

Decision-making Conditioned by Radical Uncertainty: Credibility Assessment at the Australian Refugee Review Tribunal

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Abstract

The increasing global magnitude and exigency of refugee status determination is resulting in recent attention to the parameters of credibility as part of evidentiary assessment in refugee law. In Australia, as in other countries, it is well recognised that applications for review of primary level decisions on refugee status commonly fail on the basis of credibility evidence. Furthermore, it has been suggested that the assessment of credibility is likely to be a source of error in decision making. In this article, I report on the results of a small-scale study into decision-making and credibility assessment at the Australian Refugee Review Tribunal involving interviews with decision-makers. Drawing on feminist theories of epistemic responsibility, I argue for a revised standard of proof, suggesting a rebuttable presumption of credibility, or truthfulness, on the part of the applicant seeking asylum. Such an approach may go some way towards addressing the potential for epistemic injustice and is consistent with a position of epistemological responsibility demanded by an ethical obligation to the refugee.

*‘Epistemic responsibility is a stringent requirement but not an impossible one. Perfect certainty is more than we can hope to achieve’.*¹

1. Introduction

In law, assessment of the credibility of a witness’s testimony as evidence may take into account considerations such as the coherence and plausibility of the narrative, whether it is compatible with established knowledge and ‘common sense’ and may pay attention to traits such as demeanour and character.² Feminist critiques of evidence law have revealed the widespread disbelief of women’s testimony, particularly in sexual assault claims and family violence, where the complainant’s

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¹ Lorraine Code, *Epistemic Responsibility* (University Press of New England 1987) 67.

² According to *Halsbury’s Laws of Australia* (Butterworths), the term ‘credibility evidence’ is intended to apply to ‘both evidence which bears on the reliability of a witness generally as well as evidence which bears on the reliability of particular testimony of the witness’, including ‘truthfulness or veracity; intelligence; bias or motive to be untruthful; opportunities of observation; reasons for recollection or belief; powers of perception and memory; any special circumstances affecting competency; prior statements consistent or inconsistent with testimony; internal inconsistencies and ambiguities in testimony and direct contradiction of testimony’: [16.4.2700].

account may be the only evidence available to contradict a male defendant.³ In refugee law also, it is commonly the case that the only proof a refugee has of persecution is her own testimony. While as a general legal principle the burden of proof lies with a claimant, in refugee law, the responsibility to ascertain and evaluate all the relevant facts is shared between the applicant and the decision-maker.⁴ When the case is not sufficiently clear from the available information, a decision-maker must make an assessment based on the credibility of the claimant's oral testimony.⁵ Importantly, where the applicant's account appears credible, she should, unless there are good reasons to the contrary, be given the benefit of the doubt.⁶

The *Convention Relating to the Status of Refugees*, the key legal document providing the definition of a refugee in international law, does not specify refugee status determination procedures, nor is there any real consensus among refugee receiving states for the assessment of evidence.⁷ As guidance, the United Nations High Commission for Refugees (UNHCR) points to the need to assess both the subjective element of 'fear' and the objective element that it be 'well-founded'.⁸ Decision-makers must consider whether there is an objective basis for the fear, on an assessment of the conditions in the relevant country and any other evidence presented by the applicant. In doing so, they are required to apply a level of precognition⁹ in an assessment of

³ See, eg, contributions to Mary Childs and Louise Ellison (eds), *Feminist Perspectives on Evidence* (Cavendish Publishing 2000); Jocelyne Scutt, 'The Incredible Woman: A Recurring Character in Criminal Law' (1992) 15(4) *Women's Studies International Forum* 441; Kathy Mack, 'An Australian Perspective on Feminism, Race, and Evidence' (1998-99) 28 *Southwestern University Law Review* 367 and Wendy Larcombe, 'Falling Rape Convictions: (Some) Feminist Aims and Measures for Rape Law' (2011) 19 *Feminist Legal Studies* 27.

⁴ United Nations High Commission for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979), (*UNHCR Handbook*) Clause 196.

⁵ *ibid* Clause 41.

⁶ *ibid* Clause 196.

⁷ Brian Gorlick, 'Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status' (2003) 15(3) *International Journal of Refugee Law* 357. Gorlick argues that due to the highly politicised nature of refugee status assessment, 'there has been reluctance to open the discussion on how the rules and standards on evidentiary questions are dealt with': 376. For example, Sweeney points out that while a level of consensus has been achieved within the European Union under Council Directive 2003/9/EC on minimum standards for the reception of asylum seekers, 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 and the content of the protection granted and 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, they do not provide consistency on the significance of credibility and its relationship to concepts such as the benefit of the doubt and standard of proof: James A Sweeney, 'Credibility, Proof and Refugee Law' (2009) 21 *International Journal of Refugee Law* 700, 707-8.

⁸ *UNHCR Handbook* (n 4), Clauses 37-38. The meaning of this phrase in Australian law was first subject to detailed judicial consideration by the High Court in *Chan Yee Kin v MIEA* (1989) 169 CLR 379 and was further elaborated in *MIEA v Guo & Anor* (1997) 191 CLR 559.

⁹ Precognition is generally associated with extrasensory perception, where an individual is able to ascertain future events. In this context, I am using the term to highlight the challenge presented by the requirement to assess the risk of future persecution.

whether there is a risk of future persecution if the applicant returns to her country of origin, on the basis of what has occurred in the past and current conditions.¹⁰

There are further considerations contributing to the evidentiary challenges in refugee law. Necessarily a cross-cultural communicative exchange, the process involves an individual decision-maker listening to an account of a life lived by a person whose cultural *habitus*¹¹ is vastly different to her own and whose mode of delivery and demeanour are likely to be unfamiliar. As Walter Kälin points out, the differences between the cultural backgrounds of decision-makers and asylum seekers can lead to serious misunderstandings about issues relevant to credibility assessment, including the cultural relativity of perceptions of time, notions of ‘common sense’ and understandings of truth and deceit.¹² The applicant’s evidence is usually delivered in a language unknown to the decision-maker, mediated by an interpreter.¹³ However, as Roxana Rycroft highlights, legal procedures based on understandings of interpretation as a ‘conduit’ for communication fail to account for extra-linguistic behaviours and silences which are often important elements of evidence.¹⁴ In addition, asylum claims are characterised by narratives of personal trauma, persecution and violence, presenting challenges to iteration, and potential for repression, memory loss, discomfort and embarrassment. The challenge to evidentiary assessment is compounded by the elapse of time, sometimes many years, between the relevant events and the hearing of a claim. Narrative accounts of personal experience may alter each time they are delivered—as a result of repression, memory lapses, fear, intimidation or embellishment—potentially giving rise to perceptions of inconsistency.

Internationally, there are widely divergent recognition rates across refugee receiving states working with the 1951 Convention as the result of the highly politicised nature of asylum policy, suggesting that refugee determination has more to do with understandings of national interest than the merit of individual claims. Refugee status determination is subject to the vagaries of international relations and domestic government policy. The 1951 Refugee Convention is a product of post-World War II politics, aimed at protecting Eastern European refugees escaping Communist regimes, and therefore reflects Western values; fifty years later, the overwhelming burden of

¹⁰ In Australia, this is referred to as the ‘real chance’ test, which may be well below a 50 percent chance: *Chan Yee Kin v MIEA* (1989) 169 CLR 379.

¹¹ The concept of the *habitus* was first elaborated by Pierre Bourdieu in *Outline of a Theory of Practice* (Cambridge University Press 1977). Richard Terdiman describes the *habitus* as ‘the habitual, patterned ways of understanding, judging, and acting which arise from our particular position as members of one or several social “fields”, and from our particular trajectory in the social structure’: Translator’s Introduction to Pierre Bourdieu, ‘The Force of Law: Towards a Sociology of the Juridical Field’ (1987) 38 *Hastings Law Journal* 805, 811.

¹² Walter Kälin, ‘Troubled Communication: Cross-cultural Misunderstandings in the Asylum-Hearing’ (1986) 20(2) *International Migration Review* 230.

¹³ At the Australian Refugee Review Tribunal (RRT) during 2010–11, an interpreter was required in 83 percent of hearings, with 89 languages and dialects used: Migration Review Tribunal & Refugee Review Tribunal, *Annual Report 2010–11*, 39.

¹⁴ Roxana Rycroft, ‘Communicative Barriers in the Asylum Account’ in Prakash Shah (ed), *The Challenge of Asylum to Legal Systems* (Cavendish Publishing 2005).

refugee receiving states lies with countries in the global South. As Peter Billings suggests, the decision-making culture, indeed the nation's values as a whole, reflected in its political institutions and environment, may be as important as legal and procedural rules in determination of approval rates for refugees.¹⁵

In Australia, the relationship between the wider political climate and the decision-making culture of the Department of Immigration was highlighted in a report conducted subsequent to the exposure of the unlawful detention of Cornelia Rau.¹⁶ The inquiry found, in relation to the handling of immigration and detention cases, 'deep seated cultural and attitudinal problems' within the department and a 'failure of executive leadership in the immigration compliance and detention areas'.¹⁷ The incidents and subsequent reports, which received extensive media coverage, were highly critical of many aspects of the department's operations, recommending urgent reform.¹⁸

Even within individual states, significant divergence in recognition rates exists. A recent wide-ranging empirical study of asylum adjudication in the United States found extreme levels of disparity in decision-making across decision-makers and regions, in some cases, of up to 400 percent.¹⁹ Having examined and assessed decision-making at all levels, the researchers concluded that most of the disparities were related to judgments about the credibility of the applicant and the 'degree of scepticism that they bring to the task of judging credibility based on an applicant's imperfect recollection or inconsistent retellings of personal history'.²⁰ They found that as a result of their prior work experience and particular personal histories, backgrounds and philosophies, 'different officers and judges may bring to their task quite different presuppositions about the degree to which inconsistencies or lapses in the telling or retelling of a personal history prove that an applicant is committing fraud'.²¹ Similar conclusions have been made in relation to asylum adjudication in Canada and the United Kingdom. In an empirical study of determinations of asylum appeals at the Asylum and Immigration Tribunal in the United Kingdom, Robert Thomas found that 'the vast majority of appeals succeed or fail on the basis of the decision-maker's view of the

¹⁵ Peter V Billings, 'A Comparative Analysis of Administrative and Adjudicative Systems for Determining Asylum Claims' (2000) 52(1) *Administrative Law Review* 253, 295.

¹⁶ *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau: Report* ('Palmer Report') (2005). Subsequently, another woman, Vivian Alvarez, was found to have been unlawfully deported from Australia. This case was investigated by Neil Comrie and published by the Commonwealth Ombudsman as a report: *Inquiry into the Circumstances of the Vivian Alvarez Matter* (2005).

¹⁷ *Palmer Report* *ibid* xi.

¹⁸ The department committed itself to reform: Department of Immigration and Citizenship, *Palmer Report: Two Years of Progress*: <www.immi.gov.au/media/publications/palmer-progress/> accessed 27 August 2012.

¹⁹ Jaya Ramji-Nogales, Andrew I Schoenholtz and Philip G Schrag (eds), *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (New York University Press 2009).

²⁰ *ibid* 99.

²¹ *ibid*.

claimant's credibility'.²² In Canada, Sean Rehaag found significant disparity in acceptance rates across the country, concluding that 'the identity of the Board Members assigned to particular claims appears to be an important factor in refugee claim outcomes'.²³

Furthermore, refugee status determination is particularly vulnerable to political climate and influence. In Australia, Mary Crock and Laurie Berg point out that as a result of the Minister's 'thinly veiled warning to members that they should not expect reappointment if they favoured "reinventing" the definition of refugee (by recognising the protection claims of women victims of domestic violence)', acceptance rates were 'cut by a third at first instance and almost halved on appeal'.²⁴ The establishment of appeal level tribunals such as the Refugee Review Tribunal (RRT) serve to limit access to the courts for unsuccessful asylum seekers by restricting the grounds for judicial review. Trans-nationally, there is a move to 'fast-track' procedures, including limiting grounds for review, as well as more generic approaches to decision-making, such as in the United Kingdom, with the introduction of country guidance determinations to address concerns about inconsistency.²⁵

As the studies indicate, the increasing global magnitude and exigency of this jurisdiction is resulting in recent attention to the parameters of credibility as part of evidentiary assessment in refugee law.²⁶ While no study of comparable depth to that of Ramji-Nogales et al has been conducted in Australia, it is also well recognised that applications to the RRT for review of primary level decisions on refugee status commonly fail on the basis of credibility evidence.²⁷ Furthermore, it has been suggested that the assessment of credibility is likely to be a source of error in decision-

²² Robert Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Hart Publishing 2011) 134.

²³ Sean Rehaag, 'Troubling Patterns in Canadian Refugee Adjudication' (2007-08) 39(2) *Ottawa Law Review* 337, 361.

²⁴ Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration* (The Federation Press 2011) 361. See 'Ruddock Warns Tribunal' *The Canberra Times* (Canberra, 27 December 1996) 6; Editorial, 'Ruddock's threats to Refuge Body' *The Canberra Times* (Canberra, 27 December 1996) 14; Stephen H Legomsky, 'Refugees, Administrative Tribunals, and Real Independence: Dangers Ahead for Australia' (1998) 76 *Washington University Law Quarterly* 243.

²⁵ Thomas (n 22) Chapter 7.

²⁶ See contributions to Gregor Nöll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martinus Nijhoff Publishers 2005). Other recent sources include: James A Sweeney, 'Credibility, Proof and Refugee Law' (2009) 21 *International Journal of Refugee Law* 700; Jenni Millbank, "'The Ring of Truth": A Case Study of Credibility Assessment in Particular Social Group Refugee Decisions' (2009) 21(1) *International Journal of Refugee Law* 1; Steve Norman, 'Assessing the Credibility of Refugee Applicants: A Judicial Perspective' (2007) 19(2) *International Journal of Refugee Law* 274; Robert Thomas, 'Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined' (2006) 8 *European Journal of Migration and Law* 79; Guy F Coffey, 'The Credibility of Credibility Evidence at the Refugee Review Tribunal' (2003) 15(3) *International Journal of Refugee Law* 377; Michael Kagan, 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination' (2003) 17 *Georgetown Immigration Law Journal* 367. A fascinating account of credibility assessment in the United States Immigration and Naturalization Service is presented in the documentary film *A Well-Founded Fear* by Shari Robertson and Michael Camerini (Docurama 2000).

²⁷ For example, in a case study of credibility assessment of claims on the ground of particular social group membership on the basis of sexual orientation, Millbank found that in Australia and Canada, credibility assessment played an increasingly major role in negative determinations: Millbank, *ibid*, 4. See also Arthur Glass, 'Subjectivity and Refugee Fact-Finding' in Jane McAdam (ed), *Forced Migration, Human Rights and Security* (Hart 2008).

making at the RRT and does not adequately acknowledge the variable quality of credibility evidence.²⁸ In this article, I will report on the results of a small-scale pilot study into decision-making and credibility assessment at the RRT.²⁹ The research forms part of an ongoing broader interdisciplinary investigation into standards of proof and evidentiary assessment in human rights claims. It is concerned with the contextual and political nature of truth effects in legal discourse. As Mariana Valverde has argued, if we accept that law's will to truth is always constrained and compromised, it may more useful to investigate law's epistemological processes, how law 'rather than simply *using* facts in the form of "evidence", also *produces* knowledge'.³⁰ Investigations of law's truth effects tend to draw on the rich textual sources of legal decisions, transcripts and legislation. However, in this project, interviews with decision-makers and observations of hearings are used to explore the epistemological workings of law, viewing evidentiary assessment as a site for the production of knowledge.

The article is structured in seven parts. The first three sections provide the context for the argument, including an account of the concept of epistemic responsibility derived from feminist philosophy, the research methodology used for the fieldwork component of the study, and an overview of the distinctive features of the RRT as a decision-making body. In the sections which form the second half of the article, I develop the theoretical framework for understanding decision-making as occurring in a context which Audrey Macklin describes as 'radical uncertainty' and provide and report on the results of interviews conducted with RRT decision-makers in which they discuss credibility assessment.

2. Epistemic Responsibility

In a philosophic investigation of power and the ethics of knowing, Miranda Fricker has developed a framework for understanding two forms of epistemic injustice, hermeneutical injustice and testimonial injustice.³¹ According to Fricker, hermeneutical injustice is a failure in collective social understanding of a significant area of one's social experience owing to structural identity prejudice.³² Testimonial injustice occurs when prejudice causes a hearer to accord deflated credibility to a speaker's word, a form of injustice commonly experienced by people who are members of social groups which are subjected to prejudice. Fricker describes it as a form of injustice which occurs in respect to a person in her capacity as a knower.³³

²⁸ Coffey (n 26).

²⁹ I am grateful to the University of Queensland for the opportunity to conduct this research while I was the recipient of a UQ Postdoctoral Research Fellowship, hosted by the T C Beirne School of Law, 2010–12.

³⁰ Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton University Press 2003) 5.

³¹ Miranda Fricker, *Epistemic Injustice, Power and the Ethics of Knowing* (Oxford University Press 2007).

³² *ibid* 155.

³³ *ibid* 1.

Within this framework, it is possible to see the asylum seeker as a potential victim of forms of epistemic injustice. For example, when asylum seekers are inaccurately and unfairly characterised as ‘queue jumpers’ or ‘illegals’, when border patrols fail to respond to boat arrivals with due urgency, or when resettled refugees are discriminated against or marginalised, this may be characterised as a form of hermeneutical injustice—it is a failure on the part of the collective understanding to attribute full humanity to the refugee subject. Further, when an asylum seeker delivers testimony about her experience, she may be subject to testimonial injustice if her truthful account is disbelieved as a result of deflated credibility accorded to her on the basis of prejudice.

Such conditions call for an approach to refugee decision making guided by principles of responsibility developed in feminist epistemology. Feminist ethical theory has drawn on Aristotelian concepts of intellectual virtues to inform a contextual understanding of ethical decision-making which attends to the interrelationship between individuals and society. Virtues such as care and concern, traditionally associated with women, are accorded equal weight to individualised notions of justice. Another way in which such a position of epistemic responsibility might be achieved in the context of refugee determination is through the adoption of a presumption of truthfulness, or credibility, on the part of the applicant.³⁴ I will argue that such an approach goes some way towards addressing the risks of epistemic injustice.

3. Research Methodology

In Australia, refugee status recognition occurs in a context in which there is little scope for critical appraisal. Initial assessment is conducted by a delegate of the Minister for Immigration and Citizenship—in effect a staff member of the Department—with only the delegate, applicant and an interpreter present.³⁵ Unlike most tribunals in Australia, appeal hearings of these decisions at the RRT are conducted in private³⁶ and only 40 percent of substantive decisions considered to be ‘of particular interest’ are published (with identifying information removed).³⁷ Therefore, in order to conduct fieldwork for the project, it was necessary to obtain permission from the Senior Registrar, the member concerned and the applicant concerned to observe hearings. The selection of cases

³⁴ Such an approach may take a form analogous to that found in Australia for veteran’s entitlements, where, while a volatile area of law, the onus of proof has generally required the Commonwealth or its agency to disprove a claim made by a veteran seeking compensation. I thank Peter Billings for making this point.

³⁵ The principal class of onshore visas are Protection (Class XA), subclass 785 (Temporary Protection) and Subclass 866 (Protection).

³⁶ *Migration Act 1958* (Cth) s 429. See *SZAYW v MIMIA* (2006) 230 CLR 486 regarding the difficulty in defining the term ‘in private’ as used in the Act.

³⁷ According to the RRT, decisions may be selected for publication because they represent a broad cross-section of decisions, having regard to factors such as the visa subclass and the outcome of the review; where there is detailed consideration of legal argument or policy issues, where the factual circumstances are complex or unusual or where there is likely to be significant external interest, or where there is clear precedential value. Decisions are available on AustLII, via the RRT’s website: <www.mrt-rrt.gov.au/Decisions/default.aspx> accessed 27 August 2012. In addition, the Tribunal publishes summaries of a selection of recently published RRT decisions and selected High Court, Federal Court and Federal Magistrates Court judgments in an online publication, *Précis*.

observed was determined by the RRT, in light of the project's identified research focus.³⁸ The researcher requested that the selection of hearings broadly reflect the characteristics of claims overall, but no requirements were specified in relation to the country of origin, the ground for the claim or the gender of the applicant. This was a rare opportunity to observe hearings first-hand and to discuss decision-making in this important area. While researchers have obtained permission to observe ad hoc hearings directly from members (with the consent of the applicant), I am unaware of any systematic study in Australia which has involved the formal agreement of the RRT and the participation of currently sitting members. This may reflect an increased sensitivity to the demands for transparency in administrative law decision-making in this highly politicised and volatile jurisdiction.³⁹

As a merit review tribunal, the RRT is not bound by formal rules of evidence and members have considerable discretion to conduct hearings in an inquisitorial, rather than adversarial manner.⁴⁰ Strict rules of evidence do not apply to fact finding in administrative review, notwithstanding that it must be rigorous and be based on evidence with 'rational probative force'.⁴¹ The RRT was chosen as a site for investigation of the reception of evidence in human rights claims because, as an inquisitorial style tribunal, it is said to employ a non-adversarial adjudicative process, which may reveal more about credibility assessment than more traditional courts, where the rules of evidence tend to obscure the elements of subjectivity involved in the decision-making process. As I will go on to discuss, notwithstanding its inquisitorial style, the RRT has actually been criticised for employing an approach to decision-making which is unduly confrontational and adversarial, at odds with principles of international refugee law.⁴²

The study employed a socio-legal qualitative research methodology, based on literature research, semi-structured interviews and observation of hearings. Fieldwork for the project was

³⁸ I acknowledge with thanks the permission granted by the then Senior Registrar of the RRT, Denis O'Brien, to conduct the research and also thank the applicants who gave permission to observe confidential hearings.

³⁹ It is important to point out that at the time this research was conducted, the RRT did not deal with applicants who arrived by boat 'offshore', including in Australia's excised zone. As a result of legislative amendments introduced under the Howard Government in 2001, commonly referred to as the Pacific Solution, asylum seekers who arrived on territory which has been excised from the legislative framework of the *Migration Act 1958* (Cth) were barred from making applications for protection visas and therefore denied access to the RRT. In November 2010, the High Court found that two Sri Lankan asylum seekers who were detained on Christmas Island and whose claims for protection were rejected by the Department and an independent reviewer were denied procedural fairness because the decisions were not made with reference to the Migration Act and relevant case law: *Plaintiff M61/2010E v Commonwealth of Australia*; *Plaintiff M61/2010E v Commonwealth of Australia* [2010] HCA 41. Subsequently, the Minister for Immigration and Citizenship announced that the statutory system with a single protection visa and access to the RRT for review would apply to all asylum seekers from 24 March 2012.

⁴⁰ *Migration Act 1958* (Cth) s 420 (2)(a). While, in general, rules of evidence do not apply in tribunal adjudication, in practice, they may act as a guide for decision-makers in the administration of 'substantial justice': *R v War Pensions Entitlement Appeals Tribunal; ex parte Bott* (1933) 50 CLR 228, 256. The criterion for admissibility of material is relevance: *Casey v Repatriation Commission* (1995) 39 ALD 34, 38.

⁴¹ *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 33, 41.

⁴² Susan Kneebone, 'The Refugee Review Tribunal and the Assessment of Credibility: An Inquisitorial Role?' (1998) 5 *Australian Journal of Administrative Law* 78.

conducted during 2010–12. It included interviews with seven decision-makers at the RRT (referred to as members of the tribunal), three women and four men, in Sydney and Brisbane. In addition, the researcher observed ten hearings at the Sydney Registry of the RRT.⁴³ The members interviewed volunteered to be involved in the research as a result of information distributed by the Senior Registrar.

Semi-structured interviews were chosen as the methodology because it was believed that this would allow for in-depth discussion and reflection and offer insights into attitudes to decision-making and credibility assessment. Drawing on a preliminary literature review of international research conducted in the field, a series of questions was prepared to guide the interviews. The tribunal requested that this be provided to members beforehand. The semi-structured interviews occurred over 1–1.5 hours, and were recorded and later transcribed. A commitment was given not to identify the interviewees by name in any publications.

Placing a decision-maker in the position of respondent to questions in this way may be characterised as inverting the inquisitorial form of adjudication. Robert Dingwall argues that interviews can be analysed for ‘what they can say about the kind of accounts that are treated as legitimate in a particular setting’.⁴⁴ However, as he points out, respondents in research interviews will be particularly concerned to demonstrate competence in the field such that the data produced by interviews are necessarily ‘social constructs, created by the self-presentation of the respondent and whatever interactional cues have been given off by the interviewer about the acceptability or otherwise of the accounts being presented’.⁴⁵ In this analysis, it is acknowledged that the interviewees desired to present themselves as competent decision-makers with skills to facilitate credibility assessment. Undoubtedly, the mediated selection process resulted in members who are more experienced and confident decision-makers than would be the case had it been possible to select a random sample. All members interviewed had considerable experience at the RRT, of between five and 17 years; two were senior members. For this reason, the interviews are drawn upon to explore understandings of competence with a view to shedding light on understandings of ethical decision-making practices in refugee law.

While interviews allow for ‘the elicitation of accounts’, they are best supplemented by observation.⁴⁶ The members who volunteered to be interviewed nominated selected hearings which they would permit me to observe. I was informed that the members took into account the existence

⁴³ The research received approval from the University of Queensland Behavioural Social Sciences Ethics Review Committee: No 2010000717.

⁴⁴ Robert Dingwall, ‘Accounts, Interviews and Observations’ in Gale Miller and Robert Dingwall (eds), *Context and Method in Qualitative Research* (Sage Publications 1997) 60.

⁴⁵ *ibid* 59.

⁴⁶ *ibid* 56.

of credibility issues and concerns they may have had about confidentiality when selecting hearings. Applicants were subsequently contacted by the RRT, via their representative if they had one, and asked if they would consent to the presence of the researcher at the hearing. In a number of cases, this consent was not forthcoming. As a result, it was possible only to observe hearings for four of the seven members interviewed. The Tribunal also provided audio recordings of the hearings observed, copies of documents held on file and copies of the decisions. Observation facilitated understanding of the procedural, spatial and temporal dynamics of hearings, the approach of individual members to the conduct of hearings and the strategies they employ to elicit evidence from applicants. This was particularly important, given the requirement of confidentiality which prohibits public access to hearings, the single-member constitution of the tribunal and the fact that decision-makers have a high level of discretion in how they conduct hearings.

4. The Refugee Review Tribunal

In 2010-11, there were 11,491 onshore applications for protection visas or refugee status determination requests to the Australian Department of Immigration and Citizenship; over 4,000 applications for protection visas were refused at the primary level.⁴⁷ A non-citizen who claims to be a refugee may request asylum when they arrive in Australia, or may apply once a valid visa has expired. Applicants without a valid visa are subject to mandatory detention whilst their claim is being determined, although they are likely to be released if they apply for a review of a negative departmental decision. During the same year, 2,966 cases for review of departmental decisions were lodged with the RRT, with 24 percent of primary decisions set aside.⁴⁸

The RRT was established in July 1993 under the Commonwealth *Migration Act 1958* to review decisions made by the Department of Immigration and Citizenship in relation to the granting of protection visas.⁴⁹ It is a product of the administrative law system which emerged in the 1970s in Australia, establishing tribunals to make merits review decisions as an alternative to courts.⁵⁰ In its review of the federal civil justice system, the Australian Law Reform Commission described the RRT as a ‘very pared-down merits review model’, where the tribunal member performs the role of investigator, hearing advocate and decision-maker, an array of skills ‘not easily combined in the one person’.⁵¹

⁴⁷ Department of Immigration and Citizenship, *Annual Report 2010–11*, 119

<www.immi.gov.au/about/reports/annual/2010-11/pdf/report-on-performance.pdf> accessed 27 August 2012.

⁴⁸ Migration Review Tribunal-Refugee Review Tribunal, *Annual Report 2010–2011*, 29 <www.mrt-rrt.gov.au/Publications/default.aspx> accessed 27 August 2012. This is a 31 percent increase on applications from the previous year.

⁴⁹ *Migration Reform Act 1992* (Cth) Part 4A.

⁵⁰ Originally established as Immigration Review Tribunal in 1989, with the RRT set up in 1993, integrated with the Migration Review Tribunal.

⁵¹ Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (2000) 89.

Decision-making procedures at the RRT have been subject to stringent criticism from academics, non-government organisations and practitioners. In particular, the requirement that hearings are closed and therefore not subject to external scrutiny and the fact that claimants have no right to legal representation or to engage in examination or cross-examination of witnesses have been identified as ‘fundamental flaws’.⁵² In 2000, a Senate Committee report considered that there were merits to the approach employed by the RRT, but recommended that further training be provided for members in the use of inquisitorial methods. It also made a number of recommendations aimed at addressing concerns of perceived bias, including that officers of the Department of Immigration and Multicultural Affairs, the Attorney-General’s Department or the Department of Foreign Affairs and Trade not be appointed as members.⁵³

Tribunal members are appointed by the Minister and generally work across both the RRT and the Migration Review Tribunal. Members come from a variety of professional backgrounds; they may or may not have legal qualifications.⁵⁴ Of the seven members interviewed for this study, six had previously worked in the public sector, one in the Commonwealth Attorney-General’s Department and two for lengthy periods with the Department of Foreign Affairs and Trade. In the interviews, members gave a range of reasons for their interest in working in the area, sometimes highlighting the skills they brought to the task of decision making as a result of their previous experience. Indicating an awareness of the criticism which had been levelled at the RRT that it does not maintain independence from government,⁵⁵ one interviewee said that she believed there had been a shift in the culture over the past ten years and that ‘some of the members who ... I think had an agenda or saw things in a particular way they’re no longer with the tribunal’ (member 7, female, full-time).⁵⁶

As a principal of Australian administrative law, a merits review tribunal is required to make a decision *de novo*,⁵⁷ where the member ‘stands in the shoes’ of the original decision maker.⁵⁸ However, at the RRT, in coming to a decision, a member may draw on evidence from *any* relevant source, including information which was not available to the original decision-maker. Typically, this will include the original interview with the delegate, which they have available as an audio file, the delegate’s written decision, the applicant’s written account included in their application for a

⁵² *Crock and Berg* (n 24) 353.

⁵³ Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia’s Refugee and Humanitarian Determination Processes* (2000) Recommendation 5.2, 151.

⁵⁴ Of the seven members interviewed, six had some sort of legal qualifications.

⁵⁵ See *Legomsky* (n 24).

⁵⁶ Members interviewed are not identified by name in order to preserve confidentiality, however, information on their gender and whether they are full-time or part-time is included.

⁵⁷ In *Shi v Migration Agents Registration Authority*, a 4-1 majority of the High Court found that the Administrative Appeals Tribunal was not restricted to consider evidence of the facts and circumstances as they existed at the time of the decision under review: [2008] HCA 31.

⁵⁸ *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666, 671.

review at the RRT; evidence given during the hearing in confidence; documents presented by the applicant; other witnesses; psychological and medical reports; country information obtained by the RRT's Country Advice and Information Unit; anything obtained by a member from any source; anonymous informants; etc. In the course of the fieldwork for this project, I have observed members ask questions of the applicant, often with reference to the evidence presented at the initial departmental interview, sometimes highlighting inconsistencies or omissions between accounts, or with other sources of information, such as country information. Procedural fairness requires the member to direct the attention of the applicant to points which are adverse to the case, to identify the critical issues and weaknesses in the case and to give an opportunity to comment in response.⁵⁹

The RRT functions as an informal, quasi-inquisitorial body where members sit alone to hear and determine applications for review. While procedures are codified,⁶⁰ decision-makers have very broad statutory power to determine what occurs within a hearing room and there is little scope for applicants to challenge the reasoning used in individual cases. Applicants have no right to representation and cannot examine or cross-examine witnesses if they are selected and called by the tribunal.⁶¹ Members have the power to affirm the decision of the department, to vary the decision, remit a case for reconsideration or set the ruling aside.⁶² It is generally not possible to appeal a decision of the RRT on the basis of adverse credibility findings and courts have been cautious to limit their role to errors of law.⁶³ It was not until 2006 that the RRT produced public guidelines on the assessment of credibility, which it states were 'inspired by comments and suggestions from migration practitioners'.⁶⁴ This suggests that the increasing critical attention to credibility assessment has been recognised in calls for accountability in decision-making.

5. Decision-making Conditioned by Radical Uncertainty

There is no doubt that refugee status decision-makers face enormous challenges; indeed, refugee determination has been described as 'one of the most complex adjudication functions in industrialized societies'.⁶⁵ It calls for competent decision-makers who have sufficient knowledge of the current social and political conditions in the claimant's country of origin; a detailed

⁵⁹ *Migration Act 1958* (Cth) s 424A.

⁶⁰ *Migration Act 1958* (Cth) Part 7.

⁶¹ *Migration Act 1958* (Cth) s 427.

⁶² *Migration Act 1958* (Cth) s 415.

⁶³ *Chemaly v MIMA* [1998] FCA 1403; *Kopalapillai v Minister for Immigration and Multicultural Affairs* [1998] FCA 1126; (1998) 86 FCR 547, 552, 559; *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407, [67]; *SZKJU v MIAC* [2008] FCA 802, [19]; *SZKSU v MIAC* [2008] FCA 610, [14].

⁶⁴ Available at <www.mrt-rrt.gov.au/Conduct-of-reviews/default.aspx> accessed 27 August 2012.

⁶⁵ Cecile Rousseau et al, 'The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-Making Process of the Canadian Immigration and Refugee Board' (2002) 15(1) *Journal of Refugee Studies* 43. This study of decisions made by the Canadian Immigration and Refugee Board suggested that the overlapping requirements of the role often had a negative impact on the decision-makers' competence and ability to assess credibility.

understanding of the legal framework provided by both the international convention as well as the national legislation and relevant case law; skills to conduct hearings and elicit evidence in an inquisitorial manner, in an intercultural context and with the assistance of an interpreter; an ability to understand and evaluate the psychological aspects of the process; the capacity to listen empathetically and bear witness to accounts of threats, detention, attacks, abuse, rape and torture; dealing with stress and possible vicarious traumatisation; as well as the confidence to make decisions, which, if wrong, may result in a person being forced to return to their country of origin where they may face further traumatisation or even death.

Gregor Nöll describes the process as one which may involve an adjudicator being asked ‘to give credence to the incredibility of evil’.⁶⁶ In refugee law, an applicant’s account may not be consistent, coherent or even plausible. It is often not possible to verify an account with reference to other forms of proof, such as documents or other witnesses. Furthermore, some grounds for recognition, such as membership of a particular social group, are particularly difficult to demonstrate other than on the basis of an applicant’s testimony or self-identification. These challenges are recognised in refugee law, where the standard of proof requires an assessment of the degree of probability that the events claimed to have led to a well-founded fear of persecution have occurred; even if aspects of the applicant’s claim are disbelieved, the decision-maker must consider whether there is any other basis asserted which grounds the protection claimed. In Australian law, the standard has been described as lower than the balance of probabilities; that is, there may be far less than a 50 percent chance that the claim is credible.⁶⁷ Furthermore, decision-makers are required to ask themselves ‘What if I am wrong?’⁶⁸ As Jenni Millbank suggests, rather than ‘fact-finder’, the role of the decision-maker is more akin to 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’.⁶⁹

In this context, it is appropriate to take heed of Audrey Macklin’s description of refugee decision-making as conditioned by ‘radical uncertainty’ (and this from an experienced Canadian decision-maker herself).⁷⁰ I suggest that such uncertainty calls for an approach to refugee decision making guided by considerations of epistemic responsibility. Lorraine Code argues that the rhetorical spaces any given society accords to those whose testimonial knowledge is in question

⁶⁶ Nöll (n 26) 3.

⁶⁷ *Abebe v The Commonwealth* (1999) 197 CLR 611 [190]–[193] (Gummow & Hayne JJ); [211] (Kirby J). Furthermore, the test for a ‘real chance’ that a person may experience persecution if returned to her country of origin is one of ‘degrees of probability’: *MIEA v Wu Shan Liang* (1996) 185 CLR 259, 282–3.

⁶⁸ See *MIEA v Wu Shan Liang* (1996) 185 CLR 259; *MIEA v Guo* (1997) 191 CLR 559; *Abebe v The Commonwealth* (1999) 197 CLR 510; *MIMA v Rajalingam* (1999) 93 FCR 220.

⁶⁹ Millbank (n 26) 5.

⁷⁰ Audrey Macklin, ‘Coming Between Law and the State: Church Sanctuary for Non-citizens’, *Nexus*, University of Toronto, Faculty of Law (Fall/Winter 2005) 49, 51.

make particular assumptions about credibility and trust according to how speakers and listeners are located within them.⁷¹ She suggests that:

some version of a principle of charity, belief, and trust has to govern discursive encounters marked by a power/privilege differential, if confrontational impasse and might overriding right are to be avoided. But that principle may manifest itself as propitiously in interpretative debate as in simply taking a testifier at her word. And it will not always be clear from the outset whether interpretation or straightforward credulity is required.⁷²

Of course, any acknowledgment of the differential distribution of power and authority in a society recognises this fact; indeed, it is specifically acknowledged in legal principle in the form of the presumption of innocence in criminal procedure. I would argue that the circumstances in which refugee status recognition occurs also call for an articulation of epistemic responsibility, specifically one which favours a formal presumption of credibility, or truthfulness, on the part of the refugee. I suggest that this should be a rebuttable presumption, based on the applicant's sworn testimony, requiring clear articulation of written reasons for rejection of the testimony.

This is not a fanciful argument; others have similarly made proposals for such a presumption. Ilene Durst, for example, argues that on the grounds of due process, claims for political asylum in the United States should be subject to 'an articulated and factual presumption of credibility, rebuttable only by clear and convincing evidence of material misrepresentation'.⁷³ She claims that the UNHCR clearly instructs adjudicators to 'compensate for the inherent difficulties in the process by assuming that the applicant speaks the truth, rather than proceeding from an assumption, if not presumption, of disbelief'.⁷⁴ Michael Kagen also argues that refugee status determination should begin from the presumption that the claimant is telling the truth, rebuttable if there is a substantial reason to reject credibility.⁷⁵ As he points out, 'a person does not need to be credible to be a refugee'.⁷⁶ James Hathaway and William Hicks also point out that there is a growing practice in refugee adjudication to equate any lack of credibility with absence of subjective fear, thereby disqualifying an applicant from refugee status. They present a detailed argument for eliminating the subjective element of 'well-founded fear' altogether, which they claim was never intended to require an assessment of the emotional reaction of the claimant, but is, rather, a 'forward looking expectation of risk'.⁷⁷

⁷¹ Lorraine Code, *Rhetorical Spaces: Essays on Gendered Locations* (Routledge 1995) 60.

⁷² *ibid* 63.

⁷³ Ilene Durst, 'Lost in Translation: Why Due Process Demands Deference to the Refugee's Narrative' (2000–01) 53 *Rutgers Law Review* 127.

⁷⁴ *ibid* 131.

⁷⁵ Kagan (n 26).

⁷⁶ *ibid* 370.

⁷⁷ James C Hathaway and William S Hicks, 'Is there a Subjective Element in the Refugee Convention's Requirement of "Well-founded Fear"' (2005) 26 *Michigan Journal of International Law* 505.

There are good reasons for a formalised presumption of credibility in asylum claims. As the studies above indicate, refugee determination produces a particularly high level of discrepancy in decision-making. This suggests that the discursive encounters which occasion refugee recognition are conditioned by a power/privilege differential which produces different knowledge depending on the specificities of location and subjectivity. Factors such as the potential for miscommunication occasioned by the cross-cultural context where an applicant's testimony is usually mediated by an interpreter; the impact of psychological trauma on the quality of an applicant's testimony, her ability to remember events and to provide a coherent and detailed account; and the likelihood of a lack of corroborative evidence or witnesses, all contribute to an argument for such a standard. In addition, the fact that decision-makers commonly hear claims alone and are therefore not required to debate arguments, the absence of entitlement to legal representation and the ability to examine and cross-examine witnesses, combined with the limitations placed on critical review of first instance decisions indicates a need to take a careful approach to decision making in this area. Overriding any rationale, the cornerstone principle of non-refoulement enshrined in the *Convention Relating to the Status of Refugees*⁷⁸ also calls for a clearly defined protection against injustice perpetrated on a refugee if a decision results in subsequent further traumatisation.

6. Credibility Assessment at the RRT

A number of national and transnational studies indicate cause for concern about the accuracy of credibility assessment in refugee determinations. For example, in Australia, a study of 50 decisions made by the RRT in which credibility was an issue revealed frequent determination that claims were 'intrinsically implausible', and assessment of credibility based on demeanor or consistency which did not adequately acknowledge the variable quality of credibility evidence.⁷⁹ A multidisciplinary study conducted into decision-making at the Canadian Immigration and Refugee Board found that difficulties in evaluating evidence, assessing credibility and conducting hearings, coupled with problems associated with vicarious traumatising and uncontrolled emotional reactions, poor knowledge of the political context, false representations of war and cultural misunderstandings or insensitivity led the researchers to suggest that there exists a 'culture of disbelief'.⁸⁰

Within the statutory framework and in light of judicial direction, the RRT has considerable scope to devise its own approach to credibility. It must conduct a review which is 'fair, just, economical, informal, and quick', the review process is not bound by 'technicalities, legal forms or rules of evidence' and the Tribunal must act 'according to substantial justice and the merits of the

⁷⁸ Article 33.

⁷⁹ Coffey (n 26).

⁸⁰ Rousseau *et al* (n 65) 66.

case'.⁸¹ Courts have held that decision makers should take a 'liberal approach'⁸² to the assessment of evidence, and should recognise that there may be 'special considerations arising out of problems of communication and mistrust, and problems flowing from the experience of trauma and stress'.⁸³ The RRT has prepared guidelines for decision-makers in assessment of credibility.⁸⁴ Members are guided not to rely on 'subjective belief or gut feelings about whether the applicant is telling the truth', but on what is 'objectively or reasonably believable in the circumstances'.⁸⁵ Where it is not possible to make a confident finding that an applicant's account is not credible, a member 'must make an assessment on the basis that it is possible, although not certain, that the applicant's account of past events is true'.⁸⁶ That is, applicants are given the benefit of the doubt. In addition, the rejection of some evidence on the basis that it lacks credibility may not mean that an applicant's claim should be rejected in entirety, and even if an applicant's claims are disbelieved, the member must consider whether there is a well-founded fear of persecution on any other basis.

The members interviewed readily acknowledged that credibility is not easily established and that it may not be possible to determine if an applicant is telling the truth. One interviewee suggested that:

[T]here's room for a full thesis, I think, on decision making in these circumstances. How you actually come to a decision. Sometimes it's very easy one way or the other. Some cases just fall over under the weight of their own implausibility. It's just obvious and so there isn't much subjectivity or much room for individual decision making in that sense at all. Other cases are the other way. I mean you can see quite clearly that somebody, something has really happened and that the person making the claims is quite clearly credible. ... but then in the middle, of course, there are claims where you're torn between believing a lot of what an applicant says and then finding there's something absolutely impossible embedded in there. It means that these things couldn't have happened, yet you go round and round and round trying to work out what to believe (Member 5, male, part-time).

The interview research identifies a variety of techniques used by members to assess credibility. One interviewee explained that 'the process of assessing is something you do the minute you walk in the room', that it is 'quite intuitive', where experience directs the line of enquiry (Member 4, male, full-time). However, others pointed out that information is best elicited in a structured way, with the use of closed questions to establish the facts and open questions which allow the applicant to produce a more detailed narrative account. Reflecting back and confirming understandings, where applicants 'take ownership' of what was previously said and cross-

⁸¹ *Migration Act 1958* (Cth) s 420(2)(a) and 420(2)(b).

⁸² *Harjit Singh Randhawa v MILGEA* (1994) 124 ALR 265 (Beaumont J).

⁸³ *Sutharsan Kopalapillai v MIMA* [1998] 1126 FCA (11 Sept 1998).

⁸⁴ Australian Migration Review Tribunal/Refugee Review Tribunal, 'Guidance on the Assessment of Credibility' (March 2012) <www.mrt-rrt.gov.au/Conduct-of-reviews/Conduct-of-reviews/default.aspx> accessed 27 August 2012.

⁸⁵ *ibid* 2.4.

⁸⁶ *ibid* 2.6.

referencing information were also identified as ways of establishing credibility. Inquisitorial techniques such as these highlight the liberty RRT members have in conducting hearings. They can also make a decision without calling a hearing, ‘on the papers’, if the decision is in the applicant’s favour.⁸⁷ It was suggested that the threshold for evidence can fluctuate, depending upon other characteristics of the claim (Member 2, male, full-time) and that ‘we shouldn’t be working off templates’ in this area of law (Member 4, male, full-time).

The key elements of credibility assessment identified by the members interviewed were: consistency and narrative coherence, consistency with country information, level of detail, plausibility, delay in application, corroboration and evasiveness. The responses indicate that to a large extent, credibility assessment in this context reflects quotidian communicative behaviour, not significantly different to decisions about credibility made in general day-to-day communication.⁸⁸ The extent to which formal credibility evaluation in legal environments of courts and tribunals mirrors everyday informal communicative behavior calls for investigation and would benefit from greater attention to accounts of testimony and credibility emanating from epistemology. Coady, for example, bases his philosophic investigation of testimony with an exploration of formal testimony in the legal context of courts. He argues that ‘the legal framework adapts and solemnizes an everyday phenomenon’, proceeding to describe natural testimony as a form of evidence.⁸⁹ Miranda Fricker argues that credibility judgement can be a perception of the speaker, based on ‘a body of generalizations about human cognitive abilities and motivational states relating to the two aspects of trustworthiness, competence and sincerity’. She describes this stance as one of ‘critical openness to the word of others’ which calls for a position of responsible hearer.⁹⁰

On what basis do decision-makers infer credibility in refugee status recognition? And further, what generalisations do they make about trustworthiness, competence and sincerity? The members interviewed highlighted the extent to which radical uncertainty is the norm in this area of decision-making. This is an important revelation for considerations of legal decision-making in areas of human rights, where contested claims for rights specifically concern power differentials as a result of geo-political location, socio-economic resources, in addition to the identified grounds of race, religion, political opinion, gender and sexuality. Within Code’s terms, it is an epistemological question which has to do with ‘power and the distribution of cognitive authority’, such that ‘mapping the rhetorical spaces that legitimate or discredit testimony—that foster or forestall

⁸⁷ *Migration Act 1958* (Cth) s 425.

⁸⁸ For example, a study conducted into Swedish Migration Board officers’ beliefs about deception found that their beliefs were as stereotypical as those expressed by a control group of students: Pär Anders Granhag; Leif A Strömwall, Maria Hartwig, ‘Granting Asylum or Not? Migration Board Personnel’s Beliefs about Deception’, (2005) 31(1) *Journal of Ethnic and Migration Studies* 29.

⁸⁹ CAJ Coady, *Testimony: A Philosophical Study* (Clarendon Press 1992) 26.

⁹⁰ Fricker (n 31) 66.

incredulity—seems rather to be a way of mapping social-political power structures’.⁹¹ In the following section, I will discuss some of the rhetorical processes involved in refugee recognition decision-making.

6.1 Consistency and narrative coherence

Numerous studies indicate that traumatic experiences often result in difficulties in remembering key events, repression and avoidance responses, anxiety, anger, fear and disassociation, producing fragmented and incomplete narrative accounts. Nevertheless, overall, consistency was identified in the interviews as the key indicator for credibility. Decision-makers look for internal consistency in relation to key elements of the claim across the various sources of evidence, both written and oral, including the departmental interview, the application to the RRT and evidence given at the hearing. Some expressed consistency in terms of narrative coherence, saying:

[W]hat I look at is the quality of the retelling of the story ... whether or not there’s been some consistency in the retelling ... whether there are huge unexplained inconsistencies that lead you to wonder whether any of the events actually happened (Member 6, female, full-time).

‘Consistency between various iterations of claims, written and oral, is important. Of course, ... you obviously have to make allowances there because people say things differently in different settings (Member 5, male, full-time).

As an ‘intensely narrative mode of legal adjudication’, refugee determination relies on the applicant’s story in its various reiterations, in writing and in the retelling, in part or in full.⁹² RRT members are required to ‘look at the evidence afresh’, although in the interviews, there appeared to be some uncertainty as to what this means. All interviewees said that they listened to the audio recording of the interview with the department before the hearing, although one said that she ‘had been conflicted as to whether it was a good idea’ (Member 6, female, full-time). The suggestion that listening to the audio recording of the interview might in some way prejudice the applicant highlights the radical uncertainty that may beset a decision-maker in this arena. It also points to a general scepticism about the conditions in which departmental interviews occur. As one member explained:

One thing about departmental interviews that is worth bearing in mind is that quite often the circumstances in which they’re carried out aren’t ideal. They often have, I think it would be true to say generally that the standard of interpretation in departmental interviews doesn’t meet the standards we have. Quite often they have telephone interpreters and that can be a problem (Member 5, male, full-time).

Departmental interviews may occur as soon as a person arrives in Australia and seeks asylum. In this situation, in particular, an applicant is likely to be unfamiliar with the process, may be fearful,

⁹¹ *Code* (n 1) 62.

⁹² *Millbank* (n 26) 2.

anxious, tired, ill or disoriented. Significantly, she is unlikely to have legal representation and may not have any form of personal support. These circumstances may well lead to inconsistencies in the account.

Recognising some of these circumstances, all members acknowledged that a level of inconsistency in the narrative retelling was to be expected. However, they said that an accumulation of numerous inconsistencies may trigger doubt about the substance of the claim. As one explained:

[T]here may be very minor inconsistencies that are really of no significance whatsoever or there may be an accumulation of numerous inconsistencies that might have more significance or on very fundamental issues (Member 6, male, full-time).

Temporality is significant in understandings of consistency, such as consistency in the sequence of events. One member said that:

[W]hat I look for is whether the sequence of events are consistent. ... So if someone gives one account of a sequence which is significantly different in their next account then that's a concern for me (Member 3, female, full-time).

Some suggested that while inconsistencies were normal, a significant change in the story would require explanation, for example:

I try to look past inconsistencies that can be explained but there are some that just can't ... I mean you can even forget that certain things happened but I think where the story changes quite dramatically from my father was detained for a certain period to my uncle was detained and there's no explanation as to why the change in personality and there have been sufficient questions to establish that no, we didn't mean uncle when we said father, it wasn't a slip, then that would lead me to really doubt whether what I'm being told is correct (Member 7, female, full-time).

On the other hand, an over-rehearsed story may also be equated with a lack of credibility in the narrative retelling, as was explained:

If they were simply telling me their story and it was word for word or phrase for phrase from their written claims I would be very concerned that they had just learned it off by heart and they were just regurgitating it. They weren't telling me about a lived experience they had had (Member 1, female, full-time).

It was pointed out that consistency is only useful as a tool for evaluating credibility if it relates to a significant and relevant aspect of the claim, for example:

I think consistency can sometimes be over-cooked. Or sometimes I think even seized upon out of context. Now that will vary from member to member I think, but consistency really only helps you ... if it's significant and if it's relevant. I think ... it does tend to I think occupy, sometimes, too large a place in our plethora of tools for assessing credibility. It can lead to a little bit of 'gotcha' when there's a minor thing (Member 4, male, full-time).

Coherence, particularly narrative coherence, plays a critical role in evidentiary evaluation

and as a theory for the justification of legal reasoning about facts.⁹³ Amalia Amaya argues that while coherence is central to justifications of evidentiary judgments, it must be combined with epistemic responsibility in order to avoid unjustified theories or bias.⁹⁴ She suggests that virtues such as impartiality, including ‘qualities such as openness to the ideas of others, the lack of personal bias, and a lively sense of one’s fallibility’, intellectual sobriety (‘a temperate fact-finder does not rush to judgment’) and intellectual courage (a ‘willingness to conceive and examine alternatives to well-entrenched beliefs, perseverance in the face of opposition, and courage to face and answer criticism from others’) are well suited to epistemically responsible legal fact-finding.⁹⁵

Such qualities would generally be associated with a responsible legal decision-maker. Members interviewed generally acknowledged that their own subjectivity, including qualities such as maturity and wisdom, influence and assist their decision-making. As one explained:

I think you bring everything you can to your considerations, all of your own resources that you can. So it’s about, I don’t know, your understanding of human nature and any wisdom you have accumulated, maturity. I think it would be difficult to do this work if you were very young because it’s not a mechanical process, it’s about knowing how human beings operate and knowing that there is this wide range of behaviour that people show that you can’t attach rules to the way people behave (Member 1, female, full-time).

Generally, however, members did not accept that their own gender had any impact on decision-making. While it is possible for applicants to specifically request that a review is allocated to a female (or male) member, one said, ‘I don’t think it makes any difference from the decision maker’s point of view’ (Member 3, female, full-time); another said: ‘I can’t discern any clear impact that it would have on my decision making’ (Member 4, male, full-time), although it was acknowledged that gender may play a part in ‘unconscious relationships that develop between any two human beings’ (Member 5, male, full-time).

However, at least some of the empirical research offers evidence to dispute these statements. In the study into refugee determination in the United States conducted by Ramji-Nogales et al, adjudicator gender was found to play a key role in determining outcomes, with female asylum judges 44 percent more likely to grant asylum than male judges.⁹⁶ Carrie Menkel-Meadow draws on this study to suggest that what women decision-makers are alleged to do differently, such as ‘more inclusive, less formal hearings, consideration of family connections and emotions, and a generous benefit of the doubt in credibility determinations’, should be the norm in asylum law.⁹⁷ However, as Connie Oxford demonstrates on the basis of qualitative research conducted in the US, male

⁹³ See Bernard Jackson, *Law, Fact and Narrative Coherence* (Deborah Charles Publications 1988).

⁹⁴ Amalia Amaya, ‘Justification, Coherence, and Epistemic Responsibility in Legal Fact-finding’ (2008) *Episteme* 306.

⁹⁵ *ibid.*

⁹⁶ *Ramji-Nogales et al* (n 19) 47.

⁹⁷ Carrie Menkel-Meadow, ‘Asylum in a Different Voice? Judging Immigration Claims and Gender’ in *ibid.*, 219.

adjudicators were often perceived to be more sympathetic towards female applicants who made claims on the basis of gender-based violence. Furthermore, she argues that female decision makers sometimes assert their positions of authority by making essentialist claims about women's experience based on ethnocentric assumptions.⁹⁸

In contrast to the results in the US, in a study of over 65,000 decisions of the Canadian Immigration and Refugee Board between 2004–08, Sean Rehaag found that there was a marginal difference in the grant rates of male and female decision-makers, with male adjudicators having a slightly higher grant rates than female adjudicators, particularly in cases involving female principal applicants and in cases involving gender-based persecution.⁹⁹ At the Canadian Federal Court, Rehaag found that while outcomes frequently come down to the luck of the draw, gender did not have any obvious or significant effect.¹⁰⁰ Such research is yet to be conducted in Australia.

Another member suggested that, rather than subjectivity, it is emotions that may get in the way of decision-making, explaining:

So you may feel particularly empathetic towards a set of claims, for whatever reason that happens, you may also fall ... into that trap of sensing for a good reason that you're being lied to, for instance. We're all human beings and you don't want to be taken for a fool and that's when you have to resist the temptation of either becoming angry, upset with the applicant or to try and pursue them to the point of confession. I think in the past some members have fallen into that trap where you think you've caught the applicant and you just want them to say it. [To tell you the truth.] That's never going to happen—okay, alright, you got me look I lied—because that's what you want to hear (Member 2, male, full-time).

Jennifer Beard and Gregor Nöll argue that credibility assessment in refugee determination procedures takes on the form of a confession, or, as formulated by Michel Foucault, through the Greek rhetorical concept of 'parrhesia', the obligation to speak the truth.¹⁰¹ They argue that truth-telling necessary to refugee status determination must be articulated by the applicant 'through the flesh', such that 'the applicant is not a witness to her own history but rather gives an account of the truth about her self in a way similar to a confessional subject, who exchanges truth for recognition'.¹⁰² According to the authors' insightful formulation, rather than being based on factual premises, recognition of a refugee demands a form of conversion or transformation into a 'credible legal subject, who gives an account of facts internal to herself. The refugee must testify, prove

⁹⁸ Connie G Oxford, 'Protectors and Victims in the Gender Regime of Asylum' (2005) 17(3) *Feminist Formations* 18, 34–35.

⁹⁹ Sean Rehaag, 'Do Women Refugee Judges Really Make a Difference? An Empirical Analysis of Gender and Outcomes in Canadian Refugee Determinations' (2011) 23 *Canadian Journal of Women and the Law* 627.

¹⁰⁰ Sean Rehaag, 'The Luck of the Draw? Judicial Review of Refugee Determinations in the Federal Court of Canada (2005–2010)' (2012) Research Paper No 9/12 *Osgoode Hall Law School Research Paper Series* 19.

¹⁰¹ Jennifer Beard and Gregor Nöll, 'Parrhesia and Credibility: The Sovereign of Refugee Status Determination' (2009) 18(4) *Social & Legal Studies* 455.

¹⁰² *ibid* 471.

herself as declared not as a seeing body but as a body erased of any inscriptions of doubt'.¹⁰³ To this extent, we might say that the asylum seeker embodies the evidence and the decision maker's task involves assessing the truth of that subjectivity. Indeed, the refugee subject literally comes into being as a result of legal recognition by a state in which she seeks asylum.

6.2 Consistency with country information

The RRT has a Country Information and Research Unit, which collects information from a variety of sources about the conditions in countries of origin, including Australian and overseas governments, as well as international development and humanitarian organisations, NGOs, religious and interest groups, academic and media sources. Experts, usually academics, with a strong profile or specific topical knowledge in subjects relevant to claims are also consulted.¹⁰⁴ General information packs about specific countries have been available on the RRT's website since 2009 and members may make requests for information for specific reviews.

At the RRT, a member may obtain any information considered relevant to a review;¹⁰⁵ there are no publicly available guidelines on the use of country information. Susan Kneebone has noted that even though applicants generally give a more negative picture of what is likely to happen if they are returned to their country of origin than the official account of events, the RRT tends to 'focus on credibility issues to discredit the applicant's whole version of events, and to justify a preference for the "official" view".¹⁰⁶ Similarly, Crock and Berg argue that from the applicant's perspective, the emphasis placed on evidence about conditions in a claimant's country of origin is 'one of the most frustrating and incomprehensible aspects of status determination processes' where it is 'used as a yardstick against which to test the credibility of the applicant's claims'.¹⁰⁷ They point out that the High Court has cautioned against 'facile comparisons between experiences of an applicant and treatment afforded people seen to be in a similar situation'.¹⁰⁸ The authors suggest that the availability of information from organisations and news reports 'seems to have altered the expectations and behaviour of decision-makers'.¹⁰⁹ Members are required to put any adverse information to the applicant, orally in the hearing or in writing subsequently, and to provide an opportunity for the applicant to respond.¹¹⁰ However, it is only necessary to put such information if the member considers that it will form the basis of the reason, or part of the reason, for affirming

¹⁰³ *ibid.*

¹⁰⁴ Email correspondence with Chris MacDonald, Director, Country Advice and Information, January 2012.

¹⁰⁵ *Migration Act 1958* (Cth) s 424.

¹⁰⁶ *Kneebone* (n 42) 90.

¹⁰⁷ *Crock and Berg* (n 24) 374.

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid* 375.

¹¹⁰ *Migration Act 1958* (Cth) s 424A.

the decision under review.¹¹¹ General country information is therefore the exception to rule as it is not specific to an applicant.

There is no doubt that consistency with country information and other sources of information is very important to decision-makers. In interviews, the members acknowledged the significance of country information to assessments of credibility. They indicated that external verification functions to enhance the credibility of a claim. However, some acknowledge that the amount of information can be overwhelming, that there is a 'huge volume of information out there ... and it's a matter of sifting through the information and working out what's meaningful' (Member 6, male, full-time). One member pointed out that independent information can be unhelpful, confusing and contradictory. He said:

Is somebody claiming that he's been arrested because he's a vegetarian consistent with country information? It doesn't speak about it. Country information is often, in fact almost always, diverse, often very confusing. You have reports going one way and reports going the other. ... Somehow you've got to make sense of it to work out whether what somebody's claiming is consistent broadly with what you know of what's going on in the country and to that extent may be more believable (Member 5, male, full-time).

A number of members said that they relied upon their own personal knowledge about the conditions in countries of origin. Some specialise in hearing claims from particular regions, which they reported helped them build up expertise which they draw on to understand the context of a claim. This suggests the requirement for a level of narrative resonance between the member's knowledge and that of the applicant's story. For example, one said: 'I'm looking for consistency with what I know about what is going on in the country' (Member 1, female, full-time).

The discretion members have to draw on any source of information as evidence for a claim extends to research they conduct of their own volition. One member said that he often does research himself: 'In fact I do a lot of research on the internet myself, just going through search engines and digging out relevant things' (Member 5, male, full-time). However, another expressed concern about the status of information obtained outside of the claim and whether it is considered to have greater validity than that presented by the applicant, saying:

My concern is, is there some sort of ownership? If you've discovered that piece of information out of country research which tends to blow someone's claims out of the water do you then unconsciously—and I'm not suggesting that anyone would do it consciously—but unconsciously feel ownership of that to the point where you might not give as much regard to information that they may have elicited that doesn't agree with what you've already got (Member 6, male, full-time).

¹¹¹ *Migration Act 1958* (Cth) s 424A(3).

Even during the course of a hearing, a member may suggest avenues for sourcing evidence. I observed one member suggest that the applicant show him a website where evidence that he considered relevant to the claim would be displayed. This strategy appears to be something the member readily employs. He recounted a situation where he suggested that an applicant who was claiming persecution on the grounds of membership of particular social group on the basis of her sexuality—but was unable to identify particular venues she frequented to support her claim—to show him her social networking site as evidence of her activities (Member 4, male, full-time).¹¹²

According to some members, however, too much consistency with country information should not be replicated across claims. In an interesting turn of events, one of the members interviewed was listed to hear two reviews which she said were identical in many respects. She said this presented a real quandary for her in attempting to assess the claimants' credibility. In the end, however, country information supported the claim, and the member chose to accept the evidence of the applicant who had made the first application.

6.3 Level of detail

It is recognised that allowing a witness to give a free report of events in a narrative form, rather than in a question and answer format characteristic of examination and cross-examination, 'may yield a significantly more accurate version'.¹¹³ All members said that they looked for a level of detail about key aspects of the claim as an indication of credibility. In particular, they said that they looked for 'circumstantiality, the extent to which claims are elaborated, the amount of detail about actual key events' (Member 5, male, full-time). When asked to describe how they sought evidence, members commonly said that at some stage in the hearing they asked the applicant to tell their story in an uninterrupted way and that it was during this account that they looked for a level of detail. As one member explained:

[F]irstly, I try and ask the applicant to give me their story in their own words, so I listen to the narrative. It's almost uninterrupted. I let them speak; then there might be areas where I'd like some full information or I'd like something clarified, so I might then ask more questions around that. What I'm looking for is how much detail they are able to give me; how consistent the evidence I'm hearing at the hearing is with their written statement or their interview with the Department of Immigration; whether there are inconsistencies within the evidence I've been given at the hearing; I look at how fluent they are in giving their evidence and whether they can give it to me in context and tell me what the surrounding circumstances were (Member 3, female, full-time).

Information about the circumstances surrounding particular incidents or 'peripheral information' is seen to enhance the credibility of an account. One member interviewed said:

¹¹² Millbank has highlighted the problems associated with this approach to evidence of sexuality: *Millbank* (n 26).

¹¹³ Australian Law Reform Commission, NSW Law Reform Commission & Victorian Law Reform Commission, *Uniform Evidence Law: Report* (2005) 125.

So it's not just the claims but the bigger picture around it and putting it in context of what was happening in their lives at the time and that certainly assists me (Member 3, female, full-time).

There was a suggestion that the narrative path in truth telling is not direct and that it involves 'side stories', particularly when an applicant is recounting a traumatic experience. One member spoke of a case in which a woman had been sexually assaulted by security people who had come to her home. She said that it was when the applicant mentioned that she 'was doing the washing up when they knocked on the door' that she believed credibility was established. She said that despite the fact that it was a trivial detail, it was very important to the applicant and served to contextualise the memory, explaining:

I think if you are making up a story you tend ... to talk in more straight lines about the main events. There aren't any side stories, but that was the tipping point in the hearing for me. Once she had said that I didn't ask her anymore about what had happened that day even. I think that was just enough (Member 1, female, full-time).

Members are directed not to rely on 'gut feelings' when making credibility assessment, however, they often described situations where they attributed belief in the truthfulness or otherwise of an account as an intuitive experience, based on how the applicant spoke about an event. For example:

You have got a story in enormous detail consistent with a written account. You end up having to find that it's a true account, but you might feel in your heart of hearts this person didn't talk about this event as if it was real (Member 1, female, full-time).

Consistency is therefore recognised sometimes to be inconsistent with truth telling. Indeed, excessive detail or verbatim re-iteration, including about traumatic events, may actually engender doubt about credibility. As one member explained:

I'm thinking of two particular cases ... where an applicant has been insistent on giving me very, very long - I mean extremely long descriptions of what's happened in periods of detention. They've been graphic, very detailed, hour by hour descriptions.... In the end, I didn't believe either of those accounts, but I had to listen through and I had to consider a range of other things before getting to that conclusion (Member 4, male, full-time).

Members acknowledged that applicants can be very emotional in hearings and that this can be 'quite affecting' (Member 5, male, full-time). One interviewee suggested that expressive emotion enhanced the credibility of a claim, saying:

What I try and get them to tell me is not just their claims and the context in which things happen but what impact it had on them and that really assists me when I'm assessing credibility. ... Generally say if someone's recalling and telling you about a traumatic incident they may get upset, they may get teary or they might be so overwhelmed they can't speak, but all of these things assist me when I'm coming to assessing credibility and it's as much the non-verbal stuff as it is the verbal communication (Member 3, female, full-time).

However, it was also suggested that a high level of emotion may actually indicate a lack of credibility, that it may be a ‘put on’ in an attempt to elicit the sympathy of the member. This is in contrast to the situation in criminal law, where empathy is equated with remorse. While it was understandable that applicants may ‘lose their composure in a hearing’, excessive emotion can act as an impediment to decision-making. As one member said:

We have a class of applicants ... from a certain country, who you can almost guarantee will be sobbing uncontrollably and wailing hysterically and banging their heads on the table, from the moment you come in. Having seen quite a few of these, I've formed the view that that demeanour is quite deliberate and that it is meant to sway the - call on the emotions of the tribunal member and it doesn't reflect any genuine anguish at all (Member 5, male, full-time).

Lynne Henderson has argued that empathy assists in illuminating the relevant facts of a case through the inter-subjective communication of meaning.¹¹⁴ Clearly, legal argumentation commonly relies upon empathetic responses from jurors, and judges. Yet we should not simply legitimate empathy uncritically. As Sharon Krause points out, while empathy is valuable to juridical deliberation, research indicates that we empathise most readily with those whose experiences are most like our own, including subjective experience of race and sex.¹¹⁵ It is therefore crucial to take heed of Code’s prescription that ‘the burden of proof falls upon inquirers who claim neutrality’.¹¹⁶

6.4 Plausibility

Plausibility was identified as a key area for credibility assessment. Members tended to discuss this in terms of why an applicant might leave out a significant piece of evidence, for example, in the departmental interview, but later raise it in their claim at the RRT. One member explained:

I just felt that leaving out something that he was now claiming was the most significant event in his life, traumatically speaking [being detained for two weeks], but having included less traumatic events it wasn't plausible that the major event had happened. I just didn't accept it and I didn't accept his inability to explain it was because of [father being diagnosed with cancer] (Member 1, female, full-time).

One member claimed that evidence which is identified as implausible must relate to a key or significant aspect of the claim and must be recurring (Member 2, male, full-time). While it may be possible to ignore occasional and insignificant implausibility, he described the cumulative effect of a series of unlikely significant events as creating a context of ‘comfortable disbelief’, saying:

But if there are a number of implausible claims and they relate to significant aspects of the applicant's evidence, that's when in totality they may become enough which, in conjunction

¹¹⁴ Lynne N Henderson, “Legality and Empathy” (1987) *Michigan Law Review* 1574.

¹¹⁵ Sharon R Krause, “Empathy, Democratic Politics, and the Impartial Juror” (2011) 7(1) *Law, Culture and the Humanities* 81.

¹¹⁶ *Code* (n 1) 44.

with inconsistencies, could totally shatter the applicant's credibility. That's when you can comfortably disbelieve an applicant's account (Member 2, male, full-time).

One explained that plausibility may involve considering conflicting evidence:

Let's say somebody claims to have been attacked by his family for converting from Islam to Christianity in Pakistan. They tried to kill him, they stabbed him, he ended up in hospital and that's quite a fairly common claim. Yet a month after this, we find the same family, he says, paid for his student fees in Australia. So he said both things. How can both things possibly be true? (Member 5, male, full-time)

Members rely upon their own knowledge about conditions in particular regions when considering whether an account is plausible. One described this as establishing his own credibility and authority as a decision-maker, saying:

Well a particular strategy of mine is in fact the research. I think a lot of other members are probably the same, but I put a lot of effort into making sure that I've got a lot of research—relevant research—for various reasons, but ... part of it is to create a setting to establish my role, but also to put the applicant at ease. I would for instance, in some cases, I may have information to say you left your particular town in—whenever it was, two years ago—had they completed the bridge at that stage?

That can be really, I think, useful information to establish, in a sense, my credibility with the applicant, but also to allow that person to know that I really have read and understood where they're from and I think that takes us to a—I think that type of thing is quite a good starting point (Member 4, male, full-time).

Plausibility may be an area where consultation with other decision-makers would be useful. However, this is rarely the case; members make decisions alone and there is generally no formal consultation between them about specific claims. There may be discussion between members when new areas of claims emerge and experts on particular regions sometimes present seminars. One member explained:

We also have, from time to time, on a very informal basis where we have a new class of cases, the members who've got those cases come together and talk about the issues. ... There is consultation about the country issues that are involved. ... By and large, we don't talk to each other about where am I going to go on this case. If you say, look my applicant's claiming that he was arrested in Fiji in 2006 in August by the military and somebody, some other member says, oh but of course you know that the coup didn't happen until December, so there's four months' difference there. That's the sort of level I think at which we talk with each other (Member 5, male, full-time).

One of the suggestions of the Senate Committee in 2000 was that the RRT convene three-member panels in appropriate cases.¹¹⁷ However, Crock argues that while multi-panel tribunals may reduce the incidence or perception of bias, it could just as easily intensify negative aspects of an

¹¹⁷ *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, Senate Legal and Constitutional References Committee 166-9, Recommendation 5.4.

inquisitorial system, resulting in intimidation of the applicant. Rather than increasing the number of members of panels, she forcefully advocates ‘a guarantee of *effective* legal assistance for refugees at every stage of both the application and merit review process’.¹¹⁸

6.5 Delay in application

Delay in applying for protection cannot be the sole reason for doubting the credibility of a claim, but must be supported by other reasons.¹¹⁹ However, members said that they would require an explanation if there was a delay in the application, because ‘the assumption is that if you are escaping persecution, then it would be reasonable to assume that you would want to seek protection as soon as possible, because there's always a risk that you might be sent back to where you came from’. One said:

If you have approached it very casually or you haven't made any effort in finding out what avenues are available to you to be able to stay in Australia, that's when it may go to their credibility or raise doubts as to the genuineness of the fear of persecution (Member 2, male, full-time).

Millbank points out that the assumption that claimants who genuinely fear persecution will make their claim as early and as fulsomely as possible is actually untested to date.¹²⁰ In a study of decision-making in claims on the basis of sexual orientation, she found that while delay was relatively commonplace, it did not factor significantly in negative determinations, although it was often not handled ‘thoughtfully’.¹²¹ Perhaps this suggests that the introduction of a relatively new ground for refugee recognition has occasioned a more cautious approach to elements of credibility assessment.

6.6 Corroboration

Members have an obligation to take all evidence presented to the RRT into account, including any documents presented by the applicant. However, they expressed a general mistrust of documentary evidence, pointing out that it is very easy to produce fraudulent documents. One said:

In fact, I've come really to the view that most documents can be forged and I never accept a document simply on face value. It may be, looking at the document—I mean this happens I suppose fairly often—looking at the document, hearing what the applicant has to say, you come to the view that yes, the document is probably authentic. Quite often though, there'll be real reasons for rejecting a document ... there's a lot of country information about the ready availability of forged documents in a lot of countries and it goes so far as to cover forged newspapers. In Pakistan, for instance, it's quite possible to have a dummy newspaper

¹¹⁸ Mary Crock, *A Sanctuary under Review: Where to From Here for Australia's Refugee and Humanitarian Program?* (2000) 23(3) *UNSW Law Journal* 246.

¹¹⁹ *Selvadurai v Minister for Immigration and Ethnic Affairs* (1994) ALD 346.

¹²⁰ *Millbank* (n 26) 13.

¹²¹ *ibid* 14.

produced in which you can have an article inserted, talking about the terrible things that happened to you (Member 1, female, full-time).

Any document presented as evidence must be translated, the cost of which is borne by the applicant. Members may ask the interpreter for some general assistance about the substance of the document at the hearing, but are not responsible for translation.

Members said that they have access to information available about the ease with which fraudulent documents can be obtained in particular countries through the RRT's research unit. Procedural fairness requires members to put adverse information to the applicant and invite her to respond.¹²² Further, in attempting to verify the authenticity of documents, members said that they would ask for oral evidence on the provenance of the document. For example, one said:

If I have concerns about the authenticity of the document I raise it with the applicant. I might be relying on country information which gives me those concerns; then I will discuss that country information with the applicant. I wouldn't generally ask the applicant to verify the authenticity, I would do that myself. ... We do that through our country service. So we have a protocol in place (Member 1, female, full-time).

In the past, experts were used to verify the authenticity of documents, although this procedure had subsequently been found to be unreliable, as a member explained:

There were some cases quite a long time ago where we used experts in—well, I'm not quite sure how you'd describe the discipline now but it's analysing photographic images and comparing ... for identification purposes. So on the odd occasion in the past we've used that sort of thing. I've had applicants provide their own expert witness evidence on a comparison of a—sort of facial recognition type of work (Member 5, male, full-time).

While members were generally dismissive of the evidentiary value of documents, one member pointed out that if it was determined that a document was genuine, this may serve to enhance the credibility of testimonial statements (Member 1, female, full-time).

6.7 Demeanour and evasiveness

Overall, members rejected the use of demeanour as an indicator of credibility, due to its unreliability in an intercultural communicative exchange. However, one suggested that while she 'wouldn't use demeanour to find that a person wasn't being truthful', she may, 'in reality use it to find that they are being truthful', such that 'if a person just appears to be speaking frankly to me that goes to their favour' (Member 1, female, full-time). Some said that while demeanour may be unreliable, an applicant who is consistently evasive or uncooperative may attract adverse credibility. Indeed, one pointed out that it can be 'very annoying' and requires the decision-maker to disassociate from the emotional response:

¹²² *Migration Act 1958* (Cth) s 424A.

Well there are two things happening here. One of them is it's very annoying because this might have happened after three hours of a hearing and everybody's feeling tired. So you've got to try to separate that out. Secondly of course, it may also indicate clearly that the applicant is doing this deliberately and is being non-responsive and evasive deliberately. But you need to separate out the emotional side. I mean you can't stop getting angry or annoyed, anyway, but you have to separate that out (Member 5, male, part-time).

In a study of RRT decisions based on credibility, Coffey found that rather than demeanour, negative decisions commonly referred to the manner in which the applicant responded to questions, such as when they were described as 'vague', 'lacking in detail', 'inconsistent' or 'tentative', whereas successful applicants were often described as responding to questions "directly and without hesitation", offering information that is "unrehearsed and plausible"; responses were "readily and convincingly" conveyed'. He found that there were few instances of incongruity between the extent to which an applicant appeared convincing and the merits of the claim. As he points out, this suggests that demeanour is actually playing a more important role in the weighing of evidence than acknowledged.¹²³

7. Conclusion

This research provides insights into decision-makers' reflective perspectives on credibility assessment in reviews of refugee determination decisions at the Australian RRT. The interviews reveal a level of uncertainty about credibility assessment and an idiosyncratic approach to evidentiary evaluation. If consistent with research conducted in other jurisdictions, this will contribute to differential decision-making. Undoubtedly, the context of refugee determination presents unique evidentiary challenges, including reliance upon oral testimony which can rarely be corroborated; a cross-cultural context in which nearly all hearings are facilitated by an interpreter; the likelihood that applicants will experience difficulty in speaking about experiences of trauma, persecution and violence; and the likelihood that there is a lengthy period between when relevant events occurred and the hearing of the claim. Research conducted in a number of jurisdictions indicates that there is enormous inconsistency in refugee decision-making.

In light of these difficulties, I have argued for a reassessment of the standard of proof required in refugee status determination, suggesting that it is appropriate to begin with a rebuttable presumption of credibility, or truthfulness, on the part of the applicant seeking asylum. Such an approach may go some way towards addressing the potential for epistemic injustice and is consistent with a position of epistemological responsibility demanded by an ethical obligation to the refugee. International refugee law recommends that, if an applicant's account appears credible,

¹²³ Coffey (n 26) 386.

decision-makers should adopt the benefit of the doubt,¹²⁴ however, this only applies if the account is credible. A rebuttable presumption of credibility, on the other hand, effectively inverts the onus of proof, requiring an assumption of belief as a starting point, thus facilitating the benefit of the doubt. It means decision makers should begin their assessment of the claim from an assumption that an applicant is telling the truth, rather than one of scepticism. This would serve as a counter-measure to some of the potential biases and misconceptions inherent to a process fraught with radical uncertainty.

¹²⁴ *UNHCR Handbook* (n 4) Clause 196.