ARE CREDIBILITY ASSESSMENTS IN THE UK A LEGALLY FLAWED MEASURE IN DETERMINING REFUGEE STATUS?

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Abbreviations

API – Asylum Policy Instruction

CEAS- Common European Asylum System

CJEU - Court of Justice of the European Union

ECHR – European Convention on Human Rights

HO – Home Office

TBOD – The Benefit Of Doubt

UKBA – United Kingdom Border Agency

UNHCR – United Nations High Commissioner on Refugees

UNHRC - United Nations Human Rights Committee

Introduction

Refugee migration to Europe has played a huge part in the UK Independence Party's successful campaign for Britain to vote to leave the EU in 2016[1]. However, with applications for asylum in the EU doubling between 2014-15 due to an influx of asylum-seekers and refugees in Europe, many member states like the UK are attempting to limit the numbers of asylum-seekers which are granted refugee status[2]. This can be seen through previous government approach as Theresa May stated, '*the aim is to create Britain a really hostile environment for illegal migration[3]'*. A surplus of evidence exists which suggests that this 'hostile environment' is maintained through credibility assessments. Credibility assessments involve a determination of whether and which of the applicant's statements and other evidence relating to the material elements of the claim can be accepted[4]. If an individual making an asylum/human rights claim cannot persuade the decision-maker that their claim is credible, then they are unlikely to be recognised as a refugee or in need of international protection; the application of legal tests is therefore rendered largely redundant[5]. In the exercise of its supervisory responsibility under its Statute and Article 35 of the 1951 Refugee Convention[6], the UNHCR have also noted a common trend across EU member states whereby negative decisions on applications often seem to be made on credibility grounds without application of the criteria of the Qualification Directive[7] to the facts of the application[8]. This research will highlight and explore the controversial nature of credibility assessments as well as analysing the legal framework and wider context behind them. The UK is of particular interest due to the high turnover in appeals of applications that were initially denied which may potentially suggest inaccuracy and error on behalf of the Home Office. Previous research also highlights a possible shortcoming of the UK's humanitarian commitment to refugees under international law, with restrictive asylum policies being driven by problematic notions of economic 'pull factors' and a culture of

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[1] N Gill and A Good, Asylum Determination In Europe (1st edn, 2019

[2] F Kendall ''Catch-22'? : The Assessment of Credibility in UK Asylum Applications' (LLM Thesis, Malmo University 2020)

[3] Theresa May interview: 'We're going to give illegal migrants a really hostile reception'. The Telegraph [online]

[4] United Nations High Commissioner for Refugees, (Beyond Proof. Credibility Assessment in EU Asylum Systems, May 2013)

[5] Robert T, *Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined* (2006) 8 European Journal of Migration and Law 79–96

[6] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 Apr 1954) 189 UNTS 137 (UN Refugee Convention)

[7] Council of the European Union, *Directive 2011/95/EU*.

[8] Supra, Note 4

disbelief[9]. Consequently, a number of scholars challenge the fairness of the asylum determination system suggesting that the government believes that the majority of asylum-seekers are only trying to gain access to the UK's resources and labour market.

[9] Supra, Note 2

Study Objective and Research Questions

The purpose of this paper is to delve into the credibility assessment guidelines, determine *if* they contain flaws, what these flaws are and the implications of these flaws. This paper will also discuss and examine, the API, UNCHR guidance, case law and the UK's legislation which govern/dictate credibility assessments. The questions driven by this research are outlined below.

1. What are the problems identified with credibility assessments and how does this conflict with refugee law?
2. Why is credibility so important to for determination of asylum and refugee claims?
3. What are the legal standards relating to credibility assessments of testimony in asylum procedures?

CONTEXTUAL BACKGROUND

3.1 Definition

Linguistically, the conventional meaning of credibility is whether a person is capable of being believed, reliable or trustworthy[10]. However, the term credibility assessment refers to the procedure of firstly gathering the relevant information from the applicant; secondly, examining it in light of all the other available material; and thirdly determining whether the statements of the applicant that concerns asylum claim can be approved, for the purpose of the determination of qualification for protection status[11].

3.2 Assessment Process

A good starting point is to understand the credibility assessment process. After claiming asylum in the UK, asylum-seekers are required to attend an initial screening interview so the interviewer can gather primary information and then a 'substantive' interview which involves going into further detail about the applicants case. The case is then addressed to the court with interview transcripts performed by UKBA officials, and witness statements. It will then be scrutinized for consistency, plausibility and legitimacy, firstly via cross-examination and finally by the Immigration Judge. Most of the decision-making occurs within the administrative apparatus of the Home Office with the judiciary involved only at the appeals stage[12].

The decision-maker will also have to consider the complexity of individuals' motives for seeking asylum, the political background from their origin countries, their mode of entry into the receiving country in addition to the legal tests contained in the Refugee Convention and the ECHR[13]. They will then examine the application in light of provisions in the Refugee Convention/EU Qualification Directive[14] and if unsuccessful, assess the application for Subsidiary Protection. For example, against Article 3 ECHR[15]. A decision will then be made. If the application has been rejected, it can be appealed.

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[10] A Barisic 'Credibility Assessment of Testimony in Asylum Procedures: an Interdisciplinary Analysis' (LLM Thesis, Lund University 2015)
[11] Ibid
[12] L Schuster, 'Fatal Flaws In The UK Asylum Decision-Making System: An Analysis Of Home Office Refusal Letters'[2018] 46(7) Journal Of Ethnic And Migration Studies
[13] Supra, Note 5
[14] Supra, Note 7
[15] Supra, Note 12

3.3 Context

The central concern for asylum decision-makers is whether removing the applicant from the country they're claiming asylum from could constitute a possible violation of the ECHR[16] or the Refugee Convention. The decision-maker is under a legal obligation to ensure that genuine applicants eligible for international protection are not returned to their country of origin[17]. However, the difficulty lies in determining who is legitimate and who is not. To recognise genuine claimants is to fulfil the humanitarian objectives of the Refugee Convention and protect fundamental human rights – the right to life and freedom from torture[18]. Asylum decision-making is frequently described as operating within a 'culture of disbelief' and in an atmosphere of 'lawfulness'[19]. So, the decision-maker also needs to ensure that those individuals who are not legitimate are denied entry to maintain immigration control[20]. There is an assumed risk that the economic incentives which pull asylum seekers to the UK are so strong that economic migrants will use asylum as a way to bypass normal immigration controls[21]. But, given the substantial differences in global living standards, it would be naive to suppose that some claimants do not claim asylum for the purpose of economic betterment as they do not qualify for entry under ordinary immigration rules[22].

To be recognised as a refugee in the UK, an asylum seeker must prove '*to a reasonable degree of likelihood*' that they have a well-founded fear of persecution for one of the reasons specified in the Refugee Convention [23]. However, the interpretation of the convention definition raises many complex issues and there is no single authoritative entity entitled to resolve interpretive questions in a definitive fashion[24]. In contrast to nearly all other international human rights treaties, the convention does not establish an international court, tribunal, or committee for the adjudication and resolution of differences in states' interpretation of the key terms in the Convention[25]. As a matter of binding law, the task of determining the Convention's "true

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[16] European Convention for the Protection of Human Rights and Fundamental Freedoms [1950], as amended by Protocols Nos. 11 and 14 ETS 5 Entry into force: 3 September 1953
[17]Supra, Note 5
[18] Ibid
[19] Supra, Note 1
[20] Supra, Note 5
[21] Mayblin, L. and James, P. (2016) *Factors influencing asylum destination choice: A review of the evidence,* University of Warwick
[22] Supra, Note 5
[23] J Sweeney, 'Credibility, Proof and Refugee Law ' [2009] 21(4) International Journal of Refugee Law 2
[24] J Hathaway and J Foster, The Law of Refugee Status (1st edn, Cambridge University Press 2014) 2
[25] Ibid

autonomous and international meaning" has fallen principally to domestic decision-makers[26] as said by Lorde Steyn in *R v. SSHD*[27]. This does not need to be supported by incident to show this is a dangerous instrument as each individuals interpretation of the convention is subjective and without clear guidance, unfairness and bias will consume the system in addition to violating fundamental human rights. All of these flaws are at the expense of an individual's life who may have substantial grounds for fleeing to the UK. The Convention also fails to mention credibility assessments however the influential UNCHR Handbook makes significant reference to them, but the handbook is *not* binding on state parties, though it is of considerable persuasive authority[28].

The HO became under increased scrutiny in the media; in 2010, a HO whistle- blower alleged that a 'toy monkey' was placed on the desk of those accepting too many asylum cases[29]. This is breaching the API and for asylum adjudication to be consistent with these objectives and to comply with notions of fundamental fairness essential to a just system of law, asylum adjudicators must be provided both a standard and guidelines for evaluating the credibility of asylum-seekers in order to avoid ad hoc and biased credibility determinations[30]. Since Article 8 (2) (c) API obliges Member States to ensure that "the personnel examining applications and taking decisions have the knowledge with respect to relevant standards applicable in the field of asylum and refugee law", decision-makers should know and apply these standards to credibility assessments[31].

Credibility assessments are especially significant in this crucial time for Europe, when the EU is consolidating its attempts to implement the Common European Asylum System; when Europe is receiving unusually large numbers of people due to the ongoing conflict in the Middle East; when efforts to exteriorise border controls have heightened; and when the consequences for migration patterns of Britain's expected exit from the EU are still almost entirely unclear[32].

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[26] Supra, Note 24
[27] *R v. Secretary of State for the Home Department; Ex parte Adan*, [2001] 2 AC 477 (UKHL, Dec. 19, 2000), at 517,
[28] Supra, Note 23
[29] D Taylor, 'Whistleblower Claimed Colleagues Expressed Anti-Immigration Views And Took Pride In Refusing Asylum Applications' (UK Border Agency Investigation Finds Cause For 'Significant Concern', 8th August)
[30] J Ruppel, 'The Need for a Benefit of the Doubt Standard in Credibility Evaluation of Asylum Applicants' (1991) 23 Colum Hum Rts L Rev 1
[31] EASO, *An introduction to the Common European Asylum System for courts and tribunals – A judicial analysis,* August 2016,
[32] Supra, Note 1

3.4. EU Legal Framework For Credibility Assessments

The EU legal framework which governs credibility assessments is rather limited. The EU's Court of Justice developed additional principles, but these are again relatively limited. As the 1951 Convention and 1967 Protocol[33] also lack provisions regarding the subject of evidence and credibility assessments in international protection cases, other sources of guidance and interpretation have relevance[34]. Therefore, in a number of member states, there is rich jurisprudence dealing with this subject area and in addition, the jurisprudence of the ECHR contains an important source of such guidance[35]. When there is limited legislation there are bound to be many mistakes arising from such circumstances which can significantly impact the chance of being granted asylum. The lack of law guiding credibility assessments therefore leaves large room for potential flaws violating human rights. It comes amid a string of cases reported by *The Independent* in which people who have an apparent right to be in the UK have been refused status, denied entry to the UK or threatened with removal, prompting sustained public outrage[36].

This field of law is rather extensive and specialized, but it is still a young branch of law, having only developed in the last 25 years. As a result, formal training in the field of solicitors and judges is often either poor or absent, leading them to rely on principles of domestic administrative law[37]. However, since the UNCHR Quality Initiative Project began, areas of improvement have been identified as confirmed by the Independent Asylum Commission[38]. For example, the radical reorganisation of the government department that handles applications for asylum and the implementation of the New Asylum Model announced in 2005[39]. The legislative framework appears to promote a decision making culture imbued with fairness, yet the true test of any determination system is whether it stands up during testing times, and whether its commitment to procedural justice is more than exhortatory[40].

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[33] Protocol Relating To The Status of Refugees [1967] United Nations, Treaty Series, vol. 606, p.267 Entry Into Force: 4 October 1967
[34] Supra, Note 31
[35] Ibid
[36] M Bulman, 'More Than Half Of Immigration Appeals Now Successful, Figures Show'(*The Independent*, 13 June 2019)
[37] Supra, Note 10
[38] Supra, Note 23
[39] Ibid
[40] Peter W Billings, 'A Comparative Analysis of Administrative and Adjudicative Systems for Determining Asylum Claims' (2000) 52 Admin L Rev 253

The Refugee Convention remains the '*cornerstone of international refugee protection regime*'[41]. However, as it has a relatively limited definition it has been strengthened by international and human rights law which filled in specific gaps by protecting those against returning to a real risk. Despite advancement in broadening the interpretation of its definition (for instance by recognizing gender-related persecution claims), correct application of the convention still depends on reliable credibility judgements[42]. In the present context, the most relevant allegations against denied refugee claims arise in relation Articles 2 and 3 of the ECHR which protect the right to life, right to not be subjected to torture and inhumane treatment/punishment. As shown in *Soering*[43] both articles have been recognised as extending to protect individuals from being returned to a harmful environment. This suggests they have a *non-refoulement* component.

Enforcing migration policies coordinated at EU level also has flaws: is passing the responsibility for asylum requests to EU supra-national authorities compatible with member states' human rights obligations[44]? As a consequence of the current legal and institutional framework, it is submitted that migration and asylum policies are essentially domestic issues and it is difficult to determine to what extent EU member states could pass decision-making powers to supra-national EU institutions. As there is not just one single European policy on immigration, this suggests that countries have diverse needs and have full sovereignty and responsibility for migration policy. Differences in national refugee policies distort the functioning of the European labour market and creates massive incentives for refugees to seek asylum in specific countries rather than others[45]. This information is useful into understanding the context and reasons why UK credibility assessments are potentially flawed because there is confusion in the European policy on immigration. 68% of the European population agreed

[41] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, read in conjunction with the Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (together, Refugee Convention)
[42] Kagan M, 'Is Truth in the Eye of the Beholder – Objective Credibility Assessment in Refugee Status Determination (2003) 17 Georgetown Immigration Journal 17 LJ 367
[43] *Soering v United Kingdom* (1989) 11 EHRR 439, paras 91, 113.
[44] B Massimo, 'The Case For A Common European Refugee Policy' (European Macroeconomics & Governance , March 20th)
[45] Ibid

with the suggestion of a common policy on immigration[46]. Asylum policy has also been a key issue in elections and sparked conflicts between politicians and the judiciary[47].

[46] Eurobarometer (2015) 'Public Opinion in the European Union', *Standard Eurobarometer 84*
[47] I Mcdonald and P Billings, 'The Treatment of Asylum Seekers in the UK' [2007]29(1) Journal of Social Welfare and Family Law 49-65

WHAT ARE THE COMPLICATIONS OF CREDIBILITY ASSESSMENTS?

4.1 Asylum Policy Instruction

As a result of the concerns expressed regarding the consistency and quality of the asylum determination system in the UK, specified advice for credibility assessments were determined in the context of the API by the HO in 2006[48]. Whilst it is influential, it is a *non-legislative* document designed to assist decision makers by combining law and good practice[49]. The starting point of the API considers primary legislation, UK's Immigration Rules, the EC Qualification Directive and the UNHCR Handbook[50].The API provides some useful technical advice on how to make credibility findings, but it is deeply problematic on the threshold for ' being credible ' and on the legal significance of credibility findings[51].

The central issue with the API is not its unrealistic guidance on conducting credibility assessments, but its clarification of the legal effect of credibility findings on the case outcome[52]. s5.1 states, '*someone who claims to have been detained and ill-treated because of their political/religious beliefs must show that they genuinely hold such beliefs and that they suffered detention and harm*'. It can be incredibly difficult for asylum-seekers to prove past events as they often arrive with no documentary evidence, rarely even identification. However, in *Demirkaya*[53] the Court of Appeal approved that *evidence of individualised past persecution is generally a sufficient, though not a mandatory, means of establishing prospective risk*[54]. But, the HO *do* have to filter out illegitimate applicants, therefore it is hard to find that balance between maintaining immigration control and not violating human rights. To adopt the language of K.C. Davis, the task is '*to locate the optimum degree of binding effect so that the role of precedents is neither too strong nor too weak*'[55]. Professor Sweeney's extensive content analysis of the guidelines for decision-makers concluded that the instructions on credibility

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[48] API, 'Assessing Credibility in Asylum and Human Rights Claims' (2006, rebranded 2008)
[49] Supra, Note 23
[50] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention
[51] Supra, Note 23
[52] Ibid
[53] *Demirkaya v SSHD* [1999] EWCA Civ 1654
[54] M Henderson , 'Best Practice Guide to Asylum and Human Rights Appeals'(Electronic immigration network, 1st March)
[55] R Thomas, 'Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom' [2008] 20(4) International Journal of Refugee Law 489-532

were confused, contradictory and unwieldy to follow, leading to a problematic conflation of credibility with proof[56].

4.2 Well Founded Fear

The well- founded fear test plays a significant role in credibility assessments as the decision-makers have to be convinced the applicant is unable to return to their origin country. International law dictates that refugees can only be recognised as such if they fulfil the specific definition set out in Article 1(A) 2 of the Refugee Convention[57], as modified by the accompanying 1967 Protocol, a refugee should be somebody who has[58]:

> *a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear is unwilling to avail himself of the protection of that country.*[59]

However, none of these reasons are precisely defined either in the convention itself or in the UNHCR handbook[60], nor are the key notions of 'well-founded fear' and persecution. The consequences of this is that they have all been subjected to legal interpretation by a wide range of national courts across Europe which haven't always produced congruent results[61]. In addition to this, asylum applications are approached differently by different member states in Europe which demonstrates their contrasting legal cultures and political circumstances. The consequences of this is the uncomfortable geographical anomalies both in the rate of ostensibly of similar refugee claims that are recognised and granted refugee status and in the procedural approach that different countries adopt for asylum determination[62].

The maxim that assessing a well-founded fear of persecution involves a forward-looking assessment of risk is well entrenched, yet there is little analysis of *how far forward* the

[56] Supra, Note 2
[57] *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137
[58] Supra, Note 1
[59] *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137
[60] UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status
[61] Supra, Note 1
[62] Ibid

assessment may extend, or what the *role of time* is in that prospective assessment.[63] It has been stated that refugee determination is necessarily an '*essay in hypothesis, an attempt to prophecy what might happen to the applicant in the future, if returned to his or her country of origin*'[64]. The concept of well-founded fear is rather inherently objective as it denies protection to persons unable to demonstrate a real chance of present or prospective persecution but does not in any sense condition refugee status on the ability to show subjective fear.

Despite the high turnover rate of appeals, courts have commonly ruled a breach of Article 3 exists if;

> *[...] substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3*[65].

However, it is important to ask how does the well-founded fear test correlate to with the comparable 'real risk' test in regards to *non-refoulement* under human rights law? While the Refugee Convention *itself* provides the test for refugee law, namely, a well-founded fear of being persecuted, there is no clear test provided in most of the relevant human rights treaties due to the fact that the *non-refoulement* obligations derived from the ICCPR and ECHR are implied from other, primary obligations (such as the right not to be subjected to torture)[66]. The Convention Against Torture[67] is the only exception, as Article 3 expressed that a State shall not expel or return an individual to another State 'where there are considerable reasons are present for believing that he would be in danger of being subjected to torture'.

4.3 Benefit of Doubt

The Benefit of the Doubt (TBOD) is another component of credibility assessments and has become one of the most frequently used phrases in refugee law since UNCHR included it in its 1979 handbook[68]. Decision-makers have to take into account two significant circumstances when analysing claims for international protection. First, that it can be challenging for a refugee

[63] Anderson A and others, "*Imminence In Refugee And Human Rights Law: A Misplaced Notion For International Protection*" (2019) 68 International and Comparative Law Quarterly 11
[64] Goodwin-Gill, GS and McAdam, J, *The Refugee in International Law* (3rd edn, Oxford University Press 2007) 54
[65] *I v. Sweden* 61204/09 [2013]
[66] Supra at note 4
[67] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.
[68] Supra, Note 42

to provide evidence for their claim. Secondly, the repercussions for making a wrong decision could lead to the death/persecution of an individual. Therefore, international courts and tribunals are pressured to adopt a much lower standard of proof than they do in civil/criminal cases. Therefore, the notion of TBOD was created. It serves as a safeguard to ensure that all refugees are not penalized because some people abuse the refugee protection system[69]. Rule 339L of the Immigration Rules[70] provides that where an individual asylum seeker has made every effort to substantiate and provided a story which is coherent and plausible in light of the country evidence they should be given TBOD, even if not all aspects of their account are supported by evidence[71].

While there has been much jurisprudence on the lower standard of proof, case law on TBOD is surprisingly thin[72]. The member states courts and tribunals which have adopted this principle failed to address and explain this theory in legal decisions in a substantive way. TBOD appears as a stranded vessel; commentators tend to refer approvingly but without elaboration to the UNHCR'S Handbook formulation of the principle[73]. This relatively liberal approach to credibility assessments has been corroborated by the ECHR in *F.G. v Sweden*[74] where it was held TBOD should be granted to asylum seekers when their credibility is assessed, and their supporting documents are examined[75]. Therefore, the actual definition of this theory and under what circumstances it should be applied is a mystery. This is a significant flaw devouring credibility assessments.

The API has seemingly added a circular and further requirement; that to gain TBOD the applicant must be 'credible in relation to other material facts' but this does not appear in the actual list of conditions in IR 339L or article 4(5) EC QD[76]. Before the applicant can be granted TBOD the API lays out a specific criterion which should be fulfilled first according to IR 339L. It is significant that the API suggests, that, even where the conditions are met, the decision maker should only 'consider' giving TBOD[77]. On the other hand, the Immigration Rules state

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[69] Ibid
[70] Immigration Rules (last amended July 2008) HC395 (as amended), 23 May 1994
[71] C Latham, 'Credibility In Asylum Claims' (*Richmond Chambers*, 13 August 2019)
[72] Judge Hugo Storey, 'The Benefit Of The Doubt' in Asylum Law, Reflow (March 2, 2015)
[73] Ibid
[74] *F.G. v. Sweden* 43611/11, Council of Europe: European Court of Human Rights, 23 March 2016
[75] Supra, Note 71
[76] Supra, Note 23
[77] Ibid

specific conditions where if they are met, it will result in the acceptance of an unsupported statement[78].

4.4 High Turnover of Appeals

I will now explore the high turnover of appeals and how this highlights problem areas in credibility assessments. Asylum appeals in the UK have been characterised as problematic, chaotic, and inconsistent by academics, practitioners, governmental and non-governmental organisations[79]. A common focus amongst critiques is the heavy reliance on judicial discretion in the credibility assessment process, which creates space for substantial variances in terms of how appeals are decided[80]. As many as 38 reports inspected from the previous 15 years have identified flawed credibility assessments as a problem in HO asylum determination in the UK[81]. The system suffers from widely reported inefficiencies and a culture of non-compliance[82]. In an arena where applicants are often highly vulnerable and many cases involve fundamental and non-derogable rights, the consequences of decisions for individuals can be significant[83]. Despite a new API which was issued in 2015 alongisde assosciated revised credibility training, the problem still persists. The UN refugee agency provides analysis of reasons for refusal of asylum which shows negative credibility assessments are not supported with evidence[84].

UNCHR's second report also identified that a significant number of caseworkers, including those in senior positions, incorrectly interpret key refugee law concepts[85]. Any full evaluation of credibility assessments in refugee cases must include an examination of the way appellate tribunals review such decisions[86]. Normally, appellate jurisprudence would be the source of standards and analysis in an area of law, but a review of credibility-based decisions indicates that appeals tribunals frequently accept first instance credibility findings with very little analysis[87]. The Tribunal in *Horvath*[88] said '*The lack of skilled/professional care in reaching*

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[78] Supra, Note 23
[79] Supra, Note 1
[80] Ibid
[81] Freedom From Torture, 'The Failures Of Asylum Decision-Making In The UK' (Lessons Not Learned, September 2019)
[82] Sir Ross Cranston, 'Immigration And Asylum Appeals – a Fresh Look' (JUSTICE,2nd July)
[83] Ibid
[84] United Nations High Commissioner for Refugees, August 2005, *Quality Initiative Project: Second Report to the Minister*
[85] Supra, Note 23
[86] Supra, Note 42
[87] Ibid
[88] *Horvath v. Secretary of State for the Home* Department [2000] UKHL 37

*the initial decision necessarily places extra burdens on adjudicators. In this case,...(the adjudicator) was in effect having to reach a decision on the claim almost as if he were the original decision-make*r[89]'.

Article 46 APD[90] recital 17 states;

> '*To ensure that applications for international protection are examined and decisions are taken objectively and impartially, it is necessary that professionals acting in the framework of the procedures provided perform their activities with due respect for the applicable deontological principles'.*

To do otherwise would contradict Article 6 of the Humans Right Act 1988[91] and the legal norms which govern judicial proceedings. This could be a reason why 52% of immigration and asylum appeals were allowed in the year to March 2019, with 23,514 people seeing their refusals overturned[92]. On the other hand, to guarantee objective and fair assessment, a court/tribunal can't automatically accept an applicant's proof. In the event the evidence for a case is questioned, a court or tribunal must guarantee the applicant has an appropriate occasion to explain or add to their evidence. As shown above, as the directives introduce measures favouring the positive assessment of credibility, they also introduce a number of measures which may militate against assessments of credibility in claimants' favour[93].

Contained in the Amnesty Report 2013 was an analysis of 50 cases. 42 of those 50 cases were refused right to remain in the UK. However, the decision was overturned on appeal. The Immigration Judge specified that the fundamental cause for this was because decision-makers mistakenly made a negative assessment of the applicants credibility. Although many of the errors made by decision-makers are corrected in the appeal process, the errors and delays to the asylum system mean that there remain concerns that some of those in need of protection fail to receive it, and of those who are recognized as refugees, some may not be entitled[94]. Therefore, it is not surprising that given the imponderables surrounding the effects of increased

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[89] Supra, Note 54
[90] Directive 2013/32/EU of the European Parliament and of the Council 26 June 2013
[91] The Human Rights Act 1998
[92] Supra, Note 36
[93] Supra, Note 5
[94] Supra, Note 12

procedural protection on the accuracy of decisions, it is the burden of increased costs, both monetary and non-monetary, which additional procedural safeguards usually entail, that are deemed to outweigh the benefits of some intangible increase in accuracy[95]. In *Kabaghe Malawi*[96] the Upper Tribunal felt it necessary to make a number of observations at the end of its decision *'in the hope that the Home Office will be able to learn from the problems identified in this case'* and referred the Home Office to the Administrative Justice and Tribunals Council's report and recommendations *Right First Time*[97]. The main message of the report was that …' *public bodies can save money and improve the quality of service by making fewer mistakes and learning more from those they do make'*[98].

It is clear that despite its importance, credibility-based decisions are frequently based on personal judgement that is inconsistent from one adjudicator to the next and potentially influenced by cultural misunderstandings[99]. To examine an application for international protection, the interviewer and decision-maker require specialist competencies, knowledge and skills, combined with strong analytical abilities which provide the legal structure that governs the determination of statues, but they also must reach beyond it [100]. However, courts *can* and should control the discretion of administrative agencies by invalidating decisions based on impermissible factors, decisions based on a gross error of judgement made using proper factors and those decisions which lack consistency[101]. An idea for reform is that decision-makers should defend their own decisions at appeal[102]. If Home Office presenting officers rather than decision-makers continue to represent at appeal, then an efficient feedback loop is needed so that decision-makers can properly learn from their mistakes[103].

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[95] Supra, Note 40
[96] *Kabaghe (appeal from outside UK – fairness) Malawi* [2011] UKUT 00473 IAC
[97] Supra, Note 54
[98] Ibid
[99] Supra, Note 42
[100] Supra, Note 4
[101] Supra, Note 30
[102] E Williams, 'Amnesty International' (A question of credibility: Why so many initial asylum decisions are overturned on appeal in the UK, April)
[103] Ibid

Amnesty International provided an anonymous refusal letter.

Syria 4 refusal letter:
"You answered that 'Turkey, Saudi Arabia and Qatar' opposed a resolution by Arab and European nations in the United Nations Security Council for Syria's President to resign. Given that you claim to have been protesting in February 2012, it is not considered credible that you fail to answer basic questions regarding international politics correctly. It is not accepted that you have undertaken any role in political activities."

Syria 4 Immigration Judge:
"If as claimed he has never had any education and has lived in a rural area without the benefit of electricity, it is just plausible that his information about his home country, as regards matters and events not within his immediate area, would be limited."[104]

It appears at first instance the case owner is not following the correct guidelines and procedures. This causes confusion because in the UNHCR handbook states '*After the applicant has made a genuine effort to substantiate his story, there may still be a lack of evidence for some of his statements'. But it is hardly possible for a refugee to "prove" every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt'*. In addition to this Article 8 (2) (a) APD: "*Member States shall ensure that: (a) applications are examined and decisions are taken individually, objectively and impartially*"[105] This has not been followed in this case which essentially breaches this article along with numerous human rights. Professor Vincent Chetail notes the political and legal implications of human right violations which gives rise to displacement, thus retaining a holistic perspective on refugee protection in its human rights context[106]. Requiring reasons for negative credibility assessments should be necessary as it allows credibility decisions to be reviewed, shows that decisions are not arbitrary, and makes concrete elements of a person's testimony more important than an adjudicator's personal judgement[107].

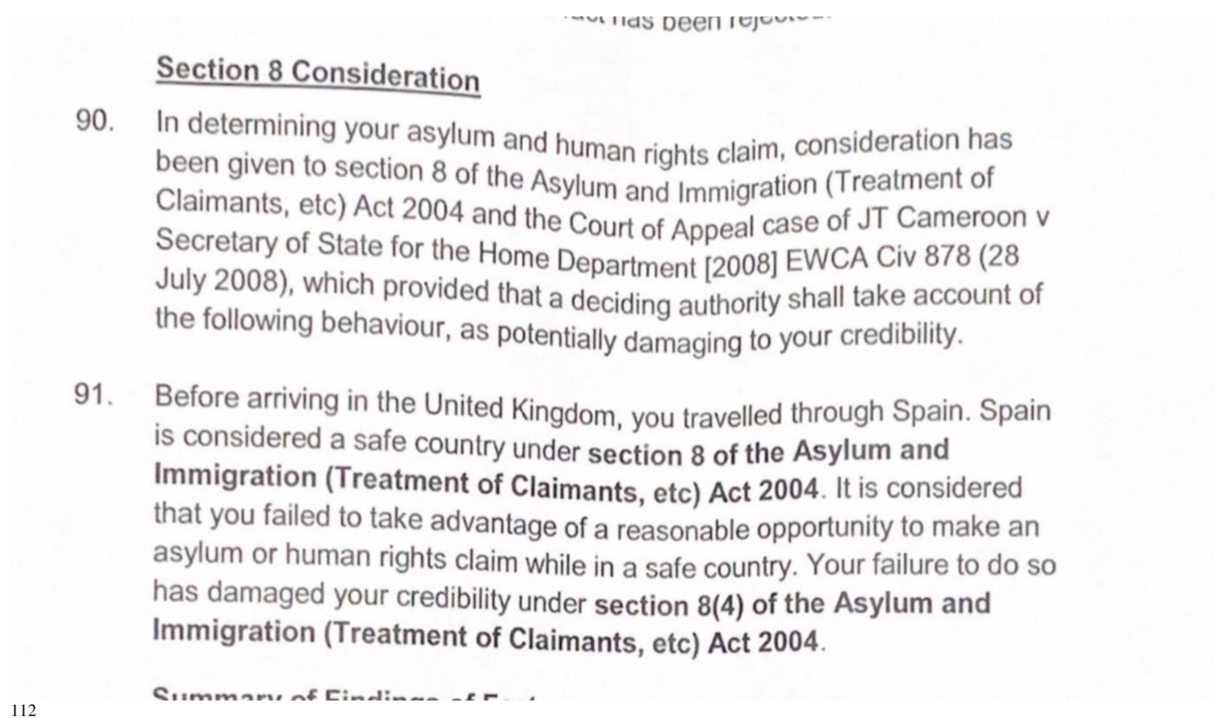
Refugee and asylum status determination procedures have often been criticised for producing inconsistent decisions; it has become almost customary for the phrases 'asylum lottery' or

[104] Supra, Note 102
[105] Asylum Procedures Directive, Directive 2005/85/EC of 1 December 2005
[106] C Harvey, 'Time for Reform? Refugees, Asylum-seekers, and Protection Under International Human Rights Law' [2015] 34(1) Refugee Survey Quarterly 43-60
[107] Supra, Note 42

‘refugee roulette’ to be employed by those who perceive that the outcomes of decisions on asylum claims differ widely irrespective of their essential similarity[108]. This can also generate further concerns: if a decision making process produces disparate outcomes, then surely some of its decisions must also be substantively incorrect – either because genuine claims have been rejected and/or non-genuine claims accepted[109]. The Court of Appeal in *Shirazi*[110] noted their concern that cases were being evaluated differently by different tribunals[111].

4.5 Refused Application Analysis

In order to gain a further understanding of credibility assessments, I will examine a refugee’s denied application to remain in the UK.



Section 8 Consideration

90. In determining your asylum and human rights claim, consideration has been given to section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 and the Court of Appeal case of JT Cameroon v Secretary of State for the Home Department [2008] EWCA Civ 878 (28 July 2008), which provided that a deciding authority shall take account of the following behaviour, as potentially damaging to your credibility.

91. Before arriving in the United Kingdom, you travelled through Spain. Spain is considered a safe country under **section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004**. It is considered that you failed to take advantage of a reasonable opportunity to make an asylum or human rights claim while in a safe country. Your failure to do so has damaged your credibility under **section 8(4) of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004**.

[112]

s8(4) requires decision-makers to treat a failure to take advantage of a reasonable opportunity to claim asylum in a safe country as damaging credibility[113]. However, in *R v Uxbridge Magistrates Court*[114] Judge Newman J said ‘*The Convention is a living instrument, changing*

[108] Supra, Note 53
[109] Ibid
[110] Shirazi v. Secretary of State for the Home Department [2004] 2 All ER 602 at 611 (Sedley LJ) (CA)
[111] Supra, Note 53
[112] On File With Author
[113] Asylum and Immigration (Treatment of claimants, etc) Act 2004
[114] *R v Uxbridge Magistrates Court, ex parte Adimi* [1999] EWHC 765 (Admin)

and developing with the times so as to be relevant and to afford meaningful protection to refugees in the conditions in which they currently seek asylum'[115]. *'There have been distinctive and differing state responses to requests for asylum so there exists a rational basis for exercising choice where to seek asylum'*[116]. The decision in this case has been supported by academic writers, the UNHCR and approved by the House of Lords[117] in *R v Afsaw*[118]. Even if the Home Office argument did have some basis in law, it is unclear how it envisages that asylum seekers would judge the relative safety of various third countries - particularly when litigation over the years demonstrates how difficult the Home Office itself has found this task[119]. Additionally, there is no obligation in international law for a person to seek international protection at the first effective opportunity[120]. Reliance upon such a factor in the credibility assessment may result in violation of the principle of non-refoulement[121].

Variances in outcomes on similar cases may also occur within national jurisdictions where individual decision-makers apply inconsistent standards and approaches, or incorrect evidentiary criteria to the credibility assessment[122]. However, courts have held that inconsistencies which do not enhance an applicant's claim of persecution should have little to no bearing on an applicants credibility, that an applicants dishonesty does not necessarily discredit his claim and that adverse credibility determinations should not rest solely on the self-serving nature of an asylum applicant's testimony[123]. But regulation by the judiciary, based on case by case review has not and cannot, provide the structured guidelines and uniform standards needed to obtain consistent and accurate credibility determination[124]. It is submitted that cases in which minor inconsistencies have been used in favour to reject the whole core aspects of an applicant's claim is unfair as it contradicts what has been repeatedly stressed by international and national judicial organs[125].

Making incorrect decisions when deciding asylum status means individuals may be refouled back to their country of origin or indeed sent to a 'safe' third country where judicial standards

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[115] Supra, Note 54
[116] Ibid
[117] Supra, Note 54
[118] *R v Afsaw* [2008] UKHL 31
[119] Supra, Note 54
[120] Supra, Note 4
[121] Ibid
[122] Supra, Note 31
[123] Supra, Note 30
[124] Ibid
[125] Supra, Note 10

and access to justice may be of a lower standard, to confront persecution[126]. Poor decision-making is not only financially costly in terms of the resources required to pay for appeals and fresh asylum applications etc., but they also undermine the legitimacy of the judiciary[127]. Thus, in the asylum context, scholars and practitioners are concerned with "imperfect procedural justice": whilst the desired outcome is the correct identification of individuals who fulfil the criteria for refugee status, it is impossible to design legal and administrative rules that always lead to the correct result[128].

45. You claim in your substantive interview that you created two Facebook accounts. You used the first account for six months then the second account for three months, therefore, for a total of nine months (AIR Q59,63).

46. Furthermore, you claim in your substantive interview that you used your first Facebook account for six to seven months and the second account for four to five months. Therefore, in total for either 10 or 12 months (AIR Q83).

47. You have not been consistent in regard to the length of time that you have been using your Facebook accounts. It is considered reasonable to expect that you would be consistent not only between your screening and substantive interview but solely within your substantive interview.

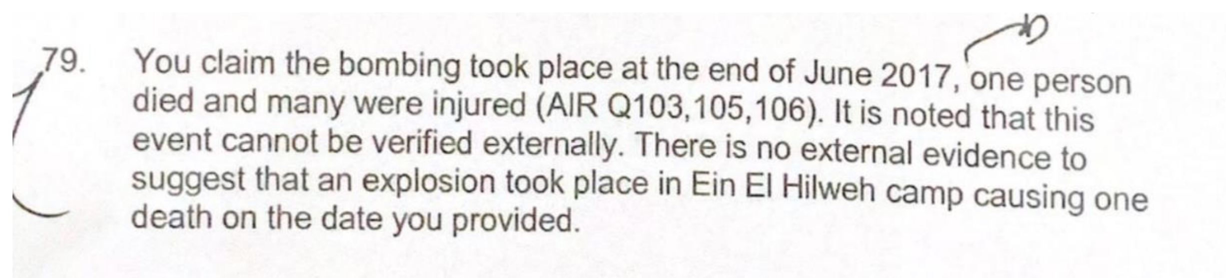
[129]

Here, the applicants credibility has been questioned due to an inconsistency of only 1-3 months. Even though it has been recognized repeatedly – by international judicial and monitoring organs, as well as by national jurisprudence – that minor inconsistencies should not generally be seen to undermine the credibility of the asserted fact, there are still examples of cases from EU member states where minor inconsistencies have been used to reject the core aspects of an applicant's account[130]. Credibility assessment should not be a search for contradictions, with any inconsistency immediately leading to a negative decision[131].

A common trend is to allege discrepancies between information given in the screening interview and the substantive interview. This is despite the fact that screening interviews are

[126] J Campbell, ' Examining Procedural Unfairness and Credibility Findings in the UK Asylum System' [2020] 39(1)Refugee Survey Quarterly 56-75
[127] Ibis
[128] Supra, Note 40
[129] On File With Author
[130] Supra, Note 10
[131] Supra, Note 42

often conducted immediately on, or very shortly after, arrival in the UK, rarely in appropriate conditions for revealing sensitive details[132]. In *JA[133]* Moore-Bick LJ pointed out the potential for unfairness in relying on apparent discrepancies between a screening interview record and subsequent evidence, because such evidence may be entirely reliable but there is room for mistakes and misunderstandings[134].A framework is desperately needed to help decision-makers analyse and balance contributing factors. In *Esen[135]* Lord Abernethy stated, '*Our system of immigration control presupposes that the credibility of an applicant has to be judged but credibility is a question of fact which has been entrusted by parliament to the adjudicator*[136]'.



79. You claim the bombing took place at the end of June 2017, one person died and many were injured (AIR Q103,105,106). It is noted that this event cannot be verified externally. There is no external evidence to suggest that an explosion took place in Ein El Hilweh camp causing one death on the date you provided.

137

The problem in this part of the refusal letter is, is it really possible to collect wholly objective evidence regarding the conditions, culture and norms in countries from which refuge is being sought[138]? The country evidence reports produced by the Home Office, have been criticised for various basic inaccuracies and for being partisan[139]. As a Parliamentary Select Committee has noted, these reports are not accepted by all parties to the refugee determination process to be "authoritative, credible and free from political/policy bias"[140]. Not everything which seems significant to those in the western world, is significant to those elsewhere. Bombing happens very often in the camps of Lebanon and are not reported due to their frequent occurrence. Decision-makers are also reminded by the API that the absence of objective country

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[132] Supra, Note 54
[133] *JA (Afghanistan) v SSHD* [2014] EWCA Civ 450
[134] Supra, Note 54
[135] *Esen v. Secretary of State for the Home Department* [2006] ScotCS CSIH23
[136] A Good, 'Witness Statements and Credibility Assessments in the British Asylum Courts' [2009] 12(3) Irish Journal of Anthropology
[137] On File With Author
[138] Supra, Note 5
[139] Ibid
[140] Supra, Note 5

information to support a claimed fact does not necessarily mean that the incident did not occur[141].

In the case of *Slimani*[142] the tribunal held a 'value-free' assessment of country conditions does not exist because each assessment is bound to be affected, whether consciously or otherwise, by the particular vantage point of the agency or person that produced it[143]. In order to remedy the situation, it is necessary that the Tribunal adopt *'in any one period a judicial policy (with the flexibility that the word implies) ... on the effect of the in-country data in recurrent classes of case'* as stated in the case[144] of *Iran*[145]. Presented with such disparate decisions amongst refusal, the Court of Appeal expressed in *Shirazi*[146] 'concern that the same political and legal situation, attested by much the same in-country data from case to case, is being evaluated differently by different tribunals[147].

4.6 Objectivity and Subjectivity

Perhaps, the reason credibility assessments contain so many flaws is because they contain a large amount of subjectivity. Subjective assessments are highly personal to the decision-maker, dependant on personal judgement, and often lacking an articulated logic which makes it difficult to review and are likely to be inconsistent from one decision-maker to another[148]. Whereas objective credibility assessments are easier for appellate tribunals because they apply standard criteria and require adjudicators to conduct a more structured inquiry. It should be mandatory that credibility assessments adopt an objective approach. This is because subjectivity can potentially undermine public confidence in the adjudication[149]. In *Y v SSHD*[150] Keene LJ stated '*The fundamental [legal principle applicable to the approach that an IJ should adopt towards issues of credibility] is that he should be cautious before finding an account to be inherently incredible, because there is a considerable risk that he will be over influenced by his own views on what is or is not plausible, and those views will have inevitably been*

[141] Supra, Note 23
[142] *Slimani v. Secretary of State for the Home Department* (Content of Adjudicator Determination) (01TH00092), [2001] at para. 17 (IAT);
[143] Supra, Note 53
[144] Ibid
[145] *R. (Iran) v. Secretary of State for the Home Department* [2005] INLR 633 at 661-2
[146] *Shirazi v. Secretary of State for the Home Department* [2004] 2 All ER 602 at 611 (Sedley LJ) (CA).
[147] Supra, Note 53
[148] Supra, Note 42
[149] Ibid
[150] *Y v Secretary of State for the Home Department* [2006] EWCA Civ 1223

influenced by his own background in this country and by the customs and ways of our own society[151]. However, credibility assessments are inevitably prone to some subjectivity as it requires the adjudicator to judge the trustworthiness of another human being[152].

4.7 Section 8 Asylum and Immigration Act 2004

Section 8 reminds decision-makers to consider certain behaviour as damaging to the applicants credibility which can be dangerous. The Court of Appeal in the case of *JT Cameroon*[153] offered an alternative construction of s8(1) that would not offend constitutional principles, such as the separation of powers: the behaviour listed in s8 should be taken into account 'as ***potentially*** damaging the claimants credibility'[154]. The policy justification for s8 is that it will deter and reduce the scope for abuse and promote consistency in the treatment of those who perpetrate it[155].

The principal concern with s8 is that it establishes an unreasonable evidential presumption that just because the claimant has behaved in a specified manner, their general credibility to be a refugee in need of international protection is presumed to have been damaged[156]. s8 is said to interfere with the fairness of the assessment process and deny applicants their right to an individual assessment based on evidence[157]. However, it should be recognized that refugees may be reluctant to talk openly and offer a complete and correct account of their case as a result of their past experiences, but false claims alone are not a justification for denying international protection. In perhaps (partial) recognition of such concerns, s8 does, at least in part, establish a rebuttable presumption rather than an absolute rule[158]. For example, an applicant might also be given the opportunity to provide a rational excuse for their inability to respond to a determining authority's query. However, the usefulness of this opportunity can be questioned. For example, if an applicant refuses to respond to a question because of its sensitive nature, they might also fail to give a reason for their refusal to respond. In *Y v SSHD*[159] Carnwath LJ said '*The Secretary of State accepts that s8 should not be interpreted as affecting the normal*

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[151] Supra, Note 54
[152] Supra, Note 42
[153] *JT Cameroon v Secretary of State for the Home Department* [2008] EWCA Civ 878
[154] Supra, Note 23
[155] Supra, Note 5
[156] Ibid
[157] Supra, Note 2
[158] Supra, Note 5
[159] *Y v SSHD* [2006] EWCA Civ 1223

standard of proof in an asylum/human rights appeal. There is nothing in the wording of the Act that requires/permit such a result'[160]. A broader concern with s8 is, because it applies to the determination of claims by both administrative decision-makers and independent judicial decision- makers, it has the effect of interfering with the integrity of the judicial process[161]. Unlike the Immigration Rules, which are instructions to initial decision-makers within the Immigration and Nationality Directorate, s8 must also be applied by the Tribunal[162]. s8 is in desperate need of a reform as it gives inappropriate weight to certain actions as damaging to an applicant's credibility[163].

[160] Supra, Note 54
[161] Supra, Note 5
[162] Ibid
[163] Supra, Note 102

Conclusion

This research has aimed to discover weather credibility assessments are a legally flawed measure in refugee and asylum law. Based on a qualitative analysis of the credibility assessment components such as the well-founded fear test, the benefit of doubt, the API, and the legal framework governing them, it can be concluded that there are many areas in need of clarification and further guidance due to the current complications. As a result, there have been many inconsistencies throughout asylum cases leading to high turnover rates of appeals. To better understand the implications of these results, perhaps it would be beneficial for future studies to conduct an empirical investigation to understand the way decision-makers evaluate legitimacy and how the guidelines and law are implemented. This would allow us to grasp the challenge of evaluating credibility and suggest methods to alleviate the difficulties and inconsistencies. Credibility assessments are a complex and difficult task, and while it is not possible to achieve consistency in all asylum claims, it is right that asylum-determination processes in the UK should adopt international guidelines to assist IJ's to assess credibility, and that all IJ's should be trained to undertake a "structured approach" to decision-making using procedural rules and guidance, which allows applicants to effectively participate in their own hearing and which will enable IJs to arrive at fair decisions[164].

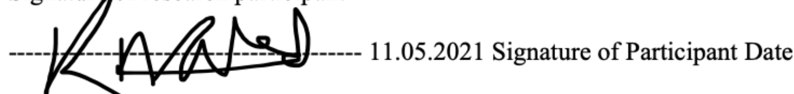
[164] Supra, Note 122

6. Appendix

Are Credibility Assessments A Legally Flawed Measure? - Consent To Take Part In Research

- I, Khaled Tafech voluntarily agree to participate in this research study.
- I understand that even if I agree to participate now, I can withdraw at any time or refuse to answer any question without any consequences of any kind.
- I understand that I can withdraw permission to use data from my interview within two weeks after the interview, in which case the material will be deleted.
- I have had the purpose and nature of the study explained to me in writing and I have had the opportunity to ask questions about the study.
- I understand that participation involves allowing access to asylum refusal documents.
- I understand that I will not benefit directly from participating in this research. I understand that all information I provide for this study will be treated confidentially.
- I understand that in any report on the results of this research my identity will remain anonymous. This will be done by changing my name and disguising any details of my documents which may reveal my identity or the identity of people I speak about.
- I understand that disguised extracts from my documents may be quoted throughout the research
- I understand that if I inform the researcher that myself or someone else or someone else is at risk of harm they may have to report this to the relevant authorities - they will discuss this with me first but may be required to report with or without my permission.
- I understand that signed consent forms and my personal documents will be retained in the researchers database until the exam board confirms the results of researchers dissertation
- I understand that a transcript of my documents in which all identifying information has been removed will be retained for be two years from the date of the exam board
- I understand that under freedom of information legalisation I am entitled to access the information I have provided at any time while it is in storage as specified above.
- I understand that I am free to contact any of the people involved in the research to seek further clarification and information.

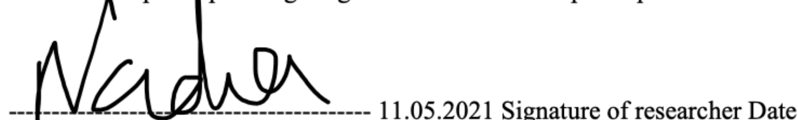
Signature of research participant



-- 11.05.2021 Signature of Participant Date

Signature of researcher

I believe the participant is giving informed consent to participate in this study



-- 11.05.2021 Signature of researcher Date

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