the applicant, an Iranian man in his late 30s, was ‘initially unable to respond’ to a question about what sexual activity took place at parties he held and ‘became visibly shaken’ when he was ‘prompted that one such activity might have been oral sex’.⁴⁹ When asked about his own sexual acts, the applicant responded ‘with head bowed’ that he could not talk about it.⁵⁰ The tribunal noted that ‘acceptance of one’s sexuality can present enormous challenges and that, even accepted, it can remain an intensely private matter’.⁵¹ Yet the decision-maker went on to hold that these possibilities

do not explain the appellant’s sudden paralysis when asked to give even a general description of the homosexual activities in which he claims to have regularly engaged with a number of other people over a fourteen year period...Far from bashfulness, the inarticulate

Canada [2006] FCJ No 35 (11 January 2006) at para 6: ‘it was open to the Board to draw a negative inference from the Applicant’s inability to clearly describe his sexual activities with his alleged lover in Georgia’.

⁴⁶ Kravchenko v Canada [2004] RPDD No 384 (9 February 2004) at para 8.

⁴⁷ Kravchenko v Canada [2004] RPDD No 384 (9 February 2004) at para 12. The decision was overturned on judicial review for other reasons: Kravchenko v Canada [2005] FCJ No 479 (17 March 2005).

⁴⁸ N04/48510 [2004] RRTA 367 (17 May 2004). Moreover in the Canadian case the witness was asked by the board what kind of condoms he used and his answer was then dismissed on the basis that a heterosexual man would be equally able to provide such information - begging the question why such personal information was requested in the first place: Hussain v Canada [2004] RPDD No 732 (17 September 2004) at para 37.

⁴⁹ NZ Refugee Appeal No 74151 (2 December 2005) at para 39.

⁵⁰ Id at para 40.

⁵¹ Id at para 41.

response of the appellant suggested, instead, distaste at the prospect of describing that which was foreign to him.⁵²

While being visibly shaken, inarticulate, non-responsive and bowing one's head may indeed be a betrayal of 'distaste', it seems at least equally possible that such elements of demeanour may evince 'bashfulness' or shame. The degree of confidence expressed by the decision-maker in being able to clearly distinguish between such emotional states, in a complete stranger, is very troubling in this instance.

In 2008 amendments to credibility guidelines used by the Australian tribunal included the proviso that, 'The Tribunal should be mindful that an applicant may find it particularly difficult or embarrassing to discuss claims relation [sic] to his or her sexual orientation'.⁵³ While such acknowledgement is a positive step, it is notable that the guidelines still do not address the conduct of the Tribunal in response to such inhibition or embarrassment; they do not, for example, provide that sexually explicit questions should be avoided where possible, or make any specific suggestion as to topics or methods of questioning.

Nicole LaViolette contends that questions about the personal experience of being gay or lesbian provide the 'strongest basis' for assessing credibility as to group membership.⁵⁴ Such questioning, however, must take place within an appropriate framework: one which excludes intensely personal inquiry, such as detail of sexual activities, and which is sensitive to the barriers in articulating such experience. It must also include sensitivity to the barriers that exist in receiving such narratives when they do not match the cultural experiences or expectations of the decision-maker.⁵⁵ Our research found a disturbing number of cases in which decision-makers appeared to have a pre-formed expectation of how gay, lesbian or bisexual sexual identity is understood, experienced and expressed by applicants from a widely diverse range of cultures and backgrounds. These are discussed in the sections that follow, on consistency and plausibility.

⁵² Id at para 41.

⁵³ Above note 22 at para 4.6.

⁵⁴ Nicole LaViolette, 'Sexual Orientation and the Refugee Determination Process: Questioning a Claimant about their Membership in the Particular Social Group', prepared for the Immigration and Refugee Board (2004) at 5.

⁵⁵ Marita Eastmond, 'Stories as Lived Experience: Narratives in Forced Migration Research' (2007) 20 *Journal of Refugee Studies* 248.

III. Consistency

Consistency may be either internal or external to a narrative.⁵⁶ Internal consistency is the extent to which the series of statements made by the applicant through the process — to border guards or at an initial interview, in the written statement that forms the basis of the claim and in oral statements during the hearing — sit comfortably with each other without contradiction. In keeping with other studies we found a strong emphasis in decisions upon the extent to which the applicant's oral narrative in the hearing correlated with earlier claims.⁵⁷

External consistency is the extent to which the applicant's narrative is contradicted by knowledge and actions outside the narrative, such as the applicant's own behaviour or history and also what the UNHCR calls 'generally known facts',⁵⁸ such as those drawn from country information sources: that is, the extent to which the story matches what is known of the applicant and of the world at large. External consistency assessment which draws upon general information thus blurs into the realm of 'plausibility', and some issues raised here could be characterised under either head. However 'plausibility' assessment may also be based upon what is speculated upon or imagined to be likely, rather than upon actual evidence of what has occurred or evidence of general conditions that inform the likelihood of an occurrence. Accordingly, plausibility is considered separately in the next section of the article.

In a Swedish study exploring attitudes to truth-telling, the authors concluded that refugee decision-makers are heavily reliant upon consistency to establish reliability of claims.⁵⁹ Sixty-seven migration board members (who are first instance decision-makers in the Swedish system) were asked both closed and open questions about factors in credibility assessment. Sixty per cent of board members agreed with the statement that deceptive statements are less consistent than

⁵⁶ In the UK, credibility guidelines which guide the decision-making of low level bureaucratic officers expressly utilise the framework of internal and external consistency, see above note 22.

⁵⁷ See eg Kneebone above note 2 at 82, Amnesty International UK, *Get it Right: How Home Office Decision Making Fails Refugees* (2004) at 20; Coffey above note 5 at 388-9; Kagan above note 2 at 386.

⁵⁸ UNHCR Handbook above note 20 at para 204.

⁵⁹ Pär Anders Granhag, Leif Strömwall and Maria Hartwig, 'Granting Asylum or Not? Migration Board Personnel's Beliefs about Deception' (2005) 31 *Journal of Ethnic and Migration Studies* 29. The authors express concern as they argue that existing research demonstrates that 'deceptive consecutive statements are consistent to at least the same extent as truthful ones', at 43, and moreover board members received no training in how to strategically use case-specific facts during investigative interviews, at 46.

truthful ones.⁶⁰ In addition in response to the open ended questions, ‘Do you have any rules of thumb for distinguishing between liars and truth tellers?’ and ‘Which factors are the most important when are to make a reliability assessment?’, the second most common response to both was contradictions.⁶¹ In a public submission in 2000 to a parliamentary inquiry, the Australian tribunal also repeatedly emphasised consistency as the basis for credibility determinations.⁶² Yet decision-makers themselves acknowledge that contradiction is inevitable in virtually every case.⁶³

When assessing inconsistency in details within a refugee narrative, several important considerations about memory and recall ought to frame value judgements about whether inconsistency is meaningful, that is, whether it bears any relation at all to truthfulness. First, general research on memory clearly demonstrates that matters experienced by the teller as core rather than peripheral are more likely to be accurately recalled over time. Secondly, stress and trauma have a demonstrably negative effect on the ability to recall events, as do other forms of mood depression. Thirdly, with the passage of time, recall declines.⁶⁴ These general conclusions on memory have all been confirmed in recent clinical research that specifically explores variations in autobiographical narratives by refugees. In a clinical study, a group of British psychologists looked at repeated interviews given by Kosovar Albanians and Bosnians who had already been granted leave to remain in the UK (so no outcome hinged upon the content or consistency of the stories). Discrepancies between two autobiographical accounts given by the same individual on different occasions were found for all participants, with a higher degree of discrepancy in details

⁶⁰ Id at 39. Interestingly, this figure was higher than the ‘control’ group of non-decision makers, comprised of students, of whom 53.8 per cent agreed.

⁶¹ These were 21 per cent and 18 per cent of responses, respectively. The number one answers were, respectively, ‘No’ and ‘If known facts correspond with the statement of the asylum seeker’: id at 40.

⁶² Parliament of Australia, Senate, ‘A Sanctuary Under Review: An Examination of Australia’s Refugee and Humanitarian Process’ (2000) at para 5.62: ‘The RRT makes an assessment of the applicant’s credibility by:

- examining any inconsistencies in the applicant’s claims;
- determining whether new claims are raised at a hearing that were not included in the written application;
- determining whether there are any inconsistencies with known conditions in the applicant’s country of origin; and
- assessing the general plausibility of the applicant’s story.’

See also Coffey’s review of 50 Australian cases on credibility, finding that inconsistency was the most significant factor in negative determinations: above note 5 at 388, fn 69.

⁶³ Cécile Rousseau and Patricia Foxen, ‘Constructing and Deconstructing the Myth of the Lying Refugee’ in Els van Dongen and Sylvie Fainzang (eds), *Lying and Illness* (2005) at 74.

⁶⁴ For an overview of such research, see eg Jane Herlihy, ‘Evidentiary Assessment and Psychological Difficulties’ in Noll (ed) above note 3.

which participants considered peripheral rather than central. For the group with high post-traumatic stress, the length of time between interviews significantly raised the discrepancy rates. This study suggests that using inconsistency as a key criterion for assessing credibility is likely to lead to erroneous conclusions of deception in cases where applicants have suffered post-traumatic stress and delays in the assessment of their claims.⁶⁵

Given that the experience of trauma and the passage of considerable time between events in the home country and adjudication of the claim are common, even ubiquitous, features of refugee claims, consistency in relating minor aspects of narratives should perhaps be seen as the exception rather than the 'rule' against which truthfulness is judged. Yet the equation of consistency with truthfulness was prevalent in our study, including in cases where the inconsistency was of a relatively minor or peripheral nature.⁶⁶ A stunning example arose in a 2005 Canadian decision in which the applicant recalled an incident that had occurred two years earlier. In his original written claim he stated that his attackers were behind a gate; in later oral testimony he said that he was behind a high fence. The tribunal held that these statements were inconsistent and placed significant emphasis on this inconsistency because, in the face of all research to the contrary, 'given the alleged traumatic nature of the incident, it was reasonable to expect the claimant to relate a clear and consistent tale at all times'.⁶⁷

Delay as inconsistency

A fundamental but untested assumption of refugee adjudication is that claimants in genuine fear of persecution will make their claim at the earliest possible opportunity and as fulsomely as possible.⁶⁸ Late claims, and claims to which detail is later added or changed, are regarded with

⁶⁵ Jane Herlihy, Peter Scragg and Stuart Turner, 'Discrepancies in Autobiographical Memories – Implications for the Assessment of Asylum Seekers: Repeated Interview Studies' (2002) 324 *British Medical Journal* 324.

⁶⁶ See also the findings of Amnesty International UK that decision-makers often focus on minor detail when finding that credibility is impugned by inconsistency, above note 57 at 19-29; similar conclusions are drawn in a review of Australian tribunal decisions: Kneebone above note 2 at 93. In their review of 40 negative decisions in Canada, Rousseau et al suggest that emphasis on factual information not relevant to the claim by decision-makers was due to their unconscious wish to avoid hearing details of traumatic incidents: above note 2 at 59.

⁶⁷ TA4-13566 [2005] CanLII 59997 (15 March 2005) at 9.

⁶⁸ See eg, EU Council Directive 2005/85/EC on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (1 December 2005) (the EU Asylum Procedures Directive), Article 11(2)(a) and the EU Refugee Qualification Directive, above note 22, Article 4(1), providing that Member states may consider it is the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection.

suspicion because they are seen as inconsistent. Guidelines on credibility (and others on gender or torture) commonly draw decision-makers' attention to 'exceptions' to this general approach, rather than actually displacing the expectation.⁶⁹

Interestingly, although delay was relatively commonplace in sexuality claims, it was rarely a major factor in negative determinations. In general, decision makers carefully considered the reasons for late claims involving homosexuality, including whether applicants (and their advisers) were unaware that sexuality was recognised in the receiving country as the basis of a PSG claim,⁷⁰ as well as applicants' reluctance to reveal such information to authority figures.⁷¹ Some cases specifically acknowledged applicants' feelings of shame, emotional turmoil or 'shyness' in revealing their sexuality.⁷² While claims of homosexuality that were raised by an applicant only after a negative determination on another ground were treated with greater scrutiny,⁷³ this was not an unreasonable approach and did not always lead to rejection of the claim.⁷⁴

However there was still a small cohort of cases in which delay in raising sexual orientation in the claim was not handled thoughtfully, and it was notable that these occurred mostly in the UK.⁷⁵

⁶⁹ See eg the UK guidelines which under 'Internal credibility' include a subsection entitled 'Mitigating circumstances' which lists 'mental or emotional trauma, inarticulateness, fear, mistrust of authorities, feelings of shame, painful memories particularly those of a sexual nature' and adds in brackets 'For further guidance see the AIS on Gender Issues in the Asylum Claim, Medical Evidence and Conducting Asylum Interviews', see above note 22.

⁷⁰ See eg NZ Refugee Appeal No 1312/93 (30 August 1995).

⁷¹ See eg NZ Refugee Appeal No 1856/93 (25 April 1996); NZ Refugee Appeal No 74665/03 (7 July 2004). In addition Canadian decision makers accepted that applicants had not make claims in the US en route to Canada due to its less progressive attitude to claims on the basis of sexual orientation: see eg MA3-10913 [2004] CanLII 56776 (7 May 2004); Re EYW [2000] CRDD No 116 (7 June 2000). Such claims would no longer be heard in Canada as a consequence of the US-Canada safe-third country agreement: see eg Audrey Macklin, 'Disappearing Refugees: Reflections on the Canada-US Safe Third Country Agreement' (2005) 36 Columbia Human Rights Law Review 365.

⁷² See eg NZ Refugee Appeal No 74946 (8 September 2004) at para 17; NZ Refugee Appeal No 75272 (16 May 2006) at para 66.

⁷³ See eg NZ Refugee Appeal No AAS 71779/99 (29 December 1999); *Nyaoma v Canada* [2004] RPDD No 446 (18 May 2004) at para 17; and in the UK *Ochirkhuyag v The Secretary of State for the Home Department* [2002] UKIAT 02991 (24 July 2002).

⁷⁴ Positive determinations were made in such circumstances: eg NZ Refugee Appeal No 75576 (21 December 2006).

⁷⁵ See eg *R (on the application of S) v The Secretary of State for the Home Department* [2003] EWHC 352 (10 February 2003); *R (on the application of Mbasvi) v Immigration Appeal Tribunal* [2001] EWHC Admin 891 (15 October 2001); *Krasniqi v The Secretary of State for the Home Department* [2001] UKAIT 01TH02140 (30 August 2001) (adjudicator has disbelieved claim based on timing).

Decision-makers in the UK did not pay proper regard to the fact that sexual orientation remained controversial as the basis for a claim in that country for several years. Indeed the Home Office vigorously opposed homosexuality as a PSG ground in early cases,⁷⁶ and appears to be maintaining this opposition.⁷⁷ This environment impeded the ability of claimants to raise the issue of sexual orientation early in their claims⁷⁸ and in earlier years reduced the likelihood of that aspect of their claim being recorded in the initial interview.⁷⁹ Decision makers in the UK were also demonstrably less sensitive than those elsewhere to the prospect that a refugee claimant on the basis of sexual orientation may not be able, or may not feel able, to make their claim in another country en route. For example in a 2001 case, the adjudicator found that the applicant from Iran was more likely an economic migrant than an asylum seeker because he had not attempted to claim refugee status on the basis of homosexuality in Turkey.⁸⁰

A consistent expression of (homo)sexuality?

A wealth of social science research and literature attests to the complexity of sexual identity development.⁸¹ Yet in the refugee context the expectation that sexual orientation is a fixed or finite quality, settled upon early and immovable thereafter, has supported adverse inferences on credibility when asylum seekers have engaged in heterosexual relationships which are seen as 'inconsistent' with a claimed lesbian or gay identity.⁸² This was most pronounced in decisions

⁷⁶ See *R v Secretary of State for the Home Department ex parte Binbasi* [1989] Imm AR 595 (25 July 1989).

⁷⁷ See eg the argument of the Home Office that, absent evidence of persecution, homosexuals cannot constitute a PSG because they are not a 'cohesive group' in *Re Stuk* [2005] ScotsCS CSOH 30 (18 February 2005).

⁷⁸ *R v Secretary of State for the Home Department ex parte Arku* [1997] Queen's Bench Division (Crown Office List) FC 3 97/7256/D (19 December 1997) regarding a claim filed in 1992. See also a 2002 Canadian decision in which failure to raise sexual orientation in a claim originally made in 1992 (although then not an established group) was held adverse to the applicant: *Re PUY* [2002] CRDD No 47 (17 April 2002), contrary to earlier decisions such as *Re EYW* [2000] CRDD No 116 (7 June 2000).

⁷⁹ *Secretary of State for the Home Department v Metanie* [1998] UKAIT 17170 (21 May 1998) regarding an interview conducted in 1991: 'He asserts that he told the interviewing officer about it but was in turn told that it was not a necessary or relevant part of his claim. ... We do not accept that the interviewing officer would have disregarded, or omitted a matter of substance raised in the course of the interview. There has for some time been an issue whether homosexuality could give rise to a claim under the Convention and we are confident that if the matter had been raised, then it would have been recorded', at 2.

⁸⁰ *Bnikhosh v Secretary of State for the Home Department* [2001] UKAIT 01TH02525 (7 November 2001) at para 6.

⁸¹ For an overview, see Berg and Millbank, above note 40.

⁸² See eg 071204626 [2007] RRTA 146 (13 August 2007); N05/51729 [2005] RRTA 311 (8 November 2005); N02/42894 [2003] RRTA 1093 (14 November 2003); *Khrystych v Canada* [2004] RPDD No 339 (15 April

from Australia and the UK, somewhat less common in Canada and least likely to occur in the New Zealand.⁸³

In Canada the Federal Court has cautioned against simplistic and essentialised notions of sexual identity in numerous cases. For example, in the 2006 case of *Leke* the Canadian tribunal held that a claimant from Nigeria could not be gay because he had married and it was ‘highly improbable’ that a homosexual would father two sons. The Federal Court of Canada overturned this decision, holding that the tribunal had erred in ignoring the wealth of evidence on the need to live a double life in Nigeria.⁸⁴ Likewise in 2006 the Canadian tribunal revoked refugee status from a woman who had previously been recognised as a lesbian refugee on the basis that her later marriage to a man indicated it was a fraudulent claim.⁸⁵ The Federal Court noted in its judgment that, ‘The human race is extremely complex, particularly when it comes to the sexuality of its members’ and, in overturning the decision, held that the bare fact of a subsequent heterosexual relationship did not establish that the applicant’s claim to being lesbian was false at the time it was made.⁸⁶

A number of commentators have noted a tendency of decision-makers to search for, or seize upon, inconsistencies in the applicant’s narrative – even those of an apparently trivial or peripheral nature – to doubt the veracity of the claim.⁸⁷ In the UK this approach has been characterised as a manifestation of a ‘culture of disbelief’ in the refugee determination system.⁸⁸ In addition to this ‘culture of disbelief’, it was apparent from the case reports that decision-makers did not always take time within the hearing to explore with the applicants inconsistencies that were later held to be significant.⁸⁹ Taking care to resolve the reason for inconsistencies is

2004); *Davydyan v Canada* [2004] RPDD No 288 (28 July 2004) at para 17; *Ochirkhuyag v The Secretary of State for the Home Department* [2002] UKIAT 02991 (24 July 2002).

⁸³ See eg NZ Refugee Appeal No 73252/02 (24 December 2002) at paras 8, 10, 30 and 35.

⁸⁴ *Leke v Canada* [2007] FCJ No 1108 (26 July 2007) at para 20.

⁸⁵ MA6-02300 [2006] CanLII 61623 (IRB) (27 September 2006).

⁸⁶ *Santana v Canada* [2007] FCJ 700 (15 May 2007) at paras 8 and 9. See also NZ Refugee Appeal No 76175 (30 April 2008).

⁸⁷ See, respectively: Amnesty International UK above note 57; Rousseau and Foxen above note 63 at 64-65; Coffey above note 5; Kneebone above note 2.

⁸⁸ See eg: Amnesty International UK above note 57; Ceneda and Palmer above note 24.

⁸⁹ See eg *WAIH v Minister for Immigration* [2003] FMCA 40 (4 March 2003). See also Coffey’s review of 50 Australian cases: above note 5 at 388.

required by classic considerations of natural justice as well as the UNHCR exhortation that the burden of fact-finding be shared between applicant and decision-maker.⁹⁰ UNHCR Procedural Standards provide that as a general principle a negative credibility finding should not be made unless an applicant has had an opportunity to explain inconsistencies.⁹¹

IV. Plausibility

Both Amnesty and UNHCR have stringently criticised initial bureaucratic decision-makers in the UK for frequently relying upon assumption or inference as to how people would behave in certain situations in making ‘plausibility’ judgments.⁹² There were numerous examples of this kind of speculative reasoning in tribunal level decisions in all of the countries under review. For example, in a Canadian case from 2000 a woman claimed that her sexuality was exposed when her husband, who was intoxicated, came to her work and confronted her about her lesbianism. The tribunal held that this claim was not plausible because no one would have believed the husband if he were drunk.⁹³ The difficulty with much ‘plausibility’ assessment is that it arises from assumptions about what is real or likely, and may rest far more upon speculation than upon evidence. This difficulty is exacerbated in sexual orientation claims because there is rarely any external form of proof of group membership. Moreover, even when available, evidence such as photographs of lovers, membership of lesbian and gay community groups, or testimony by counsellor, is often disregarded as self-serving or staged.⁹⁴ Thus, overwhelmingly, it is the applicant’s own testimony of his or her self-identity that founds the claim.

⁹⁰ UNHCR Handbook above note 20 at para 195.

⁹¹ UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR’s Mandate* (2005) at para 4.3.6.

⁹² See UNHCR, *Quality Initiative Report, 3rd Report, 2006, Section 2.3.6-2.3.7*; Amnesty International UK above note 57 at 19.

⁹³ *Re PTF* [2000] CRDD No 117 (11 May 2000) at para 5, upheld on judicial review in *Valoczki v Canada* [2004] FCJ No 612 (1 April 2004).

⁹⁴ See eg *N05/50659* [2005] RRTA 207 (17 May 2005); *Yakovenko v Canada* [2004] RPDD No 267 (22 January 2004); *Re PTF* [2000] CRDD No 117 (11 May 2000); *TA5-12778* [2006] CanLII 61444 (IRB) (28 October 2006) at 8; *Osayamwen v Canada* [2004] RPDD No 655 (22 July 2004) at para 18; *Cole v Canada* [2004] RPDD No 854 (1 December 2004) at para 29; *Re GPC* [2003] RPDD No 444 (16 September 2003) at para 11; *Re GYJ* [2001] CRDD No 46 (17 May 2001) at para 6; *Davydyan v Canada* [2004] RPDD No 288 (28 July 2004) at para 24.

Nicole LaViolette argues that, ‘There is no uniform way in which lesbians and gay men recognize and act on their sexual orientation’.⁹⁵ Given this divergence, it is worth considering what exactly constitutes a ‘plausible’ account of a homosexual self identity. In training materials that she developed for the Canadian tribunal, LaViolette suggests three areas of inquiry: (i) Personal and Family, (ii) Lesbian and Gay Contacts in both sending and receiving countries, and (iii) Experience/Knowledge of Discrimination and Persecution.⁹⁶ Most importantly LaViolette suggests a series of open-ended questions that invite the applicant to tell their narrative of how they came to their own self knowledge or experience of ‘difference’, how they felt about it and how others reacted. Yet the exploration of lesbian and gay contacts in particular was misapplied in practice, as decision-makers based their determination of plausibility on broad over-generalisations or stereotypes of gay culture or ‘lifestyle’, tellingly expressed in one Canadian case as ‘the gay reality’.⁹⁷

In a notorious 2001 Australian case the decision-maker repeatedly asked the applicant, who was from Iran, about his identification with popular culture, including Oscar Wilde, an Egyptian gay novelist, and his familiarity with the works of Freud (deemed ‘negligible’⁹⁸), in the process of deciding that he was not in fact gay.⁹⁹ Unusually, the applicant was successful in a claim for judicial review on the very difficult ground of actual bias, as the court held that the questions revealed ‘a pre-formed template into which the Tribunal considered all homosexual males would fit’ and a ‘completely closed’ approach to the issue.¹⁰⁰ The government then appealed and the tribunal decision was reinstated as the Full Federal Court held it was a ‘matter of common sense’ and ‘perfectly legitimate’ to test a claim ‘by reference to knowledge or attitudes which members of the relevant religion, social group or political party might be expected to possess’.¹⁰¹ It was not until

⁹⁵ Nicole LaViolette, ‘Coming Out to Canada: The Immigration of Same-Sex Couples under the Immigration and Refugee Protection Act’ (2004) 49 McGill Law Journal 969 at 996.

⁹⁶ LaViolette above note 54.

⁹⁷ Re KQH [2003] RPDD No 136 (19 February 2003) at para 11.

⁹⁸ This was quoted by both Heydon J and Gummow J in the leave to appeal transcript WAAG v Minister for Immigration and Multicultural and Indigenous Affairs [2004] HCATrans 475 (19 November 2004) at 6.

⁹⁹ Quoted on review in WAAG v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FMCA 191 (30 August 2002) at para 12 (RRT decision not publicly available).

¹⁰⁰ WAAG v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FMCA 191 (30 August 2002) at para 23.

¹⁰¹ Minister for Immigration and Multicultural and Indigenous Affairs v SBAN [2002] FCAFC 431 (18 December 2002) at para 65 (emphasis added).

the applicant was successful in obtaining leave to appeal to the High of Australia in 2004 that the government agreed to remit the case back for redetermination (whereupon refugee status was ultimately granted in late 2005).¹⁰²

While this is an extreme example, it unfortunately does not stand alone. In numerous cases, particularly in Australia, and to a lesser extent in Canada, decision makers appeared to test the veracity of applicants' claims to homosexual identity by asking about their familiarity with the gay 'scene' in the receiving country. This involved repeated and often detailed questioning about the names and street addresses of gay nightclubs,¹⁰³ betraying the expectation that same-sex attracted individuals from elsewhere in the world should know about and visit gay bars and clubs as a matter of course upon their relocation.¹⁰⁴ This expectation involves a two-fold assumption: this is what our gay people do, therefore your doing likewise is proof of gayness, and also: if you have come from a place of oppression/covert experience of your sexuality then the inevitable outcome of relocating should be enthusiastic engagement in cultural manifestations of gayness because that is how 'freedom' is expressed. The objections that spring to mind traverse both structural barriers and individual preference. Claimants who have really suffered as a result of their sexuality may find the prospect of publicly-identifiable gay venues appalling rather than liberating, they may be suffering from depression or PTSD as a result of their experiences such that clubbing is not high on their list of priorities, may find such venues inaccessible or unpleasant for many reasons including their expense¹⁰⁵ and the cultural and language barriers to meeting or relating to other people there. (Alternatively, they may simply be plain old home-bodies who don't enjoy socialising in what are, or are perceived to be, pick-up joints.)

¹⁰² RRT Reference N05/52122 (17 November 2005). The decision is not publicly available but was accessed through a Freedom of Information application Ref 163539 (12 June 2008).

¹⁰³ See eg in Australia: N04/48953 [2005] RRTA 363 (25 January 2005); N05/50659 [2005] RRTA 207 (17 May 2005); N03/45493 [2003] RRTA 303 (2 April 2003); *SZIXG v Minister for Immigration and Multicultural Affairs* [2007] FMCA 1331 (30 July 2007) (RRT decision unavailable); *SZKLN v Minister for Immigration and Citizenship* [2007] FMCA 1407 (8 August 2007) (RRT decision unavailable); 071494945 [2007] RRTA 276 (19 September 2007). Canada: *Cole v Canada* [2004] RPDD No 854 (1 December 2004), not disturbed on judicial review: *Cole v Canada* [2006] FCJ 199 (8 February 2006); *Akhtar v Canada* [2004] RPDD No 804 (2 November 2004) at para 16.

¹⁰⁴ Moreover when applicants did name bars they had attended, some tribunal members took extraordinary steps such as telephoning the named bars to ask whether staff remembered them, eg: *SZEOP v Minister for Immigration and Multicultural Affairs* [2006] FMCA 1707 (7 December 2006) at para 13; N97/16114 [1998] RRTA 4882 (2 November 1998) at 6 and 7.

¹⁰⁵ See *Akhtar v Canada* [2004] RPDD No 804 (2 November 2004) at para 16.

There is also an expectation that because someone is lesbian or gay they will be well informed about the legal and political issues faced by people of minority sexualities in their country of origin. Thus in the 2004 case of Laszlo the applicant was disbelieved because he did not know the name of a particular gay organisation,¹⁰⁶ a finding upheld by the Federal Court of Canada as ‘a logical plausibility finding that a person belonging to a persecuted minority would be interested in how members of that persecuted minority is [sic] treated in his country of refuge and/or show an interest in their community’.¹⁰⁷ Tribunals have also held that applicants could not be gay because they did not know whether or not gay sex was legal in their country of origin,¹⁰⁸ could not give detail as to the exact terminology used in the criminal legislation¹⁰⁹ (despite the fact that differently constituted tribunals themselves evinced considerable confusion over the same provisions¹¹⁰), or were unaware of recent legislative developments such as hate crime or anti-discrimination legislation.¹¹¹

The Federal Court of Canada has repeatedly castigated the Canadian tribunal for drawing conclusions about plausibility based upon stereotype or inference that is not founded on evidence.¹¹² For example, the court overturned as patently unreasonable the finding that a woman who had her first lesbian relationship in her 50s was not credible because most people discover their sexuality at a much younger age and she claimed that she was happy to be a lesbian.¹¹³ The court also overturned the finding that a man who was ‘truly’ gay would not describe himself as shy around girls.¹¹⁴ Yet there were many cases in the study where it was apparent that ‘plausibility’

¹⁰⁶ *Laszlo v Canada* [2004] RPDD 334 (18 March 2004) at para 6.

¹⁰⁷ *Laszlo v Canada* [2005] FCJ No 561 (6 April 2005) at para 10.

¹⁰⁸ See eg: 071494945 [2007] RRTA 276 (19 September 2007); *SZEND v Minister for Immigration and Citizenship* [2007] FMCA 1171 (21 June 2007) at para 10 (RRT decision not publicly available).

¹⁰⁹ *Osayamwen v Canada* [2004] RPDD No 655 (22 July 2004) at para 11.

¹¹⁰ See eg *Oparaanyamele v Canada* [2004] RPDD No 589 (22 July 2004), not disturbed on judicial review in *Oparanyamele v Canada* [2005] FCJ 1506 (13 September 2005).

¹¹¹ *Re KQH* [2003] RPDD No 136 (19 February 2003) at para 10.

¹¹² See also *Slim v Canada* [2004] FCJ No 879 (20 May 2004) at para 5.

¹¹³ *Dosmakova v Canada* [2007] FCJ No 1742 (5 December 2007) at para 13.

¹¹⁴ *Kravchenko v Canada* [2005] FCJ No 479 (17 March 2005) at para 3.

assessment at the tribunal level was no more than a process of projection or inference, including inference about applicants' motivations or state of mind, which extended far beyond what was knowable. A stunning example of this occurred in a 2006 Canadian case concerning a lesbian from the Ukraine.¹¹⁵ The applicant claimed that as a young woman in 1979 she had expressed her feelings to a female friend while at a graduation dance together. When questioned by the tribunal about why she chose a 'public event' (on which no aspect of the narrative of later persecution turned) to reveal her feelings, the claimant responded that this occasion was the last that she would see the woman in question and added that:

she did not shout her secret out loud, but merely whispered it to [the woman] and further that she treated [her] with gentleness, such as a touch on the shoulder or a move towards her during watching movies, and was not turned down. She also stated that she was young and would not take the same risk again.¹¹⁶

Despite this explanation the decision-maker held that the applicant would never have done this given the 'intense homophobic society of Ukraine at the time'.¹¹⁷ On such reasoning the claim of virtually every asylum seeker who has had, or attempted, a same-sex relationship in their country of origin is implausible because of the inherent risk it entailed. In fact it was a common refrain in the cases that it was not 'plausible' that applicants would take risks involved in expressing their sexuality, such as making sex tapes,¹¹⁸ picking up men in a sauna,¹¹⁹ or even entering into a second lesbian relationship having been persecuted for the first.¹²⁰ There was a raft of other cases in which plausibility assessment about responses to violence or the threat of violence featured in an incoherent manner. For instance there were cases in which decision-makers held that it was implausible for an applicant not to have sought police assistance after experiencing homophobic violence,¹²¹ while others held that it was implausible that they had sought such assistance.¹²²

¹¹⁵ TA5-12778 [2006] CanLII 61444 (IRB) (28 October 2006).

¹¹⁶ TA5-12778 [2006] CanLII 61444 (IRB) (28 October 2006) at 3.

¹¹⁷ TA5-12778 [2006] CanLII 61444 (IRB) (28 October 2006) at 3.

¹¹⁸ Sarfrazy v Secretary of State for the Home Department [2002] UKIAT 00540 (1 March 2002) at para 25.

¹¹⁹ Aslani v Secretary of State for the Home Department [2002] UKIAT 00085 (24 January 2002) at para 4.

¹²⁰ Ndagire v Canada [2005] RPDD No 133 (27 January 2005), appealed in JRN v Canada [2005] FCJ No 1983 (21 November 2005).

¹²¹ MA4-03463 [2004] CanLII 56779 (IRB) (17 December 2004) at 3.

¹²² MA4-00382 [2005] CanLII 60017 (IRB) (20 July 2005) at 5; Re YFX [2002] CRDD No 241 (2 January 2002) at para 8.

Audrey Macklin has suggested the possibility that decision-makers' frustration at the paucity of evidence may lead them to 'compensate by purporting to draw firm inferences from flimsy evidence',¹²³ a remark that appears to be borne out by these examples.

The applicant in the Ukrainian case above went on to detail her marriage and relationship with two other women over a period of several years. The second woman 'got frightened with the thought of a lesbian relationship, wanted to preserve her marriage and turned her down' while her relationship with a third woman ended when that woman left for England with a man.¹²⁴ The tribunal's finding on this sequence of events — which occurred in the 'intense homophobia' of Ukrainian society in the 1980s — was that, '[w]hile it is not impossible for someone to be bisexual it is, on the balance of probabilities, not plausible for the claimant to make three unsuccessful relationships'.¹²⁵ Again the implicit frame of reference for the plausibility assessment here is one of speculation: only a certain number of girlfriends — fewer than three — could be bisexual, or could return to heterosexuality.¹²⁶

Earl Russell in English parliamentary debates has opined that, 'Credibility is a way by which the interviewer is able to express his ignorance of the world. What he finds incredible is what surprises him'.¹²⁷ This criticism is well illustrated by a 2006 Canadian case in which the decision-maker held that the applicant's claim of exploring his sexuality by watching 'gay movies' at an internet café with 'wooden booths' in Lahore was 'implausible' in an Islamic state — but notably did not refer to any source of country evidence to test this assumption.¹²⁸ Some finding of implausibility clearly reflected decision-makers' own ignorance of how gay men experience their sexuality, such as when rejecting the idea that non-verbal cues could be the basis upon which

¹²³ Above note 1 at 137.

¹²⁴ TA5-12778 [2006] CanLII 61444 (IRB) (28 October 2006) at 4.

¹²⁵ TA5-12778 [2006] CanLII 61444 (IRB) (28 October 2006) at 5–6.

¹²⁶ It is very tempting at this point to ruminate on the fact that every lesbian who reads this finding laughs; suffice to say one recent study into same-sex attracted young women in the US found that 'variability in the emergence and expression of female same-sex desire during life course is normative rather than exceptional': Lisa Diamond and Ritch Savin-Williams, 'Explaining Diversity in the Development of Same-Sex Sexuality Among Young Women' (2000) 56 *Journal of Social Issues* 297 at 298.

¹²⁷ Quoted in Thomas above note 23 at 84.

¹²⁸ TA5-13949 [2006] CanLII 61445 (IRB) (17 May 2006) at 4. Readily available journalistic reports note that viewing sexually explicit material is a common pastime at cybercafés, see eg: Ian Fisher, 'Lahore Journal; Cybercafe Crackdown May Trip up Leering Boys' *New York Times*, 1 August 2002.

men might identify each other as gay,¹²⁹ or that men may meet other men for sex in ostensibly heterosexual pornography venues.¹³⁰

Guy Coffey has suggested that many plausibility determinations are based on factors that are ‘inherently difficult to corroborate or rebut’ and that in such circumstances, a negative finding on credibility does not meet the UNHCR ‘benefit of the doubt standard’.¹³¹ At the most basic level, commentators have urged that any determination of plausibility be based upon objective facts and clearly state the basis against which the applicant’s claim is being assessed as unlikely, so that it can be reviewed if it is factually incorrect or based upon an improper premise.¹³² The examples given above clearly demonstrate that this is not always occurring in lower level decision-making.

V. Improving Credibility Assessment

Numerous suggestions have been made in recent years to improve the quality and consistency of credibility assessment in refugee determinations. These coalesce around two main themes: stricter control of discretion and improving the calibre of decision-makers. Controlling discretion may be pursued proactively through legislative avenues, or more commonly through administrative guidelines, that set out standards for credibility assessment and delineate improper evidentiary practice.¹³³ It may also occur reactively through the enunciation of standards of lawfulness by courts undertaking judicial review of credibility decisions. Improving the quality of lower level decision-makers may occur through enhanced requirements for professional or

¹²⁹ ‘[H]e said that he could see from the appearance of a person and that he would approach them. The panel does not find this plausible’: *Hussain v Canada* [2004] RPDD No 732 (17 September 2004) at para 40. ‘It is not credible that such a man would publicly display body language and facial expressions which would cause him public notice and trouble in a homophobic society’: *Kravchenko v Canada* [2004] RPDD No 384 (9 February 2004) at para 16; overturned on judicial review as based on stereotype: *Kravchenko v Canada* [2005] FCJ No 479 (17 March 2005).

¹³⁰ See eg first instance decision quoted on review in *SZIXG v Minister for Immigration and Multicultural Affairs* [2007] FMCA 1331 (30 July 2007). In one extraordinary case, the Canadian tribunal actually viewed a sex tape of the applicant and held that it did not involve his claimed partner because the perfunctory nature of the sex, lack of smiling and conversation led them to conclude that ‘The sex acts appear so mechanical it looks more like an encounter between a “John” and a male prostitute, rather than two men very much in love with each other’: *Re HSO* [2001] CRDD No 19 (21 February 2001) at para 8.

¹³¹ Coffey above note 5 at 391.

¹³² Coffey above note 5 at 415; Kagan above note 2 at 390.

¹³³ See eg: Anker above note 2; Brian Gorlick, ‘Improving Decision-Making in Asylum Determination’, UNHCR Working Paper No 119 (2005).

educational qualifications prior to appointment, more transparent or merit-based appointment processes, greater independence of decision-making bodies from government, and the provision of initial and on-going training.¹³⁴

Each of these avenues offers the potential for positive developments. However, as I explain below, their effectiveness may also be impaired by what has been described by Robert Thomas as the most intractable problem of credibility assessment: ‘the decision-makers’ own presence of self.’¹³⁵ For this reason, any attempt at formal or structural change must be accompanied by simultaneous recognition of the need for the creation of a ‘critical space’. As articulated by Crépeau and Nakache, ‘critical space’ encapsulates both individual and institutional self-reflection in the refugee determination process.¹³⁶

Structuring Discretion

Judicial review constitutes an invaluable check on the discretion of administrative decision-makers in refugee adjudication. Although judicial review is limited in reach because it is reactive, it has the benefit that it is specific in identifying actual errors and so may have a more acute impact on lower level decision-makers than proactive but general guidelines. To be effective, review mechanisms must provide sufficiently broad grounds upon which to appeal credibility findings (such as lack of evidence to support findings of implausibility, failure to state reasons, or conclusions that are ‘patently unreasonable’). Judicial review must also be practically accessible to claimants, which is strongly determined by factors such as cost, complexity of process and eligibility for publicly funded legal representation. These factors are interlinked in practice: as grounds of review have been stringently narrowed in countries such as Australia, the judicial review process and the need for legal representation becomes more acute, since the complexity of proceedings is heightened. This is well illustrated in Australian judicial review cases from 2001 onwards, during which time the grounds of review were strictly narrowed. Of 149 court cases there was an almost even split between represented and unrepresented litigants,¹³⁷ with dramatically different outcomes: unrepresented litigants had a positive decision rate of 2.3 per

¹³⁴ See eg François Crépeau and Delphine Nakache, ‘Critical Spaces in the Canadian Refugee Determination System: 1989-2002’ (2008) 20 *International Journal of Refugee Law* 50.

¹³⁵ Thomas above note 23 at 84.

¹³⁶ Above note 134.

¹³⁷ 56 per cent of matters involved a litigant with no legal representation at hearing.

cent, while for those with legal representation at the hearing their success rate was more than ten times higher, at 29 per cent. Yet it is clear that recommending expanded availability of judicial review and legal aid funding of refugee appeals is mere wishful thinking in the current climate, as most receiving nations continue to reform their systems in the opposite direction.¹³⁸ In this context, guidelines and training aimed at lower level decision-makers appear far more viable avenues of potential reform.

It is notable that most recent legislative attempts to guide credibility assessment have been directed towards the negative assessment of credibility based on certain factors, such as delay or undocumented identity.¹³⁹ Such reforms reflect current political imperatives that favour limiting acceptance rates and ‘fast-tracking’ adjudication processes.¹⁴⁰ To the contrary, a commitment to high quality decision-making would entail measures that also include factors relevant to positive credibility assessment or a neutral approach in the absence of contrary evidence. This could be achieved, for example, through the incorporation into legislation of both the UNHCR ‘benefit of the doubt’ standard¹⁴¹ and the ‘presumption of truthfulness’ approach to sworn testimony.¹⁴² Requirements that credibility findings be clearly stated and supported by reasons¹⁴³ and that adverse findings must be based on relevant or non-peripheral matters could also be encapsulated in either a legislative or administrative framework.¹⁴⁴

¹³⁸ See eg Ninette Kelly, ‘International Refugee Protection Challenges and Opportunities’ (2007) 19 *International Journal of Refugee Law* 401.

¹³⁹ As a result of amendments in 2004, decision-makers in the UK are required to consider in the assessment of credibility various behaviours designated ‘likely to conceal or mislead’: *Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (UK) s 8*, see discussion in Thomas, above note 23 at 92-96. See also *Immigration and Refugee Protection Act 2001 SC s 106* which includes as a mandatory consideration in the assessment of credibility whether an applicant possesses ‘acceptable’ identity documentation. See Hoffman above note 5 on the US. See Spijkerboer on the Netherlands in Noll (ed) above note 3 at 90-94.

¹⁴⁰ See eg Kelly above note 138; Thomas above note 23.

¹⁴¹ See above note 20.

¹⁴² See *Maldonado v Canada* [1980] 2 FC 302 (CA), discussed in the Canadian credibility guidelines, Refugee Protection Division, above note at 22 at para 1.1.

¹⁴³ See eg Australian credibility guidelines, above note 22 at para 2.5.

¹⁴⁴ The Michigan Guidelines Recommendation 11 provides, ‘An applicant’s testimony may only be deemed not credible on the basis of a specific, cogent concern about its veracity on a significant and substantially relevant point’: ‘Third Colloquium on Challenges in International Refugee Law’ (2005) 26 *Michigan Journal of International Law* 491 at 499. See also Brian Gorlick, ‘Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status’, UNHCR Working Paper 68 (2002).

Current administrative guidelines on the assessment of credibility vary widely in terms of the comprehensiveness of their content, scope of applicability and legal weight. The Canadian guidelines are regarded as a model of their kind, with thorough coverage of a wide range of issues, detailed use of case law examples and incorporation of both the benefit of the doubt and presumption of truthfulness standards.¹⁴⁵ By contrast, the UK and Australian guidelines are comparatively brief. Yet even the most exemplary guidelines only provide a broad framework for decision-making. For example a list of factors to consider in credibility assessment does not resolve the tension involved in balancing such factors or weighing contrary evidence.¹⁴⁶ While the Canadian guidelines apply to their tribunal, the UK guidelines apply only to the bureaucratic level officers at first instance and not to *de novo* hearings before the tribunal, while in Australia the situation is reversed with the guidelines applying to the tribunal but not to the first instance bureaucratic level. Importantly, such administrative guidelines do not bind the relevant decision-maker in any of the countries under discussion, such that failure to consider credibility guidelines as they currently exist— indeed even acting clearly contrary to them— is not in itself ground for judicial review.¹⁴⁷

A number of commentators have suggested that formal rules may be of less significance in the refugee determination process than other aspects such as decision-making culture.¹⁴⁸ In interviews with former tribunal members in Canada, Crépeau and Nakache found that decision-makers viewed credibility assessment as ultimately relying less upon rules than upon ‘a constant effort to keep an open mind, to listen, to remain focused on the core elements of the claim, to guard against judging plausibility based on one’s own cultural norms’.¹⁴⁹ It is therefore important to provide content to credibility assessment through complementary guidelines addressing

¹⁴⁵ See Refugee Protection Division, above note 22. See also Immigration and Refugee Board, *Weighing Evidence* (2003).

¹⁴⁶ Kagan above note 2 at 397.

¹⁴⁷ For example while there is provision under s 499 of the Migration Act 1958 (Cth) for the Minister to issue binding guidelines, the 2006 Australian credibility guidelines were not issued pursuant to that power and thus were held by the Federal Magistrates Court to be non-binding: *M100 of 2004 v Minister for Immigration & Anor* [2007] FMCA 829 (1 August 2007).

¹⁴⁸ See eg Peter Billings, ‘Comparative Analysis of Administrative and Adjudicative Systems for Determining Asylum Claims’ (2000) 52 *Administrative Law Review* 253. Gregor Noll contends that the fact that regional harmonisation of refugee law in the EU has not aligned divergent recognition rates indicates that formal rules play only a limited role: ‘Introduction’ in Noll (ed) above note 3 at 2.

¹⁴⁹ Above note 134 at 106.

particular issues and implementation through training that assists the process of ‘keeping an open mind’.

Specific sexual orientation guidelines could be useful to structure questioning appropriately, avoid intrusive questioning and alert decision-makers to stereotyped assumptions about the ‘plausible’ expression of gay sexuality. The closest equivalent at present is the availability of gender guidelines in a number of countries.¹⁵⁰ None of these guidelines addresses sexual orientation in any detailed or substantive way.¹⁵¹ Given that UNHCR has now acknowledged that sexual orientation and gender claims are related in the sense that both arise from non-conformity to traditional gender roles,¹⁵² one possibility is to refashion existing gender guidelines, devised to respond to the experiences of women, in order to include gender and sexual orientation issues that concern both women and men.¹⁵³ Alternately, sexual orientation guidelines could be developed¹⁵⁴ for use alongside gender guidelines.

However such guidelines are only helpful if they are actually used. Taking gender guidelines as a model raises some concerns: although gender guidelines have been in place in Australia for over

¹⁵⁰ See eg: Canada: Immigration and Refugee Board, Guideline 4, Women Refugee Claimants Fearing Gender-Related Persecution (1996) and Compendium of Decisions, Guideline 4, Women Refugee Claimants Fearing Gender-Related Persecution, February 2003 update; UK, Immigration Appellate Authority, Asylum Gender Guidelines (2000); UK Home Office, Asylum Policy Instructions, ‘Gender Issues in the Asylum Claim’ (2004, revised version 2006); Australia, Department of Immigration and Multicultural Affairs, Guidelines on Gender Issues for Decision Makers, July 1996, published in (1997) 9 International Journal of Refugee Law (Special Issue) 195. Only Sweden has sexuality-specific guidelines: see Sweden, Migrationsverket, Legal Practice Division, ‘Guidelines for Investigation and Evaluation of Asylum Cases in which Persecution Based on Given Sexual Orientation is Cited as a Ground’ (2002).

¹⁵¹ See eg UK Home Office, ‘Gender Issues in the Asylum Claim’, which makes a passing reference to ‘sexual orientation’ as a PSG, id at 9. The Australian Guidelines, *ibid*, do not refer to sexual orientation at all.

¹⁵² UNHCR, ‘Guidelines on International Protection: 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’, HCR/GIP/02/01 (2002) at para 16.

¹⁵³ See Nicole LaViolette, ‘Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines’ (2007) 19 International Journal of Refugee Law 169.

¹⁵⁴ This has been recommended by a number of NGOs and commentators in recent years, see eg Amnesty International, Crimes of Hate, Conspiracy of Silence: Torture and Ill-Treatment Based upon Sexual Identity (2001) Recommendation 7; Dauvergne and Millbank above note 18 at 342; UK Lesbian and Gay Immigration Group, ‘Sexual and Gender Identity Guidelines Initiative’, available at <<http://www.uklgig.org.uk/guidelines.htm>> (accessed 12 November 2008); Ghassan Kassisieh for the NSW Gay and Lesbian Rights Lobby, From Lives of Fear to Lives of Freedom (2008). UNHCR has recently commenced drafting a guidance note on the determination of sexual orientation claims, which is expected to be released in early 2009: Personal communication with Gisela Thater, UNHCR, 19 September 2008.

a decade¹⁵⁵ and in the UK for several years¹⁵⁶ they appear to have been honoured far more in the breach than the observance at all levels of the refugee determination process in those countries.¹⁵⁷ Failure to adhere to administrative guidelines is generally not grounds for judicial review, which may also render ineffectual the use of guidelines as a tool to structure discretion at lower levels.¹⁵⁸ In addition a proliferation of guidelines may add to rather than resolve confusion; for example, in the UK, guidelines on credibility assessment and on gender are among a group of over 40 ‘Asylum Policy Instructions’ that are intended to guide first instance decision-makers.¹⁵⁹ Guidelines must be both understood and genuinely integrated into the decision-making process in order to be meaningful. It is particularly notable that, despite excellent on-going judicial guidance on credibility and detailed credibility guidelines, many of the examples of poor credibility determinations given earlier are drawn from recent Canadian tribunal decisions. This suggests that formal guidance, however detailed and thoughtful, has not permeated the lower levels of adjudication. This failure highlights the vital issue of selection and training of decision-makers.

Quality of Decision-makers

Of the countries under discussion, it is notable that three of them – the UK, Australia and New Zealand – use relatively low-level government employees as the first instance decision-maker, and a specialist administrative tribunal is only called upon to make a decision if an applicant has already failed at the earlier stage. While the UK has recently restricted this level of review to

¹⁵⁵ The Australian guidelines were originally directed to the bureaucratic level but omitting to consider the guidelines at tribunal level was held to constitute legal error in *Applicants M16 of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1641 (24 November 2005) and *MZXFJ v Minister for Immigration and Multicultural Affairs* [2006] FMCA 1465 (10 October 2006), the latter being the only Australian case at any level in our pool to refer to the guidelines.

¹⁵⁶ See above note 150.

¹⁵⁷ See Susan Kneebone, ‘Women within the Refugee Construct: “Exclusionary Inclusion” in Policy and Practice — The Australian Experience’ (2005) 17 *International Journal of Refugee Law* 7; Ceneda and Palmer above note 24; *Asylum Aid* (2007) above note 24 at paras 11-13. Moreover since being reconstituted in 2005 the new UK tribunal has determined that it is not bound by its predecessor’s gender guidelines: *Asylum Aid*, id at para 40.

¹⁵⁸ Although on rare occasions courts have held that failure to adhere to procedural recommendations in gender guidelines constitute grounds for judicial review: see above note 155.

¹⁵⁹ See <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/> (accessed 12 November 2008).

errors of law only,¹⁶⁰ in Australia and New Zealand the tribunal exercises full merits review and re-makes the decision. Canada, by contrast, utilises its specialist refugee board as the actual first decision-maker, rather than as a body that ‘stands in the shoes’ of the first decision-maker or reviews its errors. This has two important implications. First, commentators have noted that a specialist tribunal which begins with the file comprising a negative determination from government is more likely to undertake its determination in a sceptical frame of mind; in practice if not in law this places a burden on the applicant to ‘reverse’ the negative decision.¹⁶¹ Secondly, and relatedly, the original refugee determination in such systems has been made by a person who is likely to have a much lower level of education and specialist training than that required of decision-makers at tribunal level, as well as significantly less independence.

Thus any effort to improve the quality of decision-makers at tribunal level may be hampered if not accompanied by corresponding efforts to improve the quality of decision-makers at the bureaucratic level. In the UK, UNHCR has focused considerable attention on improving training and standards for bureaucratic level decision-makers in recent years.¹⁶² Prior to these efforts, first instance UK decision-makers were drawn from the general pool of public servants with a requirement only of high school level education.¹⁶³

While a tribunal structure enables more independent decision-making compared to that undertaken by bureaucrats within a government department, the largely non-transparent and political nature of administrative appointments to refugee tribunals has also given rise to concerns about both quality and independence. For example in Canada there is a perception of ‘grace and favour’ appointments due to political connections.¹⁶⁴ A particular concern in Australia

¹⁶⁰ Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (UK).

¹⁶¹ See eg Kneebone above note 2; Crépeau and Nakache above note 134 at 70.

¹⁶² See UNHCR, ‘Quality Initiative Project, First Report to the Minister’ (2005); ‘Quality Initiative Project, Second Report to the Minister’ (2005); ‘Quality Initiative Project, Third Report to the Minister’ (2006); ‘Quality Initiative Project, Fourth Report to the Minister’ (2007); ‘Quality Initiative Project, Fifth Report to the Minister’ (2008).

¹⁶³ The level of education required for an external appointment is now university degree standard, while internal applicants must undergo internal assessment to meet the same level: Fourth Report, id at paras 2.3.7 - 2.3.15.

¹⁶⁴ See Crépeau and Nakache above note 134.

is the perceived independence of tribunal decision-makers who have worked previously within the same government department responsible for the decisions under review by them.¹⁶⁵

In addition to ‘gatekeeper’ measures such as improving general educational standards, introducing a transparent merits-based process and ensuring a mix of professional expertise and experience in decision-makers,¹⁶⁶ the skills and expertise of decision-makers can also be improved through on-going training. The framework of appropriate factors to structure decision-making on credibility should be augmented with specific information in areas that have been previously identified as problematic. Thus general training on credibility assessment must be accompanied by specific training on gender and sexual orientation issues. Given the findings of our study, such training may be better provided through the use of external experts rather than in-house training. While the Canadian tribunal has utilized external experts to conduct training on sexual orientation issues since its earliest days,¹⁶⁷ the Australian tribunal represents the opposite extreme in that it had no form of training regarding sexual orientation for the first 15 years of its operation (in which it determined thousands of claims on this issue). In March 2008, after significant public pressure arising from a particular case, the Australian tribunal finally conducted a two hour external training session on sexual orientation issues.¹⁶⁸

Greater awareness of issues such as sexual orientation and gender may also require a rethinking of traditional categories of expertise when undertaking training. It is common for tribunals to categorise or develop member expertise relating to a country, or region, such that specialisation is directed to country of origin rather than ground of claim. Yet general knowledge of country conditions frequently does not translate into knowledge of the experience of, or documentation of the human rights abuses of, sexual minorities in those countries. Lack of specific knowledge of country conditions affecting lesbians and gay men is a major and on-going problem in refugee

¹⁶⁵ See eg ‘A Sanctuary Under Review’ above note 62 at paras 5.115-5.117. In a study of the grant-rates of US immigration judges, the researchers found that the positive decision rate of judges who had worked previously for the relevant government department ‘drops largely in proportion to the length of such prior service’: Jaya Ramji-Nogalas, Andrew Schoenholtz and Philip Schrag, ‘Refugee Roulette: Disparities in Asylum Adjudication’ (2007) 60 *Stanford Law Review* 295 at 377. The study found a higher positive rate for judges who had ‘once practiced immigration law in a private firm, served on the staff of a non-profit organization, or had experience as a full-time law teacher’, *ibid*.

¹⁶⁶ In 2004 criteria for the selection of board members was introduced in Canada which included a university degree or an equivalent combination of education and experience, as well as a minimum of five years’ experience in a relevant professional field: Crépeau and Nakache above note 134 at 32-33.

¹⁶⁷ LaViolette above note 18.

¹⁶⁸ See ‘Tribunal Promise’ *Sydney Star Observer*, 28 February 2008.

adjudication.¹⁶⁹ Overly general or erroneous country information also contributes to poor quality credibility assessment on the basis of external inconsistency or implausibility as outlined in this article. It is worth considering whether tribunals should develop specialist in-house expertise on topic areas, such as gender and sexuality, through dedicated legal or policy staff in order to inform decision-making that is usually organised around country specialisation.

Creating and Maintaining a Space of Critical Reflection

Granhag and his colleagues make the vital point that those who are meant to be expert in lie detection seldom if ever receive any independent verification as to whether their assessment was ultimately correct. In the refugee context, ‘feedback is rarely available on whether a person granted asylum actually told the truth about his or her reasons, or whether a person refused asylum on the basis of a lack of credibility actually did lie’.¹⁷⁰ Thus it is at least equally possible that, rather than improving in credibility assessment over time, refugee decision-makers actually entrench stereotypical ideas or erroneous beliefs about deception throughout their tenure. Interestingly, in their interviews with former Canadian tribunal members, Rousseau and Foxen found that members felt that their own expertise increased over time.¹⁷¹ Yet these authors divided members into those who saw their role as being ‘lie detectors’ and those who saw their role as one of dealing with complexity,¹⁷² meaning that there was a major divergence in what this claimed ‘expertise’ entailed.

For members who are certain about what they are doing, this impression seems to be tied in part to the fact that their certainties become stronger over time. For members who grappled with the complexity, the experience seems to be associated with a greater capacity to tolerate uncertainty.¹⁷³

¹⁶⁹ See Dauvergne and Millbank above note 18; LaViolette above note 18. On the issue of country information more generally, see Gorlick above note 133.

¹⁷⁰ Granhag et al above note 59 at 30-31. Ironically, in one of a handful of cases concerning revocation of refugee status for misrepresentation (after it was established that the applicant who was successful on the basis of homosexuality had concealed a long term heterosexual relationship with one woman during the process and subsequently married a second woman), the applicant’s demeanour in the original hearing was characterised as ‘appropriate’ and his claim found to be ‘generally consistent’ with ‘a “ring of truth” to it’: NZ Refugee Appeal No 71185/98 (31 March 1999) at 5, status revoked in NZ Refugee Appeal 75376 (11 September 2006).

¹⁷¹ Rousseau and Foxen above note 63 at 84.

¹⁷² Id at 69.

¹⁷³ Id at 84.

Refugee adjudication involves the interpretation of a story, but this interpretation takes place within a legal framework founded on the idea that truth and falsehood can be objectively verified.¹⁷⁴ What if, quite simply, they cannot? Audrey Macklin argues that the embrace of such uncertainty is a fundamentally important part of the adjudication process. Macklin contends that,

credibility determination is not about ‘discovering’ truth. It is, rather, about making choices – what to accept, what to reject, how much to believe, where to draw the line – in the face of empirical uncertainty. Acknowledging that judging is about choosing, and not about discovering, shifts the focus of credibility determination in significant ways.¹⁷⁵

Once the ‘subjective nature of drawing inferences’ is accepted, Macklin says, ‘The next step is to take responsibility for this fact by bringing whatever critical self-awareness one can to the exercise of choosing what and whom to believe’.¹⁷⁶

This idea of critical self-awareness is central to the recent work of Crépeau and Nakache, encompassing both individual and institutional dimensions. At an individual level this involves the skills associated with having an ‘open mind’: empathy,¹⁷⁷ remaining sensitive despite the heavy and at times repetitive case load, being aware of the limitations of one’s own knowledge of the country of origin and the applicant’s experiences¹⁷⁸ and having the emotional capacity to deal with vicarious exposure to trauma.¹⁷⁹ At an institutional level this requires maintaining an environment that supports and enhances such capacities in its personnel, through training and development, independence, a feasible workload, support systems such as peer review and the availability of counselling and other forms of emotional support.¹⁸⁰

A key aspect of the original Canadian system was that decisions were made by a two member tribunal. The two member panel was identified by former members as a core ‘check and balance’

¹⁷⁴ Id at 57.

¹⁷⁵ Macklin above note 1 at 140.

¹⁷⁶ Ibid.

¹⁷⁷ Showler identifies this as a key attribute for decision-makers: above note 25 at xvii. In earlier work I have also argued that this includes imaginative capacity: above note 19

¹⁷⁸ Crépeau and Nakache above note 134 at 29 and 32.

¹⁷⁹ Rousseau et al above note 2 at 57-60.

¹⁸⁰ Crépeau and Nakache above note 134. It is also worth noting that refugee tribunals and also lower level bureaucratic decision-makers are usually located within immigration departments rather than, for example, human rights or justice portfolios. This placement may have an impact on institutional norms and approaches to decision-making.

within the Canadian system.¹⁸¹ The presence of two decision-makers also provided a ‘richer critical space’ than a single member panel because of the opportunity for reflection and discussion. In the absence of agreement between members, the decision rendered was always positive. Thus, Crépeau and Nakache argue, the structure was also a practical manifestation of the UNHCR ‘benefit of the doubt’ principle at its broadest.¹⁸²

In Canada, case load pressure led to more and more single member panels sitting through the late 1990s and the early 2000s, and legislative reform formally abolished the two member panel from 2002.¹⁸³ An additional tribunal review level, comprising a three member appeal panel to act as a ‘check’ upon sole member decisions, was included in the legislation but has not been implemented.¹⁸⁴ These structural changes have drastically reduced the critical space available in the Canadian system. It is difficult to draw any firm statistical conclusions from the Canadian case set because the writing and release policies governing decisions varied considerably over the span of the study.¹⁸⁵ However, when available cases and Board statistics on outcomes are reviewed together, there does appear to be a decrease in positive tribunal decisions in the later period.¹⁸⁶

¹⁸¹ Id at 89-90.

¹⁸² Id at 89.

¹⁸³ Immigration and Refugee Protection Act, SC 2001, ch 27.

¹⁸⁴ See Andrew Kitching, ‘Past Statements and Committee Recommendations Regarding Implementation of the RAD’, Parliamentary Information and Research Service, Canada (2007), <http://cmte.parl.gc.ca/Content/HOC/committee/391/cimm/reports/rp2969755/cimmrp15/10-app-e.htm> (accessed 12 November 2008).

¹⁸⁵ Until 2002 there was no obligation for the Canadian tribunal to write up reasons in positive decisions but there were internal guidelines recommending that for ‘novel’ claims reasons should be written; therefore, many sexual orientation claims were in fact written up in the early years. Of written decisions, only a small proportion is publically released, see above note 13. In later years the use of expedited processes and use of oral reasons in positive determinations has meant that written reasons reflect a small proportion of overall decisions and may over-represent negative determinations. In response to an Access to Information Request (A-2008-00036, 2 July 2008) the Immigration and Refugee Board indicated that 77 claims on sexual orientation from Iranian applicants were determined from 2002-2006, a further request for access to those decisions (A-2008-00037, 7 July 2008) revealed that only two had been released; with a further five comprising written reasons that were not released.

¹⁸⁶ Of available Canadian tribunal cases there was a positive rate of 13 per cent in the second phase of the study (2001-2007) compared with 58 per cent in the first phase (1994-2000). In response to an Access to Information Request (A-2008-00035, 2 July 2008) the Immigration and Refugee Board provided statistics relating to finalised claims on the basis of sexual orientation from 2002-2006 (records were not kept by ground of claim in 20007) which showed that the overall positive rate for all determinations made by the board during that period (including expedited decisions, those for which reasons were delivered orally, and those that were written up but not released) was 45 per cent.

The introduction of multiple member panels was a key recommendation of a review of the Australian system in 2000 in order to improve the quality of questioning, enhance consistency of decision-making, provide a deliberative process for members, increase collective wisdom and decrease the possibility of actual or perceived bias.¹⁸⁷ However this recommendation was not implemented. In the UK two and three member panels are used at tribunal level, but since 2005 the tribunal only provides narrow legal review of the earlier decision, rather than merits based re-determination of the claim. Thus, the ability to disturb findings of credibility is limited as is any real opportunity for critical reflection on the applicant's claim. New Zealand is therefore alone in the countries under discussion in maintaining (although only occasionally) the use of a dual member tribunal.

VI. Conclusion

The wider the gulf between the experiences of the applicant on the one hand and the knowledge base and cultural frame of the decision-maker on the other, the greater the likelihood that credibility assessment may be problematic. Sexual orientation claims represent aspects of both cultural and sexual 'otherness' and bring this gulf of understanding into high relief. Yet these examples also reveal endemic problems in credibility assessment, and such insights are of broader application to refugee decision-making practices worldwide. The cases explored here highlight significant problems in credibility assessment in tribunals across four common law jurisdictions, the UK, Canada, Australia and New Zealand. In assessing demeanour, consistency and plausibility, decision-makers overestimated their own ability to discern truthfulness, relied upon assumptions and failed to fully articulate reasons for disbelief.

The distinction between 'subjective' and 'objective' elements of demeanour drawn by the Canadian guidelines is neither clear cut nor defensible in practice; inferences drawn from an applicant's appearance and their manner in giving evidence may also be subjective and there is little to suggest that such inferences are less prone to error. Moreover, in the cases examined, reliance placed upon the so-called 'objective' element of demeanour was misplaced, leading to undue emphasis on free-flowing responses to indicate truthfulness and hesitation or vagueness as evidence of deception. This evaluative framework persisted despite the fact that the sensitive (and at times invasive) nature of questions and the fraught context in which they were being answered

¹⁸⁷ See 'A Sanctuary under Review' above note 62 at para 5.88, 5.109-5.111, Recommendation 5.4.

contraindicate ease of communication. In a similar vein, well known research on inconsistencies in narrative due to trauma and the passage of time did not appear to mitigate almost universal reliance in practice upon consistency as a key measure of credibility. In keeping with other commentators this study found a strong focus on comity between an applicant's written and oral accounts, including concern with matching comparatively minor details. Perhaps most disturbingly, this study discovered that many findings on the basis of 'plausibility' rested upon speculation or assumptions about human behaviour which were unfounded on the evidence.

Despite legislative efforts to curb judicial review of asylum determinations, refugee appeals in courts continue to proliferate, markedly increasing both in absolute numbers and as a proportion of available cases in our study in later years.¹⁸⁸ The proportion of refugee decisions overturned on judicial review is — and even after the severe truncation of review grounds in many jurisdictions, remains — comparatively high.¹⁸⁹ The significant number of decisions set aside on judicial review is even more notable when placed in the context of strict statutory thresholds for legal error and the long established deference of appellate courts to findings of fact at first instance. This article suggests that a fair proportion of applications for review may well be the product of poor quality decision-making on credibility at tribunal level.

A plausible solution for governments concerned about refugee matters generating case-load pressure on courts is to invest resources in improving the quality of earlier level decision-making. This could be pursued through many of the suggestions outlined above to more closely structure decision-maker discretion, such as the creation and use of guidelines on credibility assessment, including the benefit of the doubt and fact sharing burden in such guidelines, generating guidelines on the specific issues raised by sexual orientation claims, consideration of the force given to administrative guidelines and expanding the scope of appeal mechanisms. Other measures to improve the quality of decision-making include enhanced selection and training

¹⁸⁸ In Australia there were 149 judicial review decisions in phase 2 of the study from 2001-2007 (comprising 52 per cent of available decisions) compared to only 10 judicial review cases (4 per cent of available decisions) in the first phase, 1994-2000. In Canada the number of judicial review cases rose to 109 (40 per cent of decisions) in the second phase of the study from 13 cases (10 per cent) in the first phase. In the UK judicial review cases rose from 12 in the first phase to 34 (although this actually representing a decline in proportion of judicial review cases because so few tribunal cases were released in the earlier period). See notes 7, 8, and 9 above.

¹⁸⁹ In a 2002 submission concerning legislation designed to limit judicial review, the Refugee Council of Australia noted that 30 per cent of 1997-1998 Australian tribunal decisions that went to the Federal Court were overturned or remitted by consent: 'Submission to the Senate Legal and Constitutional Legislation Committee on Migration Legislation Amendment (Procedural Fairness) Bill 2002' April 2002. After many reductions in judicial review, this figure was 11 per cent a decade later: Australian Government, MRT and RRT Annual Report 2006-2007 (2007) Table 4.11.

measures for both tribunal and lower level decision-makers. While less likely in the short-term, it is also worth considering the pursuit of more profound institutional and structural change, such as placing the responsibility for original refugee status determinations within a specialist tribunal rather than a government immigration department, and introducing (or in the case of Canada, reinstating) dual member tribunals. Such reforms would help to develop a framework for higher quality, more critical, refugee decision-making.