



## THE GATEKEEPER OF TRUTH: A CRITICAL ANALYSIS OF CREDIBILITY ASSESSMENTS IN ASYLUM LAW

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### ABSTRACT

*The functional gatekeeper of Refugee Status Determination (RSD) is credibility assessment. Considering that the documentary evidence in situations involving forced migration is necessarily scarce, the testimony of an asylum seeker usually becomes the most important evidence. This paper discusses the legal and psychological framework of the so-called credibility test with reference to the three classic pillars of such a test that include internal consistency, external consistency and plausibility. It examines, through the prism of lens critique, how the neurobiology of trauma, the culture of disbelief in adjudicative bodies and cultural barriers can be used to erode the quality of these decisions. The critique indicates that the existing dependency on demeanour and chronological accuracy is scientifically unsound, as well as legally risky. The paper ends by suggesting the transition to a more multidisciplinary model where traumatological evidence-based approaches are advised to be coupled with the rejuvenation of the principle of the benefit of doubt so that the pursuit of truth does not undermine human rights.*

**Keywords:** Asylum Law, Credibility Assessment, Refugee Status Determination, Trauma-Informed Justice, Benefit of the Doubt.

### INTRODUCTION

Within the structure of international refugee law, the Refugee Status Determination (RSD) process is the alleged search for the objective truth. An applicant has to establish that he or she may face a well-founded fear of persecution based on race, religion, nationality, membership in a certain social group or political thought, etc. under the 1951 Convention and its 1967

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Protocol.<sup>1</sup> Nevertheless, as compared to civil or criminal litigation, where DNA, CCTV, or a signed contract leaves an evidentiary trail, the asylum space is an evidentiary vacuum.<sup>2</sup>

In its turn, this has brought the Credibility Test to the top of the list of the most important tools of the adjudicator. The gatekeeper makes the purpose of identification of whether someone is a genuine refugee, a genuine economic migrant, or a genuine fraudulent claimant.<sup>3</sup> Since the pressure lies on the applicant, oral testimony can be the only evidence produced in most cases. This imposes a gigantic epistemological weight: the adjudicator only has to create a reality that happened thousands of miles distant, which is commonly in another language and based on another socio-political logic.<sup>4</sup>

The idea behind the introduction of the credibility test was not to allow the exploitation of asylum systems. However, in reality, it has become a hyper-technical questioning of the memory. This article posits the legal system of credibility assessment as structurally opposed to the most vulnerable group because it refused to take into consideration the mental distortions of the trauma and the subjectivity of common sense in a multi-ethnic background.

## DECONSTRUCTING THE CREDIBILITY PILLARS

The evaluation of credibility is longstanding divided into a so-called tripartite analysis: internal consistency, external consistency and plausibility. Although these may seem to be non-partisan legal guidelines, a further evaluation of the issue indicates that there is a lot of misguidedness in the system.

**Internal Consistency and the Fallacy of the “Video Tape” Memory:** Many adjudicators are often guided by the theory of memory held by videotape authors that a truthful individual is supposed to be capable of recounting an occasion with equally precise chronology (Fact A leads to Fact B leads to Fact C).<sup>5</sup> Any variation in order in a series of multiple interviews, in

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<sup>1</sup> Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

<sup>2</sup> Brian Gorlick, 'Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status' (2003) 15(3) *International Journal of Refugee Law* 357.

<sup>3</sup> Guy S Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalisation, detention, and protection' in Erika Feller and others (eds), *Refugee Protection in International Law* (CUP 2003).

<sup>4</sup> James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, CUP 2014).

<sup>5</sup> 'Credibility Assessment in Refugee Status Determination' (2004) 16 *National Law School of India Review* 119.

asylum law, is commonly termed a material contradiction and results in a finding of lack of credibility.

But this legal expectation is in utter conflict with the Neurobiology of Trauma. When a person is in a state of high fear, the hippocampus of the brain (in charge of time-stamping memories and verbalisation of the same) is likely to shut down to help the body save energy. At the same time, the amygdala (the emotional and sensory centre) is hyperactivated.<sup>6</sup> This generates fragmented encoding.<sup>7</sup>

The trauma survivor might be able to tell you precisely the colour of a particular object or the odour of that room (sensory memory), but not whether an event occurred on a Tuesday or a Thursday, whether there were three or four attackers. When the legal system accepts these peripheral chronological errors as symptoms of fabrication, it is, in fact, punishing the applicant according to the biological effects of the persecution the applicant is attempting to demonstrate. The law would like to see the consistency which a traumatised brain would be unable to afford, most of the time.<sup>8</sup>

**External Consistency and the "Country of Origin" Mirage:** External consistency compares the applicant and the Country-of-Origin Information (COI)<sup>9</sup> and these reports consist of reports by NGOs, governments or international organisations concerning the situation in the home country of the candidate. When, in 2025, a claimant claims to have been tortured in a particular prison, and the most recent State Department report does not mention that particular prison, the claim can be easily disregarded as externally inconsistent.

The weak point, in this case, is the critical flaw of the Information Gap. In its nature, persecution happens most of the time in the shadows. Authoritarian regimes never post records of their abuse of human rights. Moreover, the reports prepared by COI are often generic; they concentrate on high-profile political figures or on mass movements. They seldom portray the

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<sup>6</sup> Jane Herlihy and Stuart W Turner, 'Asylum claims and memory of trauma: sharing our knowledge' (2007) 191(1) *British Journal of Psychiatry* 3.

<sup>7</sup> *ibid.*

<sup>8</sup> Julie Franck and H el ene Delage, 'The Interplay of Emotions, Executive Functions, Memory and Language: Challenges for Refugee Children' (2022) 7(4) *Languages* 309.

<sup>9</sup> James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, CUP 2014).

idiosyncratic persecution of a local shopkeeper victimised by an irregular militia or a woman who was a victim of domestic honour crime in a village.<sup>10</sup>

Obviously, over-reliance on the COI non-existence imposes an evidentiary burden which cannot be met. It supposes that in case a crime was not reported by a Western journalist or a human rights observer, it did not occur.<sup>11</sup> This Documentary Mirage does not take into consideration the fact that in the case of many refugees, the most perilous places on this planet are the ones that lack any written records.

**The Subjectivity of Plausibility and "Judicial Ethnocentrism":** Probably the most dangerous aspect of the test of credibility in the legal context is plausibility.<sup>12</sup> Since it is not based on any evidence, but simply on the common sense of the adjudicator. It poses the following question: "Would someone in the position of the applicant do so? The built-in risk, however, is that common sense is hardly general; it is greatly premised on the socio-economic and cultural environment of the adjudicator.

In most of the Western or stable legal orders, the adjudicators present the Rational Actor Model to litigants of persecution.<sup>13</sup> In this example, a judge would use the fact that an applicant stayed at home two weeks after being threatened with death because it would not be plausible to run away immediately. Stress response is on-the-spot takeoff because it is the only logical thing to do, from a privileged standpoint. Nonetheless, this does not take into consideration the devastating nature of life in a war-torn world: selling everything off, waiting until a smuggler arrives, abandoning the ageing parents or even the tonic immobility or denial after a threat has often become a psychological choice.

Moreover, the asymmetry of power is not always explained by this concept. An adjudicator may question how a victim of police brutality would go back to a police station just to file a report. In a normal democracy, the right step to take is to file the report; in a country where the police are the persecutors, it would be like taking one's own life. When an adjudicator describes a story as implausible according to his/her cultural blueprint, he/she is acting as a judge in

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<sup>10</sup> Akram SM, 'Orientalism Revisited in Asylum and Refugee Claims' (2000) 12(1) International Journal of Refugee Law 7.

<sup>11</sup> *ibid.*

<sup>12</sup> 'Credibility Assessment in Refugee Status Determination' (2004) 16 National Law School of India Review 119.

<sup>13</sup> James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, CUP 2014).

ethnocentrism, which means that he/she is punishing the refugee because he/she is not living in the reality that the judge can/or cannot conceive.<sup>14</sup>

**The "Culture of Disbelief" and the Erosion of the Standard of Proof:** In asylum proceedings in accordance with the guidelines of the international community, the standard of proof is not beyond a reasonable doubt and not even the civil balance of probabilities. It is a reasonable amount of probability.<sup>15</sup> The reason why this low threshold exists is point-blank because the stakes, i.e. life, liberty, and no torture, are so high.

A Culture of Disbelief has, however, conquered many national jurisdictions.<sup>16</sup> Whether it is because the detained are asylum seekers and require considerable time to be interviewed, or the interview should be conducted aggressively to exploit reverse cultural juries, the asylum interview becomes less like a fact-finding mission and more like a hostile cross-examination. To approve the wholesale dismissal of the credibility of an applicant in a case of alleged persecution, adjudicators tend to seek so-called micro-inconsistencies, i.e. minor inconsistencies of peripheral facts that do not relate to the gist of the case (i.e. alleged persecution).

This is a gotcha style of justice which turns the credibility test into a semantic and recollection trap. In one interview, an applicant mentions a car, a truck, and the next time, a van, and this is normally used as an argument of lies. This extreme emphasis upon semantics is deaf to the pressures of translation, the lapse of time, and the waning influence of peripheral memory. Once the Culture of Disbelief is exercised, the Presumption of Truth is practically inverted, putting an unbearable burden on the shoulders of the displaced persons.<sup>17</sup>

## SUGGESTIONS

**Incarceration of the Idea of the Benefit of the Doubt:** The doctrine In Dubio Pro Refugio needs to be stipulated more firmly. In case the account provided by the applicant of the core

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<sup>14</sup> Akram SM, 'Orientalism Revisited in Asylum and Refugee Claims' (2000) 12(1) International Journal of Refugee Law 7.

<sup>15</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979, rev 2011).

<sup>16</sup> Brian Gorlick, 'Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status' (2003) 15(3) International Journal of Refugee Law 357.

<sup>17</sup> 'Credibility Assessment in Refugee Status Determination' (2004) 16 National Law School of India Review 119.

threat is plausible, and the applicant has been generally cooperative, then minor inconsistencies in time or distance, or in peripheral information, must be lawfully ignored.<sup>18</sup>

**The Doctrine of the Core Truth:** Adjudicators must be mandated to draw the line between the material and the immaterial inconsistencies. The inconsistency must also extend to the foundations of the fear of persecution and not peripheral environmental information, upon which only rejection should be allowed.<sup>19</sup>

**Compulsory Trauma-Informed Interviewing:** Neurobiological training must be provided to all front-line officers and judges. The explanation of how the amygdala (also known as the fear centre) of the brain supplants the hippocampus (also known as the fact centre) is critical to understanding the reason why a victim of sexual violence or torture might have difficulties with a chronological narrative.<sup>20</sup>

**Cultural Expert Testimony:** Where issues of implausibility have been affected, the courts must admit (or should admit) cultural experts who can elaborate on ways of localised behaviour, such as why a man may not trust the state authorities or how certain cultural stigmas may influence the way a story is narrated.<sup>21</sup>

**Eradication of Demeanour Evidence:** Body language, eye contact, and emotional exhibitions are relatively incorrect measures in culture and scientifically invalid measures of truth. They are to be officially eliminated as the acceptable features of credibility evaluation to avoid the origins of judicial vibes, and replace legal facts.<sup>22</sup>

**Collaborative Evidence-Building:** Abandon the adversarial mode of interrogation in favour of the collaborative mode, whereby the state assists the applicant in acquiring available Country of Origin Information (COI) as the state has much more resources at its disposal than an individual who fled to their life.

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<sup>18</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979, rev 2011).

<sup>19</sup> Brian Gorlick, 'Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status' (2003) 15(3) *International Journal of Refugee Law* 357.

<sup>20</sup> Jane Herlihy and Stuart W Turner, 'Asylum claims and memory of trauma: sharing our knowledge' (2007) 191(1) *British Journal of Psychiatry* 3.

<sup>21</sup> 'Credibility Assessment in Refugee Status Determination' (2004) 16 *National Law School of India Review* 119.

<sup>22</sup> Akram SM, 'Orientalism Revisited in Asylum and Refugee Claims' (2000) 12(1) *International Journal of Refugee Law* 7.

## CONCLUSION

Credibility test is today a hideout that is at times stronger than the legal definition of the persecution itself. Although the interest of states in the integrity of borders and the preclusion of fraudulent claims is legitimate, the existing methodology of consideration is scientifically and ethically imperfect. The legal system leads to a survivor bias in which the most traumatised persons (who have the greatest need of protection) are the ones the most commonly suspected to be incredible as a result of the same symptoms of mistreatment.<sup>23</sup>

We have to understand that even making a negative finding on credibility is not a neutral thing, but rather a choice that may have fatal repercussions. Any dismissal of a statement through a misinterpreted cultural matrix or a memory loss is to roll the dice with a human life. The "Gatekeeper of Truth" needs to put a halt to searching for the ideal story and begin searching for the genuine fear. The law system should never ignore that until the legal system provides such accuracy with the reality on the ground of forced migration, which is untidy and fragmented, it will not serve its purpose and protect the people that the 1951 Convention is supposed to protect.<sup>24</sup>

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<sup>23</sup> Refugee Convention, art 33.

<sup>24</sup> Guy S Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalisation, detention, and protection' in Erika Feller and others (eds), *Refugee Protection in International Law* (CUP 2003).