

9-1-2007

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Recommended Citation

Uchimiya, Diane (2007) "A Blackstone's Ratio for Asylum: Fighting Fraud While Preserving Procedural Due Process for Asylum Seekers," *Penn State International Law Review*: Vol. 26: No. 2, Article 6.
Available at: <http://elibrary.law.psu.edu/psilr/vol26/iss2/6>

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A Blackstone's Ratio for Asylum: Fighting Fraud While Preserving Procedural Due Process for Asylum Seekers

Diane Uchimiya*

Better that ten guilty persons escape than that one innocent suffer.

William Blackstone, *Commentaries on the Laws of England*, 1765

Procedural fairness and regularity are of the indispensable essence of liberty.

Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 224 (1953)
(Jackson R. dissenting)

I. Introduction

Fraud in the asylum context has long concerned U.S. government officials, and rightfully so.¹ Changes in the law, such as imposing a one-year filing deadline, mandating short processing times, and eliminating automatic eligibility for employment authorization have reduced the incentives to commit fraud. The REAL ID Act of 2005 modified the asylum laws to allow immigration judges to require asylum applicants to

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1. During the early and mid 1990's, individuals applied for asylum and automatically became eligible for employment authorization. The large number of asylum applications created a large backlog, causing lengthy processing times. See Ruth Ellen Wasem, Cong. Research Serv. NO. RL3261, U.S. Immigration Policy on Asylum Seekers, 4-6 (2006).

provide more corroboration of the asylum application. The new law also made it easier for immigration judges to find asylum applicants not credible by allowing even minor inconsistencies to support an immigration judge's adverse credibility determination.² In Asylum Profiles and through cables from some U.S. Consulates, the U.S. Department of State ("DOS") sometimes estimates a high incidence of fraud in asylum cases based on asylee relative interviews and the number and percentage of documents determined to be fraudulent. In this Article, I posit that some immigration judges react to reports of a high incidence of fraud by taking illegitimate administrative notice of fraud rates and adjudicative facts, impose non-statutory presumptions of fraud and surreptitiously raising the standard of proof, and by generally discrediting the applicant due to a high degree of fraud instead of making an individualized determination. How do these heightened requirements mesh with the realities facing asylum-seekers?

For the purposes of this Article, I will use the term "refugee" and "asylee" interchangeably, to refer to a person who meets the statutory definition, "one who cannot return to his or her country of origin because of past persecution or a well-founded fear of persecution on the basis of race, religion, nationality, political opinion, or membership in a particular social group, but who have not yet been granted asylum."³ While determination of refugee status is reached through the adjudication process, the concern raised in this article is that some applicants who actually qualify for asylum (refugees) will be denied asylum because immigration judges have covertly created overly stringent evidentiary requirements and standards of proof to prevent granting asylum based on fraudulent applications. Under *I.N.S. v. Cardoza-Foseca*, even a one in ten chance of persecution supports the finding of a well-founded fear of persecution.⁴

Anecdotal information along with a review of selected circuit court cases reveals that some immigration judges react to reports of fraud in DOS Asylum Profiles and DOS cables, in effect, by impermissibly raising the standard of proof, presuming fraud, or improperly making adverse credibility determinations. Legitimate government concern over

2. See Emergency Supplemental Appropriations Act for Defense, the Global War on Terror and Tsunami Relief, Pub. L. No. 109-13, Div. B, 119 Stat. 231 (2005) [hereinafter REAL ID Act].

3. 8 U.S.C. § 1158(a)(27)(M)(42) (2006) [hereinafter INA]. A person may apply for asylum with the Asylum Office affirmatively, before the U.S. government institutes removal proceedings. An Asylum Officer interviews the applicant and may either grant asylum or refer the application to the Immigration Court for Removal Proceedings. The application for asylum may be renewed in removal proceedings. Asylum and other forms of relief from removal may also be requested in removal proceedings. *Id.* § 208.

4. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987).

fraud does not justify immigration judges taking action outside the boundaries of the Immigration and Nationality Act (“INA”) and regulations. Adverse credibility determinations must be made on an individual basis, citing “specific, cogent reasons.”⁵ Fraud remains an important and legitimate concern of the DOS, the Department of Homeland Security (“DHS”), and the Department of Justice (“DOJ”), all of whom are involved in the asylum process; it is also a grave concern for refugees to whom the legal path to asylum must remain open. “[D]ue process of law . . . is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice but which are bound to occur.”⁶

This Article examines the impact of DOS fraud reports contained in Asylum Profiles and cables on individual asylum applicants in the Immigration Court; opposes consideration of fraud numbers as presented; and proposes that use of existing procedures,⁷ such as direct and cross-examination of witnesses, laying a foundation for documents, and where necessary, looking to the Federal Rules of Evidence (“FRE”) for guidance regarding experts and summaries and other standards where the rules protect due process, to identify and deny fraudulent asylum claims.

Section I of this Article casts the reader as an asylum seeker in a hypothetical case. Section II provides a background description of asylum protection. Section III critically examines the statement(s) on fraud in representative reports of three countries: China, Cameroon, and Ethiopia. Without critically examining the Asylum Profiles and DOS cables, it is easy to become suspicious of every asylum applicant from a country with high fraud rates. Applying evidentiary principles to the information in the reports demonstrates the prejudicial nature of the character evidence and unreliable data.

Unchecked submission of these prejudicial reports leads to the drastic measures, described in Section IV, that violate asylum applicants’ procedural due process rights. Taken alone, “suspicions” are not enough to deny asylum; the reason we have rules is to examine our first impressions which are sometimes wrong. Moreover, the asylum applicant bears the burden of proving eligibility for asylum by

5. *Gui v. INS*, 280 F.3d 1217, 1225 (9th Cir. 2002).

6. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224-25 (1953) (Jackson R. dissenting).

7. While there are reports of high rates of fraud in asylum cases and documents supporting asylum cases, the availability of fraudulent documents may have the same impact in Asylum Office adjudications. This Article focuses mainly on Immigration Court adjudications and appeals because of the availability of case opinions and their discussions of the immigration judge opinions.

establishing past persecution or a well-founded fear of persecution, a standard the U.S. Supreme Court has interpreted to be less than a preponderance of the evidence.⁸ Section IV presents both anecdotal evidence and selected Circuit Court of Appeals cases demonstrating immigration judges' improper use of the general fraud reports in denials of asylum. As explained below, immigration judges treat and apply general fraud rates in several ways: (1) by taking administrative notice of reports; (2) inventing out of thin air a rebuttable presumption of fraud and applying it to the entire case, the applicant's testimony, or specific documents⁹; or (3) by departing from the refugee statute and correlating the general fraud rate to the individual's credibility (illustrated by comparing fraud rates from cable in asylum cases to analogous criminal law hypotheticals). All of these approaches constitute legal error because they violate the due process rights of the asylum applicant.

Section V proposes measures by which the U.S. government can enhance and improve anti-fraud measures to protect the integrity of the asylum system and preserve refugee and asylum protection. The proposed changes can be implemented at different stages of immigration: (1) overseas when people are applying for visas to be admitted to the U.S.; (2) at the border, airports, and other ports of entry before being admitted to the U.S.; and (3) during the asylum application and adjudication process.

Once the applicant is before an immigration judge in the Immigration Court, immigration judges can address fraud without improper use of administrative notice, baseless presumptions of fraud, or inferences from high rates of fraud in asylum cases and documents. All three of these tactics violate asylum applicants' right to procedural due process, as explained in Section IV below. The court's procedural rules, evidentiary rules, criteria for determining credibility, and some guidance from underlying principles of FRE regarding relevance, character, opinions and expert testimony, and statistical evidence are sufficient. While the Immigration Court is not bound by the FRE,¹⁰ the underlying principles of the applicable rules may still provide guidance.¹¹ Even if

8. See *Cardoza-Fonseca*, 480 U.S. at 431.

9. What standard of proof does the immigration judge impose to overcome the presumption? See, e.g., 8 C.F.R. § 208.13(b)(1)(2007) (stating that if an applicant establishes past persecution, triggering a rebuttable presumption of a well-founded fear of persecution, the government then bears the burden of proving changed country conditions by a preponderance of the evidence to overcome the presumption of a well-founded fear).

10. See *Ocasio v. Ashcroft*, 375 F.3d 105, 107 (1st Cir. 2004).

11. See *Pasha v. Gonzales*, 433 F.3d 530, 535 (7th Cir. 2005) (holding that the spirit of the federal rule concerning the admission of scientific evidence announced in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), may apply to immigration proceedings, and that the immigration judge should have rejected the testimony of a

rates of fraud were quantifiable by country and region, the rates themselves should have no impact on the individual asylum determination.

Asylum statutes, regulations, and the principles behind evidentiary standards for expert witnesses, statistical evidence, and relevance should be applied to portions of the Asylum Profiles and DOS cables reporting incomplete and misleading data. Inaccurate and overbroad information about fraud in the Asylum Profiles and cables may cause the adjudicator to make poorly supported adverse credibility determinations of asylum applicants and their documents, as well as erroneously raise the standard of proof. Applying widely used evidentiary standards to the Profiles and cables demonstrates the unreliability of estimated "fraud rates" and the overbreadth of any actual proof of fraudulent asylum applicants.

Blackstone meets *I.N.S. v. Cardoza-Fonseca*,¹² where applying a well-founded fear of persecution standard that is satisfied by a one in ten chance of persecution, inevitably means that some will be granted asylum who actually would not suffer persecution. In criminal law, Blackstone's ratio, a widely accepted principle, shaped criminal procedure to protect the integrity of the system—and to protect the innocent from wrongful conviction and punishment.¹³ In asylum, the guiding principle must be the protection of refugees. "The existence of the class of refugee in international law not only entails legal consequences for States, but also the entitlement and the responsibility to exercise protection on behalf of refugees."¹⁴ The important goals of fraud prevention and detection must be pursued, but not by creating bias and prejudice against all applicants of a particular nationality or region—not at the cost of refugees Congress enacted the law to protect.

II. The Asylum Seeker's Challenge—Overcoming Other People's Fraud

Imagine that you are a fugitive from your own government. You were admitted to the U.S. on July 8, 2007 in New York City by showing a fraudulent passport and tourist visa. You have applied for asylum, withholding of removal, and relief under the Convention Against Torture

document expert who examined an Albanian document where the expert did not speak Albanian, had no access to comparable documents, and had no knowledge of the Albanian government's resources).

12. *Cardoza-Fonseca*, 480 U.S. 421.

13. See WAYNE R. LA FAVE et. al, CRIMINAL PROCEDURE § 1.4(e) (4th ed. 2004) (stating that parts of the criminal justice process are designed to minimize the likelihood of erroneous convictions. Protection of the innocent accused against an erroneous conviction is an important independent goal of the process).

14. GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW, 1 (Oxford 3d ed. 2007).

(“CAT”).¹⁵ You have been an active member of an opposition political organization in your country.

You left your wife when you fled your home country because of oppression based on your membership in an illegal political organization. Although your country has purportedly been a democracy for decades, it has been dominated by one party, and has had the same president for twenty years. Opposition parties exist, but because elections are corrupt and fixed, the president always wins.

About five years ago, you joined an opposition party and participated in meetings and rallies.¹⁶ Although you began as a low-level participant and operative by handing out informational flyers, you later began to help organize meetings and rallies. The police detained and beat you on three occasions. The first detention, lasting a few days, occurred in April of 2003 at the opposition party headquarters in the capital city of the country’s southern province. From party headquarters, the guards took you and three other party members to jail. They beat and tortured you and the others, demanding your loyalty to the president, forcing you to promise to cease your involvement with the opposition movement.¹⁷ After three days, you were released with a warning that they would be watching you.

The government detained you for the second time on October 11, 2004, the day of the presidential election. You attended a peaceful protest at one of the voting sites.¹⁸ Even though the protest began

15. *See generally* INA §§ 208; 241(b)(3); G.A. Res. 39/46, art. 3, U.N. Doc. A/RES/39/46 (June 26, 1987). Of these three types of humanitarian relief, asylum provides the greatest benefits—a path to permanent residence and U.S. citizenship, the right to petition for the spouse and children as asylees, while withholding of removal and CAT relief do not. Asylum also has a lower standard of proof. Asylum applicants need to prove a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group. To qualify for withholding of removal, the applicant must show a clear probability of persecution on the same protected grounds. The applicant must prove that it is more likely than not that she will be tortured upon removal to the country of origin to qualify for withholding of removal under 8 C.F.R. § 208.16(c) (2007). Withholding of removal under CAT is beyond the scope of this Article.

16. Information about political parties operating in your country are included in human rights reports published by the U.S. Dep’t of State, Human Rights Watch, Amnesty International and others. These reports are admissible in the Immigration Court and immigration judges give them great weight. 8 C.F.R. § 208.12 (2007).

17. Information about common forms of torture used in your country may be available. *See, e.g.*, OLIVIA BALL, “EVERY MORNING, JUST LIKE COFFEE.” TORTURE IN CAMEROON (2002), available at <http://www.asylumlaw.org/docs/showDocument.cfm?documentID=927> (last visited Nov. 8, 2007).

18. The election is easily verifiable through newspapers, and sometimes articles contain information about protests, naming locations. However, legitimate published accounts of detention and persecution are reportedly rare. *See* Memorandum (cable) from R. Niels Marquardt, U.S. Ambassador to Cameroon (November 2004) (on file with

peacefully during the early morning, police arrived in the afternoon and began pushing and dragging protesters away. Some people fled, but you could not get away fast enough. A policeman knocked you down and hit you on the shoulder with the rifle butt, causing a gash. The officer dragged you to a truck which held about twenty-five to thirty other prisoners.

The police took you and the others to prison. They confiscated your wallet, including your political party membership card and identification cards. In prison, you were forced to strip and were detained with thirty other prisoners in one large cell with no furniture. There was no toilet in the room, just a bucket. Although you needed medical attention for the wound on your shoulder, the guards did nothing to help. Nobody told you about your rights at the time of your arrest and the government never officially charged you. You never saw an attorney, never went to court, and never got your wallet and identification cards back.

Guards forced you and the other prisoners to crawl on a wet floor, while they beat you with clubs. Each day for about three weeks, the guards took you to a room and beat the soles of your feet—torture known as “bastinade.” They demanded the names of the rally organizers, party leaders and members, as well as the opposition party’s plans. When your wife eventually found out where you were imprisoned, she had a relative bribe a guard to release you. She took you to a doctor who gave you antibiotics and told you to rest.

After that, you resolved to stay out of politics. You did not return to school after your release because you feared returning to a government institution. Finding work was difficult, so you began helping your uncle in his store. You maintained only sporadic contact with your closest friends from the party, and kept a low profile. In June of 2007, shortly before the legislative elections, a close friend from the opposition party asked if one of the speakers for a political rally could stay with you the night before the rally. Although it made you nervous, you agreed and even decided to attend the rally.

Although the police broke up the rally, you escaped without harm. The next day, while you and your wife were out, police came and ransacked your house and your uncle’s store. You could not bear the thought of going to prison again. You told your wife to go to her parents’ house in another city. You went to your uncle’s house to make sure that he was safe. He was fine, but advised you that it was not safe for you. He said that the government suspected that you helped organize the rally and knew that you hosted the activist who spoke at the rally. Your uncle helped you obtain an authentic passport and U.S. visa to flee

to the U.S. The passport contained your photograph, but the original name remained. Fearing it was unsafe, you never returned to your ransacked house. You fled without any of your own identity documents or party membership documents so that you could avoid trouble if you were caught.

Within one year of your admission to the U.S., you applied for asylum without any supporting documents from your home country.¹⁹ Your application is first considered by an Asylum Officer in an asylum interview.²⁰ You carry the burden of proving that you qualify for asylum,²¹ a difficult burden without documentary evidence to support your own testimony.

Your wife remains in your homeland, but in another city, with her parents, because you both feared that she would not be safe at home. No one has dared to return to the house to find any identity documents or any other documents to show your past involvement in the opposition party. You have no warrants for your prior arrests or detentions because the police never issued any paperwork, and you have no record of the doctor's appointment you had after you were released from jail.

Many different types of fraudulent documents may be easily obtained in your country, including altered authentic government documents (inserting the name and photograph); fabricated documents; and documents fraudulently obtained or purchased through bribes. Fraudulent documents are used by citizens both domestically and internationally to obtain jobs, travel documents, as well as immigration benefits. In addition, you have heard that others from your country have made up stories in order to gain asylum and other benefits.

The Asylum Office referred your case to the U.S. Immigration Court,²² and you are entitled to due process under the Fifth Amendment throughout removal proceedings.²³ The Immigration and Customs Enforcement trial attorney submits three documents into evidence: the DOS's Human Rights Report confirming your government's persecution

19. The law requires applications for asylum to be submitted within one year of the date the applicant arrived in the United States. INA § 208(a)(2)(B).

20. 8 C.F.R. § 1208.9(b) (2007).

21. 8 C.F.R. § 1208.13(a) (2007).

22. An asylum officer may grant asylum or refer the applicant to the Immigration Court. The asylum officer does not issue denials of asylum. 8 C.F.R. 1208.14(c).

23. Keep in mind that:

[p]rocedural due process is more elemental and less flexible than substantive due process. It yields less to the times, varies less with conditions, and defers much less to legislative judgment. [I]t is technical law . . . [and] must be a specialized responsibility within the competence of the judiciary on which they do not bend before political branches of the Government, as they should on matters of policy which comprise substantive law.

Shaughnessy, 345 U.S. at 224.

of opposition party activists; the DOS Asylum Profile; and a DOS cable from the U.S. Consulate in your home country. The Asylum Profile is a report describing the characteristics of asylum claims from the applicant's country of origin, including descriptions of the political, religious, and social climate pertinent to asylum claims, the incidence of fraud, the trustworthiness of documents, and the number of documents determined to be fraudulent by the U.S. Consulate of those referred for investigation. The DOS cable is a memorandum prepared and sent by the U.S. Consulate in your country to inform various U.S. agencies and asylum adjudicators of the high incidence of fraud, the wide scope of the problem, some identifiable indicators of fraud, and any other data on fraud that they have, based on their own investigations and adjudications. Asylum Officers adjudicate asylum applications before the U.S. government tries to remove the applicant. Immigration judges, adjudicate asylum applications submitted to the Immigration Court by people whom the government is trying to remove from the U.S. Both reports estimate that over fifty percent of the asylum applications from your home country are fraudulent and that more than seventy-five percent of the documents investigated were fraudulent.

The immigration judge in your case is familiar with reports of "high fraud rates" through the DOS Asylum Profile that the attorney for the U.S. government files with the Immigration Court. Although the standard of proof, "well-founded fear" is lower than the preponderance of the evidence,²⁴ the immigration judge warns you that because of the high rate of fraud in your country you will need strong corroborating evidence, including affidavits and evidence of your political involvement, and warns your attorney that she will be disciplined if any of the documents submitted are found to be fraudulent. Your options are either to present your case with your testimony and human rights reports alone (without your personal documents which confirm your identity, political party membership, etc.) or to contact friends and family asking them to find and send your relevant documents and provide affidavits or letters corroborating details of your past persecution or your well-founded fear of persecution.

How will you prove your true identity, that you suffered persecution by the government because of your political activities, or that you have a well-founded fear of future persecution? Can you document your case without endangering family and friends in your home country, or will you have to ask them to look through your ransacked house for ID cards and medical records or to request duplicate identity documents from the government? Will your wife be safe asking the government, your

24. *Cardoza-Fonseca*, 480 U.S. at 431.

persecutor, for documents, or contacting the opposition party office to obtain proof of your membership, participation in rallies, and confirmation of your detention?

Even if you succeed in obtaining your official documents and letters of support, in light of the DOS Asylum Profile, you will need to convince the immigration judge that any official documents are valid by confirming the authenticity of government officials' signatures,²⁵ your persecutors, and that any other documents submitted are not fraudulent. That process is called authentication.²⁶ You fear that the authentication process will immediately endanger your family, and may increase the risk of persecution you will face if you are not granted asylum.²⁷

III. Asylum as a Process for Protecting Refugees in the United States

The two defining principles in this article are refugee protection and procedural due process. This section defines the term refugee, explaining who is a refugee and why refugees merit protection. In addition, the procedures to apply for asylum in the U.S. and the rules for adjudicating asylum applications define the procedural processes due to each asylum applicant in the U.S.

A. Congressional Purpose to Protect Refugees

The central purpose of the U.S. asylum system is to protect refugees from persecution based on race, religion, nationality, political opinion or membership in a particular social group.²⁸ Congress passed the Refugee Act of 1980 to "respond to the urgent needs of persons subject to

25. See 8 C.F.R. §§ 287.6, 1287.6 (2007).

26. Chain authentication under immigration regulations requires the U.S. consular officer to "certify the genuineness of the signature and the official position either of (i) the attesting officer, or (ii) any foreign officer whose certification of genuineness of signature and official position . . . is in a chain of certificates of genuineness of signature and official position relating to the attestation." *Id.* Immigration regulations also describe the process to authenticate the signatures and seals on official documents under the Hague Apostille Convention, a competent authority, not necessarily a U.S. consular officer. See Virgil Wiebe, *Maybe You Should, Yes You Must, No You Can't: Shifting Standards and Practices for Assuring Document Reliability In Asylum and Withholding of Removal Cases*, 06-11 *Immigr. Briefings* 1, 1 (Nov. 2006).

27. Regulations prohibit disclosure of information "in or pertaining to any asylum application" without the applicant's written consent. 8 C.F.R., § 208.6(a), (b) (2007). A memorandum from Legacy Immigration and Naturalization Service recognizes the importance of maintaining confidentiality in the process, stating that "[p]reserving the confidentiality of asylum applications must always be a primary consideration in processing requests for investigations." Memorandum from Owen B. Cooper, U.S. Dep't of Justice, Immigration and Naturalization Services, Office of the General Counsel (June 21, 2001) (on file with author) [hereinafter the Cooper Memorandum].

28. See INA §§ 101(a)(42), 208.

persecution in their homelands”²⁹ and to increase uniformity of assistance provided to “refugees of special humanitarian concern to the United States.”³⁰ A non-citizen physically present in the United States may apply for asylum within one year of the date of entry, and may qualify for asylum if he or she meets the definition of a refugee. An application for asylum in the Immigration Court is also treated as an application for withholding of removal, a lesser form of relief from removal.

B. Refugees Deserve Protection

A refugee is one who is “unable or unwilling to return to” his or her home country or country of last habitual residence “because of [past] persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . .”³¹ For example, an individual might express a political opinion by violating his or her government’s coercive population control scheme; have a well-founded fear of forced abortion, involuntary sterilization, or other punishment for resisting a coercive population control program; or actually have suffered one of these events.³² Even if the applicant meets the definition of refugee, and qualifies for asylum, he or she must also merit asylum in the exercise of discretion.³³

29. Refugee Act of 1980, Pub. L. No. 96-212, § 207, 94 Stat. 102, 103 [hereinafter Refugee Act] (codified as amended in scattered sections of 8 U.S.C.). The United States acceded to the 1967 Protocol Relating to the Status of Refugees in 1967. The U.S. is bound by provisions of the Protocol and the 1951 Convention Relating to the Status of Refugees. United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Protocol]; United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, *reprinted in* 19 U.S.T. 6223, 6259. Enacting the Refugee Act in 1980 brought the U.S. asylum adjudication system into conformance with the Protocol. *Cardoza-Fonseca*, 480 U.S. at 435-36.

30. Refugee Act Pmb1.

31. INA § 101(a)(42)(A). A person may apply for asylum with the Asylum Office affirmatively, before the U.S. government institutes removal proceedings. An Asylum Officer interviews the applicant and may either grant asylum or refer the application to the Immigration Court for Removal Proceedings. The application for asylum may be renewed in removal proceedings. Asylum and other forms of relief from removal may also be requested in removal proceedings. INA § 208.

32. INA § 101(a)(42) (as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, sec. 601, 110 Stat. 3009-594 (1996)).

33. See 8 C.F.R. § 208.14 (2007); *see also* Matter of Pula, 19 I. & N. 467, (BIA 1987).

C. *Adjudicating Asylum Applications and the Role of the Department of State*

Asylum Offices and Immigration Courts both adjudicate asylum applications, and the DOS may provide detailed country condition information relevant to the asylum application.³⁴ The DOS may provide an assessment of the application, information about those similarly situated, or “such other information it deems relevant.”³⁵ Rather than providing an assessment of each individual case, periodically the DOS, Bureau of Democracy, Human Rights and Labor, issues a Profile of Asylum Claims and Country Conditions for a particular country.³⁶ In addition, the DOS publishes an annual report assessing the human rights record for every country. These human rights reports are submitted as evidence of country conditions in virtually every asylum case in the Immigration Court by either the Immigration and Customs Enforcement attorney or by the asylum applicant, and may be relied upon by regulation.³⁷

D. *Well-Founded Fear Is a Standard of Proof for Asylum that Demonstrates U.S. Commitment to Human Rights*

The applicant bears the burden of proving eligibility for asylum and withholding of removal to “establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.”³⁸ The standard of proof is higher to qualify for withholding of removal than to

34. 8 C.F.R. §§ 208.11(b), 1208.11(b) (2007):

(b) At its option, the Department of State may also provide: (1) An assessment of the accuracy of the applicant’s assertions about conditions in his or her country of nationality or habitual residence and his or her particular situation; (2) Information about whether persons who are similarly situated to the applicant are persecuted or tortured in his or her country of nationality or habitual residence and the frequency of such persecution or torture; or (3) Such other information as it deems relevant.

(d) Any such comments received pursuant to paragraphs (b) and (c) of this section shall be made part of the record. Unless the comments are classified under the applicable Executive Order, the applicant shall be provided an opportunity to review and respond to such comments prior to the issuance of any decision to deny the application.

35. *Id.*

36. See U.S. Dep’t of State, Bureau of Democracy, Human Rights and Labor, China: Profile of Asylum Claims and Country Conditions (1998) [hereinafter Profile of Asylum Claims and Country Conditions (1998)], <http://www.asylumlaw.org/docs/showDocument.cfm?documentID=147> (last visited Nov. 8, 2007).

37. 8 C.F.R. § 208.12 (2007).

38. 8 U.S.C. § 1158(b)(1)(B); see also 8 C.F.R. §§ 208.13(a), 208.16(b), 1208.13a, 1208.16(b), 1240.11(c)(3)(iii), 1240.33(c)(3), 1240.49(c)(4)(iii) (2007).

qualify for asylum. In withholding of removal, the applicant must establish a clear probability that he would suffer persecution on the basis of race, religion, nationality, political opinion or membership in a particular social group.³⁹ However, the Supreme Court interpreted “clear probability” as “more likely than not.”⁴⁰ The Court also held that the “well-founded fear of persecution” required for asylum is a lower standard than the “clear probability of persecution” required to qualify for withholding of removal.⁴¹ The Court in *INS v. Cardoza-Fonseca*, stated the following:

That the fear must be “well-founded” does not alter the obvious focus on the individual’s subjective beliefs, nor does it transform the standard into a “more likely than not” one. One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place. As one leading authority has pointed out:

“Let us . . . presume that it is known that in the applicant’s country of origin every tenth adult male person is either put to death or sent to some remote labor camp. . . . In such a case it would be only too apparent that anyone who has managed to escape from the country in question will have ‘well-founded fear of being persecuted’ upon his eventual return.”⁴²

Even where the trier of fact doubts the truth to some degree, but believes that the claim is probably true or more likely than not true, the preponderance of the evidence standard is satisfied.⁴³ Again, the standard is even lower for asylum than it is for withholding of removal. The asylum application must be adjudicated according to the well-

39. *INS v. Stevic*, 467 U.S. 407, 408 (1984).

40. *See id.* The “preponderance of the evidence” standard is also commonly defined as “more likely than not.”

41. *See Cardoza-Fonseca*, 480 U.S. at 431.

42. *Id.* (quoting 1 A. GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 180 (1966)).

43. Memorandum from Robert C. Divine, Acting Deputy Director, U.S. Citizenship and Immigration Services, January 11, 2006. Re: *Matter of Chawathe* (January 11, 2006) [hereinafter Divine Memo], <http://www.uscis.gov/files/pressrelease/LegalDscrAnlys050306.pdf> (last visited Nov. 8, 2007) (designating *Matter of Chawathe* No. A74 254 994, 2006 WL 3004074 (INS Jan. 11, 2006) a U.S. Citizenship and Immigration Services Adopted Decision. This adopted decision defines an “American firm or corporation,” as one “that is both incorporated in the United States and trades its stock exclusively on the U.S. stock exchange markets. Additionally this decision reemphasizes that the “preponderance of the evidence” standard of proof is applicable in most administrative immigration proceedings) (citing *Matter of E-M-*, 20 I. & N. Dec. 77, 79-80 (BIA 1989)).

founded fear standard. The example of well-founded fear in *Cardoza-Fonseca*, quoted above, describes the standard in terms of a one in ten chance of persecution, while the preponderance of the evidence standard is described as “probably true” or “more likely than not,” interpreted as “more than a fifty percent probability.”⁴⁴ Even where the standard of proof is low, as in asylum cases, the applicant must still “satisfy[] the basic evidentiary requirements set by regulation.”⁴⁵ The adjudicator must review the “factual circumstances of each individual case” to determine the “truth” of the claim.⁴⁶

DHS regulations provide that past persecution of the applicant, once established, creates a presumption that the applicant also has a well-founded fear of persecution. The government bears the burden of rebutting the presumption by proving changed country conditions by a preponderance of the evidence.⁴⁷ The well-founded fear standard and the presumption of a well-founded fear of persecution, once past persecution is established, both demonstrate a commitment to human rights and refugee protection that must be unwavering.

E. Fair Credibility Determinations Are Based on an Assessment of the Individual

The immigration judge evaluates the applicant’s credibility based on “the totality of the circumstances” and “all relevant factors.”⁴⁸ The statute provides the following list of factors used to consider the credibility of the applicant’s claim:

... demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant’s or witness’s account, the consistency between the applicant’s or witness’s written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim, or any other relevant

44. Divine Memo, *supra* at note 43 (indicating that the more likely than not standard of proof is interpreted as having a more than fifty-percent probability) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447, 107 S. Ct. 1207, 1213 (1987)).

45. *Matter of Chawathe*, No. A74 254 994, 2006 WL 3004074, n. 6. (INS Jan. 11, 2006).

46. *Id.* at 7 (citing *Matter of E-M-*, 20 I. & N. Dec. 77, 79-80 (BIA 1989)).

47. 8 C.F.R. § 208.13(b)(1)(ii); *see also* 8 C.F.R. § 1208.13(b)(1)(ii) (2C07).

48. 8 U.S.C. § 1158 (b)(1)(B)(iii) (2007).

factor.⁴⁹

Broad reports on country conditions generally do not contradict an individual's account of specific events, unless those events are detailed in the country conditions report.⁵⁰ Country reports rarely provide direct corroboration of specific acts of persecution, but they do provide context, helpful in evaluating credibility.⁵¹ "While country reports may, in rare instances involving prominent dissidents, contain direct corroboration of a petitioner's account, to demand that they do so and otherwise eschew any analysis of the evidence is clearly erroneous."⁵²

An immigration judge making an adverse credibility determination must state "specific cogent reasons."⁵³ The REAL ID Act made credibility determinations even more important and even tougher to challenge on appeal by allowing immigration judges to make adverse credibility determinations based on inconsistencies, inaccuracies, or falsehoods regardless of whether they relate to facts or issues central to the claim for petitions filed after May 11, 2005.⁵⁴ There are no presumptions of credibility for the applicant or witness unless the immigration judge fails to make a credibility determination.⁵⁵ Where there is no credibility determination of the applicant or witness, there is a rebuttable presumption of credibility on appeal.⁵⁶ In her concurring opinion in *In re S-M-J-*, Lory Rosenberg noted the important point that asylum adjudicators "should avoid any predisposition against believing the applicant" for their inability to obtain supporting documents, further

49. *Id.* Adverse credibility findings may also be based on fraudulent documents. See *In re O-D-*, 21 I. & N. Dec. 1079 (BIA 1998). Before the REAL ID Act, "[M]inor inconsistencies . . . that [did] not relate to the basis of an applicant's alleged fear of persecution, [or] go to the heart of the asylum claim [did] not generally support an adverse credibility finding." *Singh v. Gonzales*, 439 F.3d 1100, 1105 (9th Cir. 2006) (citing *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 660 (9th Cir. 2003)).

50. *Bace v. Ashcroft*, 352 F.3d 1133, 1139 (7th Cir. 2003) (urging the Board to assign a different judge to the Baces' case on remand, the Circuit Court vacated and remanded the Board of Immigration Appeals' order denying asylum).

51. *Zahedi v. INS*, 222 F.3d 1157, 1163 (9th Cir. 2000).

52. *Bace*, 352 F.3d at 1139 (citing *El Moraghy v. Ashcroft*, 331 F.3d 195, 204 (1st Cir. 2003)).

53. *Lopez-Reyes v. INS*, 79 F.3d 908 (9th Cir. 1996).

54. *Cham v. Attorney General of US*, 445 F.3d 683, 692-693 n. 10 (3d Cir. 2006) (citing the REAL ID Act of 2005, Pub. L. No. 109-13, §§ 101(a)(iii), 101(h)(2) (May 11, 2005) (codified at 8 U.S.C. § 1158(b)(1)(B)(iii)). Prior to the REAL ID Act, under *In re S-M-J-*, 21 I. & N. Dec. 722, 738 (BIA 1997) (en banc), it was unclear whether the unexplained absence of individualized documents supported a negative credibility finding. While the REAL ID Act did not explicitly state that documentary evidence may be required to support the applicant's credibility, the "totality of the circumstances, and all relevant factors" may be interpreted to include the lack of corroboration.

55. 8 U.S.C. § 1158(b)(1)(B)(iii).

56. *Id.*

stating that “presum[ing] an individual to be a liar rather than a truth teller . . . violate[s] not only [the] duty to be impartial, but . . . abrogate[s] the statute and regulations which govern . . . adjudications.”⁵⁷

F. Weighing the Prejudicial Impact and the Probative Value Evidence from the Department of State

The applicant’s asylum claim must be detailed and specific.⁵⁸ The asylum applicant must prove each element of the asylum claim: (1) past persecution or a well-founded fear of persecution (subjective fear and objectively reasonable fear); (2) on the basis of race, religion, nationality, political opinion, or membership in a particular social group; and (3) nexus, that the protected ground was a central reason for the persecution.⁵⁹ The evidence must show that he or she would either be singled out or that there is a pattern and practice of persecuting others who are similarly situated.⁶⁰

An applicant’s credible, persuasive and factually specific testimony alone, showing that she meets the statutory definition of a refugee, may satisfy the standard of proof.⁶¹ However, applicants also have a statutory right to present evidence and to cross-examine witnesses.⁶² The testimony may be weighed along with other evidence in the record.⁶³ Other evidence such as the DOS country condition report, may corroborate the applicant’s account and support the asylum application.⁶⁴ Due process requires that the judge fairly consider the evidence presented.⁶⁵

Before the REAL ID Act passed in 2005, the Board of Immigration Appeals in *In re S-M-J*⁶⁶ held that evidence “of general country

57. *In re S-M-J*, 21 I. & N. 722, 738 (BIA 1997) (en banc).

58. *INS v. Elias-Zacarias*, 502 U.S. 478, 483-84 (1992).

59. INA §§ 208(b)(1)(B)(i), 101(a)(42) (2007).

60. 8 C.F.R. §§ 208.13(b)(2)(iii)(A), 208.16(b)(2)(i), (ii), 1208.13(b)(2)(iii)(A), 1208.16(b)(2)(i), (ii) (2007).

61. 8 U.S.C. § 1158(b)(1)(B)(ii) (2007); 8 C.F.R. §§ 208.13(a), 1208.13(a) (2007).

62. INA § 240(b)(1), (b)(4)(B); 8 U.S.C. §§ 1229a (b)(4)(B); 8 C.F.R. § 1240.10(a)(4) (2007).

63. INA § 240(b)(1), (b)(4)(B); 8 U.S.C. §§ 1229a(b)(1), (b)(4)(B); 8 C.F.R. § 1240.10(a)(4) (2007). Other evidence in the record may include the Department of State (“DOS”) cables/memos about fraud, unless their admission would violate the asylum applicant’s due process rights.

64. *See, e.g., Chen v. Gonzales*, 417 F.3d 268, 272 (2d Cir. 2005) (holding that the Board of Immigration Appeals must consider the evidence and argument presented by the parties—in this case, a country condition report supporting his religious persecution claim).

65. *Ahmed v. Gonzales*, 398 F.3d 722, 725 (6th Cir. 2005); *see also Amadou v. INS*, 226 F.3d 724, 727 (6th Cir. 2000).

66. *In re S-M-J*, 21 I. & N. Dec. 722 (BIA 1997) (en banc).

conditions and of the specific facts sought to be relied on by the applicant, where such evidence is available” was required.⁶⁷ Where the evidence is unavailable, the asylum applicant must “explain its unavailability,” or possibly “fail to meet [his or] her burden of proof.”⁶⁸ The REAL ID Act based its corroboration requirements on those set forth in *In re S-M-J*, resolving a Circuit Court split over whether an unexplained lack of documents could support a denial of asylum where the asylum applicant credibly testified to past persecution or a well-founded fear of persecution and the related facts.⁶⁹

The INA now states that “[w]here the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided *unless the applicant does not have the evidence and cannot reasonably obtain the evidence.*”⁷⁰ Records requested or expected often include records of medical treatment, prison records, employment records, birth certificates, and marriage certificates. The Immigration Courts permit evaluations by experts such as doctors, psychologists, and country conditions experts.⁷¹ The immigration judge should identify the facts that may reasonably be corroborated, question the applicant about whether such corroborating documents exist and may be submitted to the court, and analyze whether the applicant provided adequate explanations for the absence of the corroborating documents where the expected corroborating documents are not provided.⁷²

67. *Id.* at 724.

68. *Id.* (e.g., evidence of place of birth, large demonstrations, publicly held office, and medical treatment).

69. The Ninth Circuit held that the Board of Immigration Appeals' corroboration requirements included in *In re S-M-J* were disapproved where the asylum applicant was found credible or where credibility is presumed because of a failure to make a credibility determination. *Ladha v. INS*, 215 F.3d 889, 901 (2000). However, under Ninth Circuit law, lack of documentation could impact the credibility determination itself. *See Chebchoub v. INS*, 257 F.3d 1038, 1045 (9th Cir. 2001); *Sidhu v. INS*, 220 F.3d 1085, 1090 (9th Cir. 2000); *Mejia-Paiz v. INS*, 111 F.3d 720, 722-23 (9th Cir. 1997). However, the Second, Third, and Seventh Circuits held that corroborating evidence could be required both to determine the asylum applicant's credibility, as well as in determining whether the applicant had met his or her burden of proof. *See Balogun v. Ashcroft*, 374 F.3d 492, 501-03 (7th Cir. 2004); *Abdulrahman v. Ashcroft*, 330 F.3d 587, 599 (3d Cir. 2003); *Diallo v. INS*, 232 F.3d 279, 289-290 (2d Cir. 2000). Now, under the REAL ID Act, corroborating evidence can be required by an immigration judge specifically to meet the asylum applicant's burden of proof. Pub. L. No. 109-13, Div. B, Sec. 1; Title I, Sec. 101(a)(3). May 11, 2005.

70. INA §§ 240(b)(1), (b)(4)(B); 8 U.S.C. § 1229a(c)(4)(B)(2007) (emphasis added).

71. IRA J. KURZBAN, *KURZBAN'S IMMIGRATION LAW SOURCEBOOK*, 401 (9th ed. 2004). *See, e.g., Dia v. Ashcroft*, 353 F.3d 228, 258-59 (3d Cir. 2003).

72. *See, e.g., Mulanga v. Ashcroft*, 349 F.3d 123, 134 (3d Cir. 2003) (reversing an immigration judge's rejection of petition for asylum where the judge's findings on lack of corroboration were not supported by substantial evidence when asylee was unable to

Evidence is admissible based on “whether the evidence is probative and whether its use is fundamentally fair so as not to deprive the alien of due process of law.”⁷³ Material statements made by the applicant, oral or written, included in previous investigations, examinations and hearings are admissible.⁷⁴ Even though the FRE do not apply in the Immigration Court, some courts refer to them, as in *Lacinaj v. Ashcroft*,⁷⁵ to “provide guidance as to the types of evidence that may be less reliable and, therefore, properly excluded without violating due process.”⁷⁶

The asylum process requires not only that the applicant provide relevant documents, but that the documents be real. Concerns over fraudulent documents have led to the creation of elaborate rules for authenticating documents that an applicant relies upon.⁷⁷ There exists “inherent conflict between evidentiary procedures (i.e., document authentication regimes) that are based on trust between countries on the one hand and the Refugee Convention which accepts as a basic premise that state actors are sometimes not to be trusted.”⁷⁸ Immigration judges determining the weight of the evidence generally give greater weight to documents that have been authenticated, investigated, or otherwise tested. These practices are extremely important, especially in those cases where fraud is a great concern. Authentication, prescribed for official government documents by regulation,⁷⁹ presents significant challenges in asylum cases where the government is the persecutor because the process requires verification of the signature on the document.⁸⁰ The

obtain proof of husband’s membership in a political organization from the Republic of Congo).

73. *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 405 (3d Cir. 2003) (citing *Bustos-Torres v. INS*, 898 F.2d 1053, 1055 (5th Cir. 1990)); *see also Lopez-Chavez v. INS*, 259 F.3d 1176, 1184 (9th Cir. 2001); *Ocasio v. Ashcroft*, 375 F.3d 105, 107 (1st Cir. 2004) (providing that due process imposes evidentiary limits based on fairness and reliability—INS may not use an affidavit from an absent witness unless it first establishes that, despite reasonable efforts, it was unable to secure the presence of the witness at the hearing).

74. 8 C.F.R. § 1240.7(a) (2007).

75. *Lacinaj v. Ashcroft*, 133 F. Appx. 276, 287 (6th Cir. 2005). Cases cited in this Article, but not selected for publication by the Circuit Courts are used as examples of immigration judge practices.

76. *Id.*

77. *See* Wiebe, *supra* note 26, at 1.

78. *Id.*

79. 8 C.F.R. §§ 287.6, 1287.6 (2007).

80. *Id.* The Department of State Foreign Affairs Manual defines authentication: An authentication is a certification of the genuineness of the signature and seal or the position of a foreign official who has previously executed, issued, or certified a document so that a document executed or issued in one jurisdiction may be recognized in another jurisdiction. U.S. embassies and consulates maintain exemplars of the seals and signatures of host government officials against which documents presented for authentication can be compared.

authentication processes set forth in the regulations—chain authentication,⁸¹ and the Hague Apostille Convention⁸² methods—are designed to verify the signatures and seals on the documents as evidence that the document was issued by an authorized person. Asylum applicants often do not authenticate, or instead opt for alternative methods of authenticating documents because they fear the prescribed methods may endanger the applicant's family, friends, colleagues, and him or herself.⁸³ Asylum regulations include confidentiality requirements which may be violated if authentication is required.⁸⁴

Professor Wiebe has observed trends in courts' authentication and documentary requirements in asylum cases, noting that "[j]udges have grown increasingly skeptical about documentary support for claims for asylum, and many (but not all) of the cases reaching the circuits come from a small number of countries."⁸⁵ Even courts denying asylum do not strictly require authentication by the chain or Hague Apostille methods, sometimes allowing other methods of authentication, referencing FRE and Federal Rules of Civil Procedure.⁸⁶ The Board of Immigration Appeals has addressed the issue of document authentication in asylum cases only in a nonprecedent decision in 2003, finding that the immigration judge had "improperly excluded" a number of documents from Albania due to a lack of authentication pursuant to 8 C.F.R. § 1287.6(b)(2). In a subsequent non-precedent case, the Board of

Originally, these were card files of signatures and seals. Many posts now maintain these exemplars electronically.

Wiebe, *supra* note 26, at 3-4.

81. A U.S. consular officer "must certify the genuineness of the signature and the official position" of a foreign official in the chain of signatures. 8 C.F.R. §§ 287.6(b)(2), 1287.6 (2007). Where the consulate does not have a specimen of the signature or seal, he should require that each signature and seal be authenticated by some higher official or officials of the foreign government until there appears on the document a seal and signature which he can compare with a specimen available to him. However, this procedure should only be followed where required. *Id.* An asylum applicant should be able to avoid chain authentication to maintain confidentiality. *See id.*

82. 8 C.F.R. §§ 287.6(c)(1), 1287.6 (2007). The requirements for authentication under the Hague Apostille Convention are as follows:

a public document or entry therein . . . may be evidenced by an official publication, or by a copy properly certified under the Convention. To be properly certified, the copy must be accompanied by a certificate in the form dictated by the Convention[,] . . . signed by a foreign officer so authorized by the signatory country, and it must certify (i) the authenticity of the signature of the person signing the document; (ii) the capacity in which that person acted; and (iii) where appropriate, the identity of the seal or stamp which the document bears.

Id.

83. Wiebe, *supra* note 26, at 3.

84. 8 C.F.R. §§ 208.6, 1208.6 (2007).

85. Wiebe, *supra* note 26, at 26.

86. *Id.* at 23.

Immigration Appeals did not find that exclusion of an unauthenticated document violated the applicant's due process rights because admission of the document would not have changed the outcome of the case.⁸⁷ Authentication under the regulatory methods was not required for the document to be admissible. The "[m]ere failure to authenticate documents, at least in the absence of evidence undermining their reliability, does not constitute a sufficient foundation for an adverse credibility finding."⁸⁸ Often, immigration judges will admit the documents, but give them less weight. Immigration judges also do not always specify how much weight they give to any of the documents, and therefore do not indicate what evidence motivated a decision.

An attack on the credibility of the documents must be consistent with due process and a fair hearing.⁸⁹ Where Immigration and Customs Enforcement is suspicious of unofficial documents or official documents and does not insist upon authentication, it may instead request the documents for forensic examination. Documents subject to forensic examination include documents such as letters, membership cards, and photographs. The examination itself may consist of reports comparing the documentary evidence with samples of original documents, handwriting analysis, or examination of the paper, ink, and typeface. Additionally, the consular post may also submit an investigative report. Hearsay is admissible in immigration proceedings where the evidence is probative and fair.⁹⁰ A motion to suppress may be filed where the evidence is fundamentally unfair.⁹¹ In *Ezeagwuna v. Ashcroft*,⁹² admission of a letter from the DOS, Director of Office of Country Reports and Asylum Affairs, regarding the results of overseas investigation of documentary evidence, which undermined the credibility of documentary evidence in the asylum record, violated due process because the letter contained double and triple hearsay and denied the asylum applicant the right to cross-examination.⁹³

87. *In re Samarawickrama Daundasekara*, No. A78 439 886, 2007 WL 1724873, FILE: A78 439 886 (BIA May 25, 2007).

88. *Wang v. INS*, 352 F.3d 1250, 1254 (9th Cir. 2003); *Lin v. Gonzales*, 428 F.3d 391, 404-5 (2d Cir. 2005); *Shtaro v. Gonzales*, 435 F.3d 711, 716-17 (7th Cir. 2006); *Liu v. Ashcroft*, 372 F.3d 529, 532 (3d Cir. 2004) (providing that immigration judge should have given applicants time to authenticate through other means than 8 C.F.R. § 287.6 (2007), where Chinese government officials failed to cooperate). *But see Sviridov v. Ashcroft*, 358 F.3d 722, 728 (10th Cir. 2004) (providing that unauthenticated documents seemed unreliable, causing the Circuit Court to defer to the immigration judge).

89. *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 405-08 (3d Cir. 2003).

90. *Id.*

91. *KURZBAN*, *supra* note 71, at 280.

92. *Ezeagwuna v. Ashcroft*, 325 F.3d 396 (3d Cir. 2003).

93. *Id.* at 405-08. *See also Olabanji v. INS*, 973 F.2d 1232 (5th Cir. 1992); *Cunnam v. INS*, 856 F.2d 1373 (9th Cir. 1988); *Baliza v. INS*, 709 F.2d 1231 (9th Cir. 1983). *But*

Those facing the greatest evidentiary challenges are asylum applicants from countries that are “known” to have high fraud rates.⁹⁴ The DOS has taken on the role of informing Immigration and Customs Enforcement counsel and immigration judges which countries have great numbers of fraudulent asylum applications and fraudulent documents. While Immigration and Customs Enforcement uses authentication and forensic examination to root out fraud, asylum applicants may bolster their cases by submitting opinions by laying a solid foundation for documents and using their own country conditions and forensic experts. Additional suggestions for asylum applicants and attorneys are included in Section 5 of this Article.

IV. Evidentiary Analysis of Department of State Country Profiles and Department of State Cables: Explanation and Critique

This section presents an evidentiary analysis of sections of the Asylum Profiles and cables that present information on fraud. Weighing the probative value against the prejudicial impact of some inflammatory information on fraud is central to the analysis in Section V and the proposals in Section VI. The evidentiary standards in the Immigration Court are necessarily less restrictive than the FRE, to the benefit of the asylum applicant. However, due process, which sets the outside limits of admissibility, applies even to information in the DOS Profiles and cables.

The DOS Profile is created “to provide information about the context in which the alleged persecution took place, in order that the fact finder may intelligently evaluate the petitioner’s credibility,”⁹⁵ “not to corroborate specific acts of persecution (which can rarely be corroborated through documentation).”⁹⁶ The DOS Asylum Affairs prepares the asylum profiles based on information from various government and non-government resources.⁹⁷ The Asylum Profiles provide basic descriptions of the various types of claims for asylum received from citizens of that country, relevant country conditions, information about political parties, government law enforcement and

see Matter of Lemhammad, 20 I. & N. Dec. 316 (BIA 1991); Bustos-Torres v. INS, 898 F.2d 1053 (5th Cir. 1990) (providing that where hearsay is not impeached, it may be admissible).

94. Professor Wiebe recommends that applicants “from countries where fraud has often been alleged by Immigration and Customs Enforcement Counsel should be especially vigilant about proving up claims from those countries . . . [providing] thorough explanations for failed attempts at authentication or sound reasons backed by independent research for not attempting to do so.” Wiebe, *supra* note 26, at 26.

95. KURZBAN, *supra* note 71, at 407 (citing Duarte de Guinac v. INS, 179 F.3d 1156, 1162 (9th Cir. 1999)).

96. *Id.*

97. Profile of Asylum Claims and Country Conditions (1998), *supra* note 36, at 2.

political practices, religious practices, and government's political control, and other information relevant to asylum claims.

The remainder of this section analyzes the DOS Asylum Profiles for China from 1998 and 2004 (1998 and 2004 DOS China Profile), the DOS cables from the American Embassy in Yaounde, Cameroon dated November 2004 (2004 Cameroonian cable) and dated April 2007 (2007 Cameroonian cable), and the DOS cable from Addis Ababa (Ethiopian cable) dated June 2006. Each provides examples of problematic fraud reports, as well as helpful fraud indicators.⁹⁸

A. *China*

In the case of China, DOS Asylum Profiles for China from 1998 and 2004 contain extensive information regarding coercive population control, and information regarding fraud in asylum claims—specifically naming the Fujian province as the source of many fraudulent asylum claims based on coercive population control. Some immigration judges, though not all, cite only to portions of the profile that weigh against the asylum claim rather than considering all of the information.⁹⁹ The fact that others, unrelated to the applicant before the court, have committed fraud in the past has no bearing on that asylum applicant. Moreover, asylum applicants have a due process right to an individualized determination of their applications.¹⁰⁰ The 1998 Profile demonstrates the U.S. government's obvious and legitimate concern about fraud in asylum cases, but that concern does not authorize an immigration judge to weigh generalized information about fraud more heavily than the evidence the applicant has submitted in the case.¹⁰¹

Where the 1998 Profile describes the Chinese government's coercive population control policies, it specifically casts doubt on asylum claims of individuals from the Fujian Province by providing prejudicial, ambiguous, and unreliable information as described below.¹⁰² The profile states that “[n]inety percent of asylum claims received by the

98. DOS Asylum Profiles for other countries also express concern regarding fraud. *See e.g.* U.S. Dep't of State, Bureau of Democracy, Human Rights and Labor, Mauritania—Profile of Asylum Claims and Country Conditions, 6 (1997) (cited in *Matter of M-D-*, 21 I. & N. Dec. 1180, 1187 (BIA 1998)) (Paul Schmidt and Lory Rosenberg in their dissents of challenged unwarranted conclusions about the possibility of false claims to be Maruitanian refugees by Senegalese citizens).

99. *See, e.g., Ren v. Gonzalez*, 164 Fed. Appx. 33, slip op. at 35 (2d Cir. 2006) (finding that “the Immigration Judge overstated the extent to which the petitioner’s account was necessarily contradicted by, or inconsistent with, the 1998 Country Profile. . .”).

100. *Abdulai v. Ashcroft*, 239 F.3d 542, 549 (3d Cir. 2001).

101. *See, e.g., Ren v. Gonzalez*, 164 Fed. Appx. 33.

102. Profile of Asylum Claims and Country Conditions (1998), *supra* note 36, at 32.

DOS come from the Fujian province.”¹⁰³ The Asylum Profile lists “elements common in claims from Fujianese:¹⁰⁴

- that a wife was ill and could not undergo sterilization, so the husband was chosen to have the procedure;
- that a couple violated birth control regulations by adopting a foundling, who, the officials charged, was the couple’s natural child;
- that a couple had left inadequate spacing between children;
- that an applicant got into a physical fight with aggressive birth control officials (this is a claim that appears frequently in applications by young *unmarried* applicants who say they were protecting their relatives);
- that houses were damaged by angry birth control officials;
- that children over the limit were born after sterilization procedures were faked or that IUD’s were surreptitiously removed to permit new pregnancies;
- that a wife had to leave her home area to avoid her pregnancy being discovered by officials, or;
- that zealous birth control officials tried to impose fines that were allegedly so high that the applicant and his family were unable to pay.¹⁰⁵

However, an asylum claim based on any of the elements listed should not be suspect solely on the basis of being on the list above. After all, the Profile “confirm[s] from various sources that *each of these types of events occur,*” but not with the frequency they are claimed by people from the Fujian Province.¹⁰⁶ Instead of serving as a list of fraud indicators, it may just as easily support a well-founded fear of persecution because all are confirmed possibilities. Any one of those claims made by an asylum applicant (if the claimed forced abortion or sterilization took place during the relevant time in the report) should not be dismissed as implausible, harmful for the application as a whole, or damaging to the applicant’s credibility. The probability of the truth of the account could only roughly be evaluated based on answers to a number of specific questions, the applicant’s demeanor, consistency, and so on. If the chances of suffering a forced abortion or forced sterilization were one in ten, then the likelihood of persecution is one in ten, which meets the well-founded fear standard under *Cardoza-Fonseca*. A low

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* (emphasis added).

probability of persecution (say ten percent), used to disqualify an applicant, directly contradicts the rationale in *Cardoza-Fonseca* and violates the applicant's procedural due process right.

The Profiles also call into question the authenticity and veracity of all documents from China, but especially documents from Fuzhou and Southeast China, because of "widespread fabrication and fraud."¹⁰⁷ The Profiles also contain more useful information, specific facts to assist Asylum Officers and immigration judges to identify suspect testimony and suspect documents, such as information that a particular province only issues one-child certificates and not other documents, that a particular type of document was only issued up to a certain date, as well as other detailed information that an adjudicator can apply to the applicant's claim and to the documents submitted in support of the application.

Reportedly high fraud rates alone should not constitute substantial evidence to support a denial of asylum, especially when the country conditions information does not foreclose a legitimate asylum claim from that region. A number of statements in the 1998 Profile support asylum claims by a Chinese citizen, even from the Fujian Province, based on the government's coercive population control policy.

A consistent theme throughout the reports from the U.S. Consulate General in Guangzhou is the unevenness with which the one child policy has been implemented. There has appeared to be no clear understanding on the part of local officials of the "urban-rural" distinction, and regulations lack transparency and are enforced inconsistently.¹⁰⁸

Poor supervision of local officials who are under intense pressure to meet family planning targets sometimes results in abuse such as forced abortion and sterilization. For example, during an unauthorized pregnancy, a woman might be visited by family planning agents and pressured to terminate the pregnancy. Newspapers sometimes report abuse. In 1996 there were credible reports that several women were forced to undergo abortion in Fujian. A well-documented incident of a 1994 forced 8-month abortion has been reported in Guangdong. In 1995 an incident of forced sterilization was reported in Guangzhou. In Shenyang a

107. Profile of Asylum Claims and Country Conditions (1998), *supra* note 36, at 33. The report states that "documentation from China . . . is subject to widespread fabrication and fraud." *Id.* With corroboration requirements increasing and documents such as identity documents, personal histories, birth and birth control documents, and notices from public security authorities being suspect, it is very challenging for refugees to support their asylum applications. *Id.* at 34.

108. Profile of Asylum Claims and Country Conditions (1998), *supra* note 36, at 26.

newspaper reported that family planning agents “convinced” a woman who was 7 months pregnant to take “appropriate measures.” According to a credible report, some women in reeducation-through-labor camps found to be pregnant while serving sentences, were forced to submit to abortions.¹⁰⁹

The 1998 China Profile contains information that both supports asylum claims based on coercive population control, and that may disprove those same asylum claims.¹¹⁰ These examples demonstrate that a claim of forced abortion or forced sterilization cannot be dismissed as implausible on the grounds that the official Chinese population control program does not include such practices. For instance, although the Chinese government prohibits forced abortion or sterilization, “officials acknowledge that there may be instances of force being used.”¹¹¹ Some asylum applicants claim they had to sign a contract with the town setting forth birth control obligations and penalties. The Profile casts doubt upon those claims by reporting that the Chinese government does not recognize such contracts, inferring that they may be fabricated. However, the Profile goes on to report that the Chinese government acknowledges that local officials may use contracts under their own misguided initiative and that “[t]he U.S. Consulate General in Guangzhou has one copy of a contract between a town in the Fujian province and an unmarried resident of that town. It is not clear if it is a prevalent practice.”¹¹²

Officials coerce women to abort pregnancies and force people to submit to sterilization by threatening to fine them or take away their privileges.¹¹³ The Profile also cites pressure to meet family planning targets and poor supervision of local officials as reasons that some local officials resort to forced abortion and sterilization.¹¹⁴ Finally, although there is no such thing as an “abortion certificate” to document a forced abortion, sometimes hospitals issue a document, at the patient’s request, after a voluntary abortion to request sick leave.¹¹⁵ When an asylum applicant submits an abortion certificate, the applicant must still answer questions about whether the abortion was “forced” or whether she

109. *Id.* at 24-25.

110. *See, e.g.,* *Chen v. Gonzales*, 434 F.3d 212, 223 (3rd Cir. 2003) (denying petition for review before the REAL ID Act. Adverse credibility determination incorrectly based in part on failure of proof. DOS report can constitute substantial evidence even where it “cuts both ways”).

111. *Profile of Asylum Claims and Country Conditions* (1998), *supra* note 36, at 25.

112. *Id.* at 24.

113. *Id.*

114. *Id.* The 1998 China Profile also states that, “[i]n 1996 there were credible reports that several women were forced to undergo abortion in Fujian.” *Id.* at 26.

115. *Id.* at 36; *see also id.* at 24.

submitted, whether the abortion was still considered voluntary if she acquiesced only because of steep fines or other penalties, whether submission meant the ability to obtain the document to present to an employer for sick leave, and other foundational questions regarding the document.

Information that points out systemic problems in China's documentation of births, marriages, and identification justifies the need for some means of authentication. However, both the 1998 and 2004 China Profiles contain sweeping statements casting doubt on the credibility of all Chinese documents. Both Profiles state that no reliable documentation exists.¹¹⁶ The Profiles do explain that a Chinese Official with notarial offices in Fujian Province told the U.S. Consulate in Guangzhou, "[n]o reliable documents existed to prove relationships and that notaries must do field investigations to confirm information in notarial documents."¹¹⁷ The 1998 report not only mentions the prevalence of counterfeit identification cards, but states, even valid ID cards may be out of date and have incorrect information because the ID cards have a 10 or 20 year validity period.¹¹⁸ The U.S. Consulate considers the household registration document so unreliable that it will not accept it as primary documentation for issuing visas.¹¹⁹

A common problem with information presented in parts of the Profile is the lack of information about the data supporting the opinion. If Profiles are treated as information from an expert, then the area of expertise needs to be clear. Without *voir dire* of the author, the parameters of the report must be set, and the authors should not stray from that.¹²⁰ If the data supporting the opinion is unreliable, then the

116. See Profile of Asylum Claims and Country Conditions (1998), *supra* note 36, at 33; U.S. Dep't of State, Bureau of Democracy, Human Rights and Labor, China: Profile of Asylum Claims and Country Conditions 39-40 (2004), <http://www.asylumlaw.org/docs/showDocument.cfm?documentID=5394> (last visited Nov. 8, 2007) [hereinafter Profile of Asylum Claims and Country Conditions (2004)].

117. Profile of Asylum Claims and Country Conditions (1998), *supra* note 36, at 33-34; Profile of Asylum Claims and Country Conditions (2004), *supra* note 116, at 39-40. The Department of State does not explain what a "field investigation" entails.

118. Profile of Asylum Claims and Country Conditions (1998), *supra* note 36, at 35.

119. Profile of Asylum Claims and Country Conditions (2004), *supra* note 116, at 40 (citing fraud concerns, as well as liberalization of the economy, for reasons information might not be reliable).

120. Expert opinions may be based on three possible sources under the Advisory Committee Note 56 F.R.D. 182, 283 Notes to Rule 703: "The first is the firsthand observation of the witness, with opinions based thereon traditionally allowed. . . . The second source, presentation at the trial, . . . the hypothetical question. . . . The third source contemplated by the rule consists of presentation of data to the expert outside of court and other than by his own perception." See also, Lory Rosenberg's dissent in *Matter of T-M-B-*, 21 I. & N. Dec. 775 (BIA 1997) (arguing there is no basis to rely on a DOS opinion whether the persecution was on account of one of the protected grounds in

opinion itself is unreliable. For example, the fact that U.S. Consular officers “had personally seen no evidence of forced abortion or property confiscation,” when they interviewed Fujian visa applicants who had several children, is not persuasive evidence that forced abortion, forced sterilization, and confiscation of property do not occur or do not frequently occur, without any additional information.¹²¹ The opinion lacks credibility without any information about the number of applicants interviewed, how the interviewees were selected, or the purpose of the interview. Also, the opinion is not reliable precisely because it is based on incomplete information from the Chinese central government, the persecutor, or at least the source of the policy that results in persecution by local officials.

The Profiles provide data, including the number of asylum-related documents referred for investigation and the number found to be fraudulent, that may cause significant prejudicial impact due to the erroneous inference of a high overall fraud rate that may be drawn. Even if DOS does not intend to mislead, the reports provide poor sample data without any clarification of what the data ultimately shows. For example, “[i]n 1993, the Consular General in Guangzhou requested officials in Fujian to investigate suspected fake documents; 66, more than half of the 109 that were investigated, were determined to be incorrect or fake.”¹²² If inferences are to be drawn from the incidence of fraud, then the DOS must be able to determine whether a document is incorrect versus fake. Documents containing incorrect information may not be fraudulent, as fraud requires intent to deceive. This data leaves open the danger of false inferences. Possible incorrect inferences include the following: (1) that approximately two-thirds of the documents in Chinese coercive population control cases are fraudulent; (2) that there is about a two-thirds chance that the documents presented in each Chinese coercive population control case are fraudulent; and (3) that the applicants lack credibility (without determining the credibility of each individual and each individual’s own documents).¹²³

A percentage of fraudulent documents or fraudulent applications

the absence of evidence establishing its expertise in reporting on matters other than country conditions).

121. Profile of Asylum Claims and Country Conditions (1998), *supra* note 36, at 26.

122. Profile of Asylum Claims and Country Conditions (1998), *supra* note 36, at 33; the 2004 China Profile reports that “[f]rom early 1999 to early 2000, of 60 document verifications performed by the Consulate General in Guangzhou, 38 were found to be fraudulent and 6 were found to be inconclusive; only 17 were found to be genuine.” Profile of Asylum Claims and Country Conditions (2004), *supra* note 116, at 40.

123. *Leon-Barrios v. INS*, 116 F.3d 391, 393-94 (9th Cir. 1997) (holding that the credibility determination must be based on specific, cogent reasons); *Matter of A-S-*, 21 I. & N. Dec. 1106, 1109-1010 (BIA 1998).

cannot even be determined because the information provided is incomplete. The Profile does not indicate whether the documents related to all types of Chinese asylum cases or only those based on coercive population control, the number of documents in total submitted in Chinese asylum cases, or the approximate number of documents submitted per case. The usefulness of the report depends not merely on the conclusions, but the underlying data and the sources of the data, as well as more detailed information about documents, such as field investigations. Weakness in the underlying data and the sources result in biased opinions and information relied upon as expert information, admissible by regulation.

B. Cameroon

The U.S. Consulate in Yaounde, Cameroon, has issued two cables regarding the high incidence of fraud in asylum cases. Niels Marquardt, U.S. Ambassador to Cameroon, issued one of these cables in November of 2004.¹²⁴ Richard W. Nelson, Chargé d'Affaires at the U.S. Embassy in Cameroon, issued the second cable in April of 2007.¹²⁵ The nature of the cables from the U.S. Consular Posts differs from the Profiles in that the cables do not appear to have been prepared under the regulatory requirement at 8 C.F.R. 208.11. They are written in memo form, and addressed to multiple offices and agencies.¹²⁶ The language in the cables appears alarmist in tone and content. The cables have been submitted into evidence in some asylum cases before the Immigration Court,¹²⁷ but that step may be beyond the original intent of the drafter of the 2004 cable. The Consulate "welcome[d] suggestions for bringing the fraud issues to the attention of DHS asylum adjudicators and [immigration judges]," suggesting that the drafter did not intend for the cable itself to be submitted into the record in Immigration Court proceedings.¹²⁸ By

124. Memorandum (cable) from Neils Marquardt, U.S. Ambassador to Cameroon, U.S. Embassy in Cameroon (November 2004) (on file with the author).

125. Memorandum (cable) from Richard W. Nelson, Deputy Chief of Mission, U.S. Embassy in Cameroon (April 2007) (on file with the author).

126. To Secretary of State, Washington, D.C.; Homeland Security Center, Washington, D.C. (with instruction for the Bureau of Citizenship and Immigration Services to pass on to BCIS Nebraska Service Center; American Embassy Abuja (BCIS Wing); American Embassy Kinshasa; American Consul Frankfurt, Germany (for RCO-Wintheiser); and Immigration and Customs Enforcement Headquarters, Washington, D.C.; see, e.g., Marquardt, *supra* note 18, at 7, ¶ 17. Neither memo indicates specifically what prompted the memos besides the apparent concern regarding the high incidence of fraud in asylum cases and the resulting drain on U.S. Consulate resources in investigating claims.

127. This information is based on the author's discussions with attorneys. Notes from these discussions are on file with the author.

128. Marquardt, *supra* note 18, at 7, ¶ 17.

2007, the Consulate must have known that the new cable would be submitted to the Immigration Court, because it states that the purpose of the cable is “to outline the story behind the story so asylum (and other) adjudicators can make informed decisions about the stories and documents presented to them.”¹²⁹

These documents should be redacted because the prejudicial impact exceeds the probative value, at least until the U.S. Consulate revises the content and form of its reports to provide detailed, admissible information, useful in determining the truth and veracity of an asylum claim. Instead, the tone and language generally invite alarm and specifically invite skepticism that is inappropriate for a fair and unbiased administrative proceeding. The 2004 cable “advises DHS *to view such Cameroonian asylum requests with skepticism* and use all tools available to adjudicate follow-to-join.”¹³⁰ It further states, “[the Consular] Post believes that most of these original asylum claims are frivolous or fraudulent,” referring to the original asylum applicants granted asylum in the U.S., and who filed asylee relative petitions.¹³¹ Skepticism is defined as, “an attitude of *doubt* or a *disposition to incredulity* either in general or toward a particular object.”¹³²

Return to your hypothetical case. Suppose you have your choice of two immigration judges: one judge who knows about the report, but remains neutral as to your application until all of the evidence can be evaluated; while the other judge is an immigration judge who knows about the high fraud rate and approaches each case with great skepticism. You would choose the neutral immigration judge. It will likely take more to overcome the doubt that the immigration judge feels. The cables can be interpreted as asking the asylum officers and immigration judges to apply a rebuttable presumption of fraud based on the applicant's nationality. By doing so, an immigration judge implicitly raises the standard of proof for asylum beyond the statutorily required level of well-founded fear, to proof beyond some unknown level of doubt.

In both the 2004 and 2007 cables, the Consulate briefly acknowledges the political and humanitarian concerns supporting asylum applications, but believes that the dramatic rise in asylum claims granted from 1991 (0) to 2003 (823) without material change in the political

129. Nelson, *supra* note 125, at 1, ¶ 1.

130. Marquardt, *supra* note 18, at 1, ¶ 1 (emphasis added).

131. Once I-730 Asylee relative petitions are approved in the U.S. for relatives still residing abroad, the case is sent to the U.S. Consulate where the beneficiary resides to interview and complete the process. However, when the Consular Post finds fraud, it may return the approved petition to U.S. Citizenship and Immigration Services to revoke the approved petition.

132. Merriam-Webster Online, <http://www.m-w.com/dictionary/skepticism> (last visited Nov. 8, 2007).

situation, but with a long recession proves a high incidence of fraud.¹³³ The 2004 cable specifically mentions “egregious misuse of material drawn from the Human Rights Report.”¹³⁴ The memo reports that there are false police reports, government documents and stamps, medical reports, newspaper articles with false accounts of imprisonment and torture, and even photographs of staged fake weddings.¹³⁵ It also reports that of the “scores” of documents referred for investigation, “all were determined to be false.”¹³⁶ The 2007 cable notes the same issue, “[w]ith every conceivable document readily available for sale (including, but not limited to affidavits, newspaper articles, membership cards and birth certificates), it is relatively easy for unscrupulous claimants to produce ample ‘evidence’ of persecution which would appear genuine to adjudicators not familiar with country conditions.”¹³⁷

Information indicating the types of documents subject to fraud and common counterfeiting practices is useful to adjudicators and attorneys by providing the basis for specific questions. Useful information, such as the practice of paying journalists to write and publish false accounts of individuals detained and tortured by the government allows adjudicators and attorneys to ask detailed questions about newspaper accounts submitted in support of an asylum application, such as the source, the journalist, the reputation of the newspaper, and other foundational questions. Other anti-fraud measures suggested by the Consular Post in the cables are also helpful, such as “checking the Consular Consolidated Database to ensure that the person named on the marriage certificate is, in fact, the petitioner.”¹³⁸ However, they may be more appropriate for the training manuals and adjudications handbooks in order to effect systemic change with wider applicability than just asylum adjudications. This would also address the biased, alarming tone that adds to the prejudicial impact.

Informed decisions must be made based on more than mere conjecture and suspicion of fraud based on general reports of fraud. Broad and misleading statements about the number of fraudulent cases and document fraud cause concern about nearly every conceivable document that can be submitted in support of an asylum application. For example, an April 2004 memorandum from the U.S. Consulate in Cameroon states the following:

133. Marquardt, *supra* note 18, at 2, ¶ 2.

134. Nelson, *supra* note 125, at 1, ¶ 5.

135. *Id.* at 5, ¶ 11.

136. Marquardt, *supra* note 18, at 2, ¶ 2.

137. Nelson, *supra* note 125, at 2, ¶ 1.

138. Marquardt, *supra* note 18, at 5, ¶ 12.

In 2006, the Consular Section adjudicated 939 cases of asylum, many containing doubtful claims of asylum given the situation in Cameroon. This put Cameroon in the top ten “sending” countries in the world—which is an amazing statistic considering the small population (about 17-18 million) and relatively limited infringements on human rights evident in the country.¹³⁹

The DOS annual Human Rights Report, however, states that the Cameroon has a very poor human rights record, “Security forces committed numerous unlawful killings; they regularly engaged in torture, beatings, and other abuses, particularly of detainees and prisoners.”¹⁴⁰

Moreover, the 939 asylum cases cited in the report may really represent fewer doubtful I-589 asylum applications. Each asylee and refugee may petition for his or her spouse and children as derivative beneficiaries. Each derivative beneficiary must have a separate petition. Many refugees petition for more than one family member. So, the 989 doubtful cases most likely refers to fewer than one-third or even one-quarter the number of fraudulent primary asylum cases. That is not to discount the fraud issue, but merely to place it in the correct perspective without the alarmist tone.

The main concern for the adjudicator in the U.S. is whether or not the applicant meets the definition of refugee by the standard of proof assigned by statute, a well-founded fear of persecution. While the adjudicator can and should strive to accurately evaluate the applicant's credibility, witness' credibility and the credibility of documents, the standard of proof remains the same. Considerations of consular post workload and general implausibility of the overall numbers of asylum applicants from Cameroon cannot properly be considered in the individual asylum applicant's hearing.

C. *Ethiopia*

One cable, issued by U.S. Charge d'Affaires Ambassador Vicki Huddleston in June of 2006, addressing fraud has been submitted to the Immigration Court in asylum cases. The Ethiopia cable should be inadmissible or at least redacted for the same reasons as the Cameroonian cables. The report does not provide the preparer's expertise in statistics, the basis for the estimated fraud rates, and an

139. Nelson, *supra* note 125, at 4, ¶ 8. Adjudicated cases refer to interviews of the beneficiaries of approved asylee relative petitions. Although the U.S. Consulate does not have the power to approve or revoke petitions itself, it may refuse to issue the asylee documents and return the approved petition to U.S. Citizenship and Immigration Services for revocation of the approved petition.

140. Cameroon, U.S. Dep't of State, Country Reports on Human Rights Practices, 1 (2006), <http://www.state.gov/g/drl/rls/hrrpt/2006/78723.htm> (last visited Jan. 23, 2007).

explanation of how the proportion of fraudulent documents to those referred for investigation provides the basis for an estimated overall document fraud rate of Ethiopian asylum applicants.¹⁴¹ The cables from the U.S. Consulate provide the proportion of fraudulent documents of those referred without explaining how that proportion can be used as the basis for reliable estimates of the percentage of fraudulent asylum applications and the percentage of fraudulent documents. Moreover, the cable fails to describe how the embassy knows the documents are fake or explain the type of fake documents, e.g., black market, desktop published, or another type.

The reports of fraud may be helpful to the Immigration and Customs Enforcement attorney if they set forth red flags, factors that help the Immigration and Customs Enforcement attorney to determine whether an application or document is suspect, and then to formulate questions for cross-examination to determine whether actual fraud exists. That information helps immigration judges and attorneys in the same way. Instead, the Consulate makes blanket statements such as, "victims of persecution are poor, not those who qualify for tourist visas," without support.¹⁴² It is unclear from the cable why the Ethiopian government would only persecute the poor, or that the statement is true at all.

Again, while the concerns raised are valid, the measures taken to identify and catch fraud should be carefully designed so that they do not inadvertently harm refugees. The 2006 Ethiopia cable contains many of the same weaknesses identified in the cables from Cameroon, unreliable document and asylum fraud estimates and overbroad profiles.

The document summary contains the following:

- SUMMARY. This cable is designed to provide guidance gleaned through Post's year-long assessment of nearly 1,500 . . . following-to-join asylees, to DHS officers in the United States who adjudicate Ethiopian asylum claims.¹⁴³
- Based on local investigations, Post has determined that many such cases are based on fraudulent asylum claims, and *estimates the rate of asylum fraud for Ethiopian I-589s to be more than 50 percent.*¹⁴⁴

141. Memorandum (cable) from Vicki Huddleston, Charge D'Affaires, U.S. Embassy in Ethiopia, 1, ¶ 3 (June 2006) (on file with the author) (noting that more than seventy-five percent of documents investigated were fraudulent and suspects a fraud rate of over fifty percent of asylum-related inquiries).

142. *Id.* at 4, ¶ 12.

143. *Id.* at 1, ¶ 1.

144. *Id.* at 1, ¶ 3 (emphasis added) (suspecting fifty percent fraud in asylum cases and more than seventy-five percent of the documents investigated were fraudulent). The report does not indicate how DOS determines whether an asylum claim is fraudulent. The determination that one or more documents contains incorrect information or is

- Consular officers note that the social class, professions, and background of asylum claimants are generally not compatible with observations of those persecuted in Ethiopia.¹⁴⁵
- The Consulate has identified Ethiopian communities in the U.S. as the source of fraudulent documents.¹⁴⁶

In addition, the Consulate reports a worrisome practice of investigating the personnel records held by the asylee's former employer. This process necessarily provides the name and other identifying information of an asylum applicant, violating regulatory confidentiality requirements. The cable provides no information on how the practice may be instituted in a way that protects refugees and their families, in case their suspicion is wrong, and without exposing the name and other information that may endanger the family.¹⁴⁷ Consular Officers requested personnel records from the former employers of eleven asylum claimants, chosen from a group of cases that the Consular Officer deemed suspect. The requested information included records pertaining to any family members claimed for benefits purposes, as well as attendance records. Consular Officers compared the family members identified in employment records with the number and identity of family members claimed in I-730 Asylee Relative Petitions. They also compared employment attendance records to the timelines and narratives given in the petitioner's I-589 Asylum Application,¹⁴⁸ without any justification for assuming employer records were more reliable than information in the I-589s. In ten of the eleven cases, the employment records revealed information that conflicted with the asylum application.¹⁴⁹ The cable acknowledges, in this instance, that the sample

counterfeit does not necessarily indicate that the asylum claim is fraudulent. Maybe out of desperation, people with valid claims who cannot recover their valid documents feel compelled to prove the claim with false documents.

145. *Id.* at 1, ¶ 1. Notably, this statement is unsupported by any additional information regarding those persecuted and why the persecutions occurred.

146. Huddleston, *supra* note 141, at 3, ¶ 10 (establishing that Ethiopian communities in the metropolitan areas of Washington, D.C., Minneapolis, Los Angeles, Atlanta, Seattle, and in parts of Texas provide a support system for asylees. Reportedly, Ethiopians in the U.S. provide unsolicited advice on asylum and provide counterfeit documents and statements to support Ethiopian asylum cases).

147. *See, e.g.,* Wiebe, *supra* note 77, at 6 n.24 (human rights organization in Chad was forced to close down and its members forced to flee the country after the U.S. revealed to the Chadian government the name of a Chadian human rights activist who had applied for asylum in the United States; reported by American University Human Rights Clinic).

148. Huddleston, *supra* note 141, at 3, ¶ 7.

149. *Id.* at 3-4, ¶ 8.

size is “too small to draw any statistical conclusion, . . . but adjudicators feel that it is representative.”¹⁵⁰ The cable does not include information about whether the Consulate followed guidelines in a previous Immigration and Naturalization Service (“INS”) memorandum by then General Counsel, Owen B. Cooper.¹⁵¹ The memo does not guarantee complete confidentiality in overseas investigations. The Cooper Memorandum allowed disclosure of identifying information for requests commonly associated with other consular duties, not merely asylum, so one could not easily infer that the DOS inquiry was based on a claim for asylum.¹⁵²

D. *Conclusions Regarding DOS Asylum Profiles and Cables*

General information about fraudulent claims and fraudulent documents may sometimes cause an immigration judge, in effect, to presume that the asylum claim is fraudulent or that documents submitted in support of the application are fraudulent. DOS Asylum Profiles (by country) and other consular reports containing estimates of overall asylum fraud rates and document fraud rates deny the applicant procedural due process when they cause the immigration judge to presume fraud. Asylum regulations explicitly permit Asylum Officers to rely on “material provided by the [DOS]” among other organizations.¹⁵³ These estimates create a danger of unfair prejudice by creating hostility in the adjudicator toward asylum applicants who fit an overbroad profile.¹⁵⁴

The purpose of the fraud-related information is clear—to warn asylum adjudicators about the possibility of fraud in cases from a country or region in order to prevent erroneous grants of asylum. But the fraud profiles (distinguished from the Asylum Profile as a report) and estimates of fraud rates stated, or at least inferred, from the Asylum Profiles and DOS cables are inaccurate. DOS country condition reports have been described as the best and most appropriate information on country conditions.¹⁵⁵ Misleading DOS reports are especially dangerous to refugees, given the deferential treatment DOS reports receive by the Board of Immigration Appeals and several Circuits.¹⁵⁶ Even if DOS

150. *Id.* at 3, ¶9.

151. Cooper Memorandum, *supra* note 27.

152. *Id.*

153. 8 C.F.R. § 208.12(a) (2007).

154. See CHARLES TILFORD MCCORMICK et. al., MCCORMICK ON EVIDENCE § 185 (5th ed., ed. John W. Strong, 1999) (arguing that prejudice means more than damaging the applicant’s case).

155. See, e.g., Matter of V-T-S-, 21 I. & N. Dec. 792.

156. See *Xie v. Ashcroft*, 359 F.3d 239, 243-44 (3d Cir. 2004); *Navarrijo-Barrios v.*

corrects its estimates, immigration judges should not rely heavily on fraud rates to determine whether an asylum applicant has committed fraud. The goal of detecting fraud is necessary and welcome to all but those engaging in fraud, but the fraud reports encourage immigration judges to demand ever more corroboration with indicia of reliability sometimes unachievable by refugees.¹⁵⁷

When the government offers evidence that the applicant fits the profile of a fraudulent asylum seeker, it should be inadmissible as character evidence.¹⁵⁸ Where character evidence is included in a report that contains admissible evidence, the inadmissible information should be redacted. Character evidence should be excluded when the prejudicial impact outweighs the probative value.¹⁵⁹

[E]vidence that an individual is the kind of person who behaves in certain ways almost always has some value as circumstantial evidence of how this individual acted (and perhaps with what state of mind) in the matter in question. For instance, on average, persons reputed to be violent commit more assaults than persons known to be peaceable. Yet, evidence of character in any form—reputation, opinion from observation, or specific acts—generally will not be received to prove that a person engaged in certain conduct or did so with a particular intent on a specific occasion, so-called circumstantial use of character. The reason is the familiar one of prejudice outweighing probative value. Character evidence used for this purpose, while typically being of relatively slight value, usually is laden with the dangerous baggage of prejudice, distraction, and time-consumption.¹⁶⁰

The DOS presents estimated document fraud rates and estimates of asylum fraud rates of sorts without any of the safeguards generally required to ensure that the data is sufficient to support the opinion.¹⁶¹

Ashcroft, 322 F.3d 561, 564 (8th Cir. 2003). *But see* Tian-Yong Chen v. INS, 359 F.3d 121, 130-32 (2d Cir. 2004) (DOS reports are sometimes influenced by foreign policy goals).

157. While authenticating documents, laying foundation for documents, and submitting affidavits from witnesses can be accomplished in other types of cases, asylum seekers, as well as applicants for withholding of removal and relief under the Convention Against Torture face unique challenge of “Asking for a note from [their] torturers.” Wiebe, *supra* note 77, at 37 n.1 (referring to the title of an earlier article by the same author).

158. *See* MCCORMICK et. al., *supra* note 154, § 206, at 323. Stories about widespread corruption and illustrations in DOS Asylum Profiles have been admissible country conditions information.

159. *Id.* § 189, at 283 (stating that the rule against use of character evidence to prove conduct on a particular occasion applies in civil cases).

160. *Id.* § 188, at 282, 283.

161. *Id.* § 208, at 325.

The DOS profiles and cables are like expert opinions,¹⁶² but are authored by experts on country conditions, not statistics.¹⁶³

Courts must carefully examine whether their conclusions rest on data that permits “fair inferences about the relevant factual questions.”¹⁶⁴ The sample data provides statistics, such as the proportion of fraudulent documents found out of those referred for investigation. If sixty percent of the sample studied (documents referred for investigation) were fraudulent, then one might conclude that sixty percent of future documents *referred for investigation* will be found to be fraudulent. But because the study is based on a pool of already-suspicious documents, its relevance to the larger pool of all asylum applicants and all documents submitted in support of asylum applications is extremely limited.¹⁶⁵ The suspected fraudulent documents are not a random sample that might be representative of all asylum applicants. Rather, one should expect a much higher fraudulent document rate from a pool of suspect documents referred to the U.S. Consulate to be investigated. Similarly, the pool of applicants used to determine the fraudulent asylum applicant rate may not be a representative sampling of the larger population of all asylum applicants. It is less immediately apparent, but the same errors occur. Because nothing in the “study” at DOS cancels out the non-random error that occurs due to the non-random sample population (the suspect documents in one study and the derivative asylee beneficiaries in the other), the document fraud and asylum fraud estimates made on the basis of the sample data are inherently biased.¹⁶⁶

Random sampling of asylum applications and testing the documents and the correctness of the asylum determination is the more reliable method of determining the fraudulent document rate and asylum fraud rate. The value and accuracy of the document fraud rate may still be

162. *Id.* § 206, at 324. McCormick describes the similarities between profile evidence and expert testimony because profiles “describe the results of psychological research identifications. In both instances, the expert provides background information that might contradict lay impressions and that the jury can apply to the case at hand, if persuaded to do so.”

163. Under Federal and Uniform Rules underlying data that is hearsay may be admitted into evidence if it is “reasonably reliable, as the basis for an expert opinion.” MCCORMICK et. al., *supra* note 154, § 208, at 325. In the immigration context, rather than serving as the *basis* for an expert opinion, it is part of a document considered by some to be the expert opinion.

164. McCormick describes the following basic scientific survey techniques: “The researcher tries to collect information from a manageable portion (a sample) of a larger group (a population) to learn something about the population. Usually some numbers are used to characterize the population, and these are called parameters.” *Id.* § 208, at 325-26.

165. *Id.* § 208, at 326.

166. *See id.* § 208, at 326 (providing that a larger sample size does not protect against bias).

questionable because the number of documents varies from case to case, and it is possible that one with a fraudulent and frivolous asylum case would submit fifty counterfeit documents while a legitimate refugee would submit three authentic documents, or vice versa. Or a fake or honest claimant might submit some real and some fraudulent documents. A simple proportion would tell nothing about the probability of receiving fraudulent documents in any given case.¹⁶⁷

The reports can and sometimes do provide detailed information that assists asylum officers and immigration judges in identifying fraud through more detailed questions. Reports can provide factors or details that indicate fraud (“fraud indicators”), as well as the explanation of how or why those factors indicate fraud. Based on that information, asylum officers and immigration judges can examine documentary evidence and ask the appropriate questions while taking testimony. Where some information in country conditions reports and Asylum Profiles supports a claim for asylum, generalized information about fraud should not result in a presumption of fraud or an increase in the standard of proof. And yet, Section V of this Article describes cases in which immigration judges have taken administrative notice of Asylum Profiles, presumed fraud which unlawfully increases the standard of proof in asylum above a well-founded fear, and restricted the asylum applicant’s opportunity to explain discrepancies. Even if such measures reduce the number of asylum grants, they do so by denying due process and asylum to refugees, as well as the fraudulent applicants.

V. How General Fraud Reports Impact Individual Asylum Applicants

This section examines and analyzes immigration judges’ historical treatment of general fraud reports and the impact of these reports on individual asylum applications based primarily on review of Circuit Court cases. The possible treatment identified below includes: (1) immigration judges taking administrative notice of the Asylum Profile; (2) immigration judges implicitly imposing a presumption of fraud on the claim, the applicant, or the documents; and (3) immigration judges finding the asylum applicants’ credibility as well as the credibility

167. *See id.* § 208, at 326-27. This very issue arose when an Immigration and Naturalization Service study supposedly showed a thirty percent fraud rate in spousal immigration petitions. After passage of the Immigration Marriage Fraud Act, partially in response to the study, flaws in the study were revealed. Investigators selected spousal petitions rather than using random sampling. In addition, the thirty percent reflected cases suspected of fraud, not actual fraud. In litigation, an Immigration and Naturalization Service official revealed that “the survey ‘was statistically invalid and lacked any probative value regarding the actual incidence of marriage fraud.’” 56 IR 25-26 (1988); 66 IR 1011 (1989).

of their documentary evidence significantly lacking. The end of each section returns to the hypothetical discussed in this Article's introduction to consider the demands that would be made of you, the refugee, in each instance.

A. The Problem of Taking Administrative Notice of Asylum Profiles and Consular Cables that Report Fraud

Judicial notice, under FRE 201, has been defined as, “[a] court’s acceptance, for purposes of convenience and without requiring a party’s proof, of a well-known and indisputable fact.”¹⁶⁸ Administrative notice is similar to judicial notice, but is within administrative proceedings.¹⁶⁹ By regulation, the Board of Immigration Appeals may take administrative notice of certain facts, and immigration judges have that same power.¹⁷⁰ “Certain facts” refers to contents of official documents and commonly known facts, such as legislative and technical facts within the administrative body’s expertise.¹⁷¹ Although country conditions reports have been recognized among official documents,¹⁷² whether that includes the Asylum Profiles and the cables should depend on the content of those documents and whether that content is limited to the DOS’ foreign policy expertise.¹⁷³

Immigration judges have taken administrative notice of Asylum Profiles improperly. The Immigration Judge Benchbook notes that immigration judges may, in their discretion, take administrative notice of facts that are “generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”¹⁷⁴ One example provided in the asylum context is to election results or other changes in the government.¹⁷⁵ The Asylum Profiles often contain information that is neither generally known, nor accurate beyond question; some opinions and statements are unsupported, biased, and

168. BLACK’S LAW DICTIONARY 863 (8th ed. 2004).

169. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, IMM. JDG. BNCHBK., 1, II, H (2001).

170. 8 C.F.R. § 1003.1(d)(3)(iv) (2007); Matter of R-R-, 20 I. & N. 547 (BIA 1992) (recognizing administrative agencies’ authority to take administrative notice of commonly known facts).

171. See EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, IMM. JDG. BNCHBK., 1, II, H (2001).

172. 67 FR. 54878-01, 54892 (2002).

173. See *Galina v. INS*, 213 F.3d 955, 958-59 (7th Cir. 2000) (treating opinions in the Country Reports as uncontested facts misapplied the principle of administrative notice).

174. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, IMM. JDG. BNCHBK., 1, II, H. (2001) (citing FRE 201).

175. *Id.* at H, 5 (citing Matter of R-R-, 20 I. & N. 547 (BIA 1992)).

mislead, such as the presentation of fraud statistics. In addition, an immigration judge who takes administrative notice of a report containing information of questionable accuracy may deprive the asylum applicant of fair consideration of his or her testimony and evidence.¹⁷⁶ For example, information that the U.S. Consulate had not seen evidence of forced abortion or sterilization in the Fujian Province did not foreclose the possibility that the local officials did force the particular asylum applicant to undergo an abortion under the coercive population control policy in China.¹⁷⁷

Although notice to the asylum applicant is required where the immigration judge takes administrative notice of indisputable facts, due process requires notice *and* an opportunity to rebut the facts or “to show cause why administrative notice [of controversial facts] should not be taken. . . .”¹⁷⁸ In an unpublished Seventh Circuit case, *Zhou v. Gonzales*,¹⁷⁹ the immigration judge took administrative notice of the 2004 Asylum Profile and based part of the adverse credibility finding on a perceived conflict between the applicant’s testimony and information in the 2004 Asylum Profile, which stated that U.S. officials found no cases of forced abortion in Fujian during visits.¹⁸⁰ The Circuit Court granted the petition for review, remanding the case in part on the ground that it was improper for the immigration judge to take administrative notice of the fact that the Consulate saw no signs of forced abortion.¹⁸¹

Taking administrative notice of an entire Asylum Profile or DOS cable in an asylum case is improper because it would, in most cases, include statements which are not generally known and unquestionably accurate.¹⁸² Because controversial facts are necessarily at issue in the asylum case, and the fraud rates and fraud practices are often

176. See, e.g., *Bace v. Ashcroft*, 352 F.3d 1133, 1139 (7th Cir. 2003) (holding it improper to find that witness’s testimony about specific events is contradicted by a generalized Department of State report about the applicant’s country of origin).

177. See, e.g., *Zhou v. Gonzales*, 230 Fed. Appx. 588, 591 (7th Cir. 2007).

178. *Circu v. Gonzales*, 450 F.3d 990, 993 (9th Cir. 2006); *Rivera-Cruz*, 948 F.2d 962, 967 (5th Cir. 1991).

179. *Zhou*, 230 Fed. Appx. at 591 (vacating order of removal and remanding the case for further proceedings. The Board of Immigration Appeals had affirmed an immigration judge’s denial of asylum and denied withholding of removal based on an adverse credibility finding. The applicant was unwed and pregnant, the father was too young to marry at the time of the pregnancy, and the applicant fled China years after forced abortion. Immigration judge denied asylum finding that the applicant’s testimony conflicted with DOS human rights report 2003). See also *Circu*, 450 F.3d 990 (distinguishing between “indisputable facts” and “controversial facts”).

180. *Zhou*, 230 Fed. Appx. at 593.

181. *Id.*

182. See EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, IMM. JDG. BNCHBK. *supra* note 169. Taking administrative notice of specific facts that are indisputable and easily verifiable poses no problem.

unsupported conclusory statements, even if offered, the opportunity to rebut does not cure the problem. By statute, the asylum applicant only bears the burden of proving his or her own case, not to rebut broad, unsupported, conclusory statements. Taking administrative notice of the central fact at issue in the asylum case may violate the asylum applicant's right to procedural due process. It necessarily denies the asylum applicant an individualized determination of his or her asylum eligibility.¹⁸³

Returning to the hypothetical refugee from the beginning of the Article, your attorney tells you that this immigration judge has taken administrative notice of DOS Asylum Profiles and cables. These Asylum Profiles and cables cite a high proportion of fraudulent documents of those referred for investigation by the Consular Post. Although your claim is consistent with the human rights reports, the immigration judge will likely expect you to provide documentary evidence of your membership in the political organization (with a membership card and at least one affidavit from an official office attesting to your membership and past political activities); documentary evidence of your detention records and warrants; a copy of the doctor's report or some other documentary evidence of your doctor's visit for the gash on your shoulder from being hit with the rifle; and affidavits from your wife and uncle corroborating as many aspects of your story as possible. Because of the high fraud rate, the immigration judge will require some form of authentication, overseas investigation (if anything is suspicious), or a good reason why you cannot provide authentication. When you submit documents, you will need to establish where, when, and how you obtained the documents, in addition to the chain of custody. Because you believe it is not safe for your spouse to return to the house to search for documents or to approach the government in your country of origin for evidence of your two terms in detention, you will be unable to provide these documents to the immigration judge. You do not know whether the doctor will still have any record of your visit years ago.

B. Improperly Creating a Rebuttable Presumption of Fraud Raises the Standard of Proof

The well-founded fear standard of proof, established to protect refugees cannot be changed by the courts. The INA, immigration regulations, and case law contain no presumption of fraud regarding

183. Even if the immigration judge takes administrative notice of a report or a fact in a report and offers the respondent the opportunity to rebut the fact(s), the applicant should not be required to rebut a fraud rate. The respondent asylum applicant only bears the burden of proving his or her own well-founded fear of persecution.

asylum. Moreover, “[courts] may not create new law under the guise of assessing evidence.”¹⁸⁴ Any rise in the standard of proof required for asylum erodes refugee protection. However, in discussions with other attorneys, in my own practice experience, and from other case opinions, it appears that some immigration judges apply an unwritten presumption of fraud when the government submits a report indicating a high incidence of fraud in asylum cases or a high incidence of fraudulent documents.¹⁸⁵ An immigration judge’s firsthand experience with fraudulent asylum cases and fraudulent documents may also cause the same result, even before the trial attorney submits any documents. Some jurisdictions have found it reasonable for an immigration judge to require some special type of authentication where there is a concern regarding fraudulent documents.¹⁸⁶

Besides being *ultra vires*, imposing a presumption of fraud raises the asylum applicant’s standard of proof from a well-founded fear of persecution to a higher standard: anywhere from a preponderance of the evidence up to proof beyond a reasonable doubt. Although these elevated standards of proof are unspoken, the impact on refugees and other asylum applicants is very real. The documentation requirements and detailed recollections from years of experiences and corroboration requirements are daunting, and constitute reasonable approximations of the “clear and convincing evidence” or “proof beyond a reasonable doubt” standards imposed on asylum applicants to overcome a presumption of fraud.

In one case, an immigration judge appeared to hold an asylum applicant from Cameroon, a member of the Southern Cameroons National Council (“SCNC”), to a standard approximating the clear and convincing evidence standard or higher. The immigration judge required the testimony of an officer in the U.S. office of the SCNC in order to proceed with the hearing despite many other corroborating documents, including alternative means of authentication to provide some indicia of reliability.¹⁸⁷ The applicant had already submitted numerous supporting documents confirming membership in the SCNC, political activities, membership card, several letters from different leaders and members

184. *Makonnen v. INS*, 44 F.3d 1378, 1382 (8th Cir. 1995).

185. Notes from discussions with attorneys are on file with the author. *See also* *Gao v. Gonzales*, 467 F.3d 33 (1st Cir. 2006); *Ren v. Gonzales*, 164 Fed. Appx. 33 (2d Cir. 2006) (“[R]eminding the [immigration judge] and [Board of Immigration Appeals] that ‘the asylum application process requires a good-faith *inquiry* into whether an applicant is entitled to this country’s protection, and should never resemble a search for a justification to deport.’”) (citing *Poradisova v. Gonzales*, 420 F.3d 70, 82 (2d Cir. 2005)).

186. *Lin v. Ashcroft*, 371 F.3d 18, 22 (1st Cir. 2004).

187. This is based on an asylum case before an immigration judge from 2005-06 (notes on file with the author).

corroborating the claim, a psychological evaluation, an affidavit from a country conditions expert, and additional affidavits from lay persons who had knowledge and experience with certain Cameroonian documents. Although the government did not submit a DOS cable from Cameroon regarding fraud, it submitted a human rights report from the UK Home Office containing a paragraph about the widespread availability of fraudulent documents through the Cameroonian communities. The immigration judge did not trust anyone from the SCNC, except the designated officer of the U.S. SCNC office. The immigration judge only allowed the applicant to proceed and granted asylum after the testimony of the SCNC officer specified by the immigration judge who confirmed membership in the political organization and participation in political activities.

While fraud concerns can justifiably increase the importance of providing some authentication and corroboration, it is a matter of degree. The requirements in the case described above and others like it are obvious examples where immigration judges either applied a higher standard of proof than the well-founded fear asylum standard, or appeared to presume fraud in both the application for asylum and several of the documents confirming membership and activities in the political organization. The presumption, it seemed, could only be rebutted by the live testimony of one person specifically named by the immigration judge. In another case, an immigration judge gave virtually no weight to documents submitted because they were not authenticated, and because the applicant was from the Fujian Province of China where fabricated documents were common.¹⁸⁸ The immigration judge found that the applicant lacked credibility.¹⁸⁹ The decision referred to undisputed government reports, which differs from taking administrative notice because it implies that the applicant could have disputed the report. As this Article pointed out in previous sections, the reported country conditions and practices described in the China Profile are not absolute, and do not necessarily require dispute or argument.

Applying the correct standard of proof requires great care,¹⁹⁰ and that standard of proof in asylum is a well-founded fear. On appeal, “[u]se of the appropriate standard . . . is a question of law, . . . review[ed] *de novo*.”¹⁹¹ Where the court “use[s] an inappropriately stringent

188. *Gao*, 467 F.3d 33 (1st Cir. 2006) (denying asylum and relief under the Convention Against Torture. The Board of Immigration Appeals affirmed without opinion and the Circuit Court denied the petition for review).

189. *Id.*

190. GOODWIN-GILL & MCADAM, *supra* note 14, at 54 (Oxford 3d ed. 2007).

191. *Makonnen v. INS*, 44 F.3d 1378, 1382, 1384 (8th Cir. 1995) (applying well-founded fear standard, but requiring a showing that all ethnic Oromos were being

standard when evaluating an applicant's testimony, [the use of the stringent standard] would [be] treat[ed] as a legal, rather than a factual error."¹⁹²

The Cameroonian case was an extreme case with a very high standard of proof required. It is more difficult to tell what standard of proof is being applied when the immigration judge identifies other inconsistencies, a failure to provide any attempt to authenticate documents, or the failure to lay a foundation for documents. Protecting the asylum system from being overrun by fraud is a high priority, but should never supersede the primary purpose of asylum law—to protect refugees. The standard of proof required to gain asylum remains a well-founded fear standard, established by the Refugee Act and explained in *Cardoza-Fonseca*.

In the hypothetical, you may face the same demands for documentation as above. However, the demands will actually vary depending on the standard of proof required to rebut the presumption of fraud. If the immigration judge presumes that your claim is fraudulent, then you will have great difficulty overcoming the presumption without documentary evidence to support your claim. Even with documents, the immigration judge may request some alternate means of authentication if you are unwilling to risk exposure to your government. Because the presumption of fraud is *ultra vires*, you have no way of knowing what standard of proof you must meet unless the immigration judge tells you.

C. *Improper Adverse Credibility Determinations—The Impact of General Fraud Reports*

This section is broken down into two subsections: (1) improper use of fraud rates to attack the credibility of refugees; and (2) improper use of fraud rates to attack the credibility of documents.

The credibility of the applicant is critical; it is usually the single most important aspect of the case. As refugee experts have recognized, “[i]t’s no easy task to determine refugee status; decision-makers must assess credibility and will look to the demeanour of the applicant. Information on countries of origin may be lacking or deficient, so that it is tempting to demand impossible degrees of corroboration.”¹⁹³ The REAL ID Act amended INA to include a long list of factors that immigration judges may consider in making credibility determinations.¹⁹⁴

persecuted. Failed to consider pattern-and-practice persecution).

192. *Secaida-Rosales v. INS*, 331 F.3d 297, 307 (2d Cir. 2003).

193. *GOODWIN-GILL & MCADAM*, *supra* note 14, at 58.

194. REAL ID Act, *supra* note 2, § 101(a)(3), 119 Stat. at 303 (codified at INA § 208(b)(1)(B)(iii)).

The Act instructs immigration judges to evaluate credibility based on “the totality of the circumstances” and “all relevant factors.”¹⁹⁵ General fraud rates or statements regarding the high incidence of fraud, because of their prejudicial nature, should only have a minimal impact on the credibility determination. Consider the impact on credibility determinations themselves, and on refugee protection when the credibility determinations are based significantly on other people’s fraud. An adverse credibility determination may be vacated if the immigration judge “has failed to ‘act fairly in judging credibility and in assessing the sufficiency of the evidence,’ . . . where the I[mmigration] J[udge] based the credibility ruling ‘upon speculation or upon an incorrect analysis of the testimony. . . .’”¹⁹⁶

1. Improper Use of Fraud Rates to Attack the Credibility of Refugees

In a U.S. criminal trial of an African-American defendant for robbery, a statistical report citing the high rate (sixty percent) of violent crime by African-Americans would be inadmissible for lack of relevance, lack of probative value, and high prejudicial impact. Moreover, the purpose of the study’s attempted admission would obviously be intended to persuade the judge or jury that there is at least a sixty percent chance that the defendant in the present case committed the crime based on his race alone. While sixty percent does not meet the standard of proof in criminal cases of proof beyond a reasonable doubt, and the study lacks probative value because it does nothing to demonstrate that the particular defendant committed the crime, it would reduce the need for substantial additional evidence if the trier of fact draws the impermissible inference. Even worse, it supplants the court’s truth-seeking function on an individual basis in an adversarial proceeding with a statistical prediction. And if the reported rate were seventy or ninety percent it would still be inadmissible.

In immigration cases, there are similar important concerns, but the reports containing proportions of fraud and estimates of fraud are routinely submitted into evidence and relied upon by immigration judges, the Board of Immigration Appeals and Circuit Courts.¹⁹⁷ Although the

195. 8 U.S.C. § 1158 (b)(1)(B)(iii).

196. *Liu v. U.S. Dep’t of Justice*, 455 F.3d 106, 110 (2d Cir. 2006) (quoting *Cao He Lin v. U.S. Dept of Justice*, 482 F.3d 391, 394, 400 (2d Cir. 2006)).

197. *See, e.g., Weng v. Ashcroft*, 104 Fed. Appx. 194, 196-97 (1st Cir. 2004). The immigration judge denied asylum, withholding of removal, and relief under the Convention Against Torture. The Board of Immigration Appeals summarily affirmed and the Circuit Court denied the petition for review. In denying the petition, the Circuit Court addressed the adverse credibility determination and stated, “The [immigration

Second Circuit implicitly acknowledges the significance of the credibility determinations in its unpublished opinion *Xu v. U.S. Department of Justice*,¹⁹⁸ stating that even where the denial of asylum is based on an adverse credibility finding, the decision is subject to review.¹⁹⁹ Moreover, “[courts] shall not uphold credibility determinations based on speculation or conjecture, rather than evidence in the record.”²⁰⁰ The credibility determinations are critical because often an applicant’s testimony, if believed, would demonstrate past persecution.

Use of a statistical prediction based on a high fraud rate in place of an individualized credibility determination is no more acceptable in the asylum context than in the criminal context. In asylum cases, Immigration and Customs Enforcement attorneys submit DOS Country Profiles and Consular Post cables (fraud memos) to the Immigration Court as a loud warning about fraud, pleading that the Immigration Court view the asylum applications with skepticism.²⁰¹ The Profile is

judge] considered . . . inconsistencies in light of the widespread document fraud among asylum seekers from the petitioner’s home region and the seeming pattern falsehoods that emerged.” *Id.* See also U.S. Dep’t of State, China: Conditions (April 14, 1998); 8 C.F.R. § 208.12 (enabling immigration officials to consider such reports in making asylum determinations). The adverse inferences that she drew from that evidence were supportable. See *Qin v. Ashcroft*, 360 F.3d 302, 307 (1st Cir. 2004) (holding the Profile, considered in light of contradictory documentary evidence sufficient to support a finding of fabrication).

The immigration judge also based the adverse credibility finding on the high price petitioner paid to be smuggled into the U.S. The petitioners argued that the immigration judge’s adverse credibility determination did not deserve deference because it was based on mere conjecture. *Weng*, 104 Fed. Appx. at 197 (citing *Cordero-Trejo*, 40 F.3d 482, 487) (holding that no deference is due when findings are based on inferences not grounded in the record or “merely personal views of the Immigration Judge”). However, the Circuit Court treated the immigration judge’s findings as reasonable inferences from the evidence. *Weng*, 104 Fed. Appx. at 197.

198. *Xu v. U.S. Dep’t of Justice*, 127 Fed. Appx. 553 (2d Cir. 2005).

199. *Id.* (denying the petition for review, finding the immigration judge’s adverse credibility determination of the applicant supported by the applicant’s and husband’s conflicting testimony); see also 8 U.S.C. § 1101(a)(42), *Dong v. Gonzales*, 421 F.3d 573, 578 (7th Cir. 2005) (“[O]ne forced abortion is sufficient to show persecution.”); *Dawoud v. Gonzales*, 424 F.3d 608, 612 (7th Cir. 2005) (noting that applicant’s credible testimony can sustain burden to prove asylum eligibility).

200. *Kllokoqi v. Gonzales*, 439 F.3d 336, 341 (7th Cir. 2005) (citing *Korniejew v. Ashcroft*, 371 F.3d 377, 383 (7th Cir. 2004) (internal quotations omitted)).

201. An Asylum Officer may rely on reports by credible sources, including the DOS when deciding whether to grant asylum or refer the application to the Immigration Court. 8 C.F.R. 208.12(a) (2007) (providing that the applicant has no right to discovery). 8 C.F.R. § 208.12(b) (2007). The DOS may also opt to provide any of the following: “(1) An assessment of the accuracy of the applicant’s assertions about conditions in his or her country of nationality . . . and his . . . situation;” (2) whether similarly situated persons are persecuted in his home country; or (3) other relevant information. 8 C.F.R. §§ 208.11(b), 1208.11(b) (2007).

submitted and admissible by regulation. It provides relevant information about country conditions specific to common issues raised in asylum applications from that country. However, portions of the profiles and now the DOS cables from U.S. consular posts are objectionable because they invite misunderstanding and prejudice.

Due process also requires an individualized determination of the application.²⁰² While DOS Asylum Profiles and cables are treated in some ways as an expert opinion, they are not evaluations of an individual asylum application based on a review of his or her application and supporting documents. Rather, they provide a general profile of asylum claims from that country. The regulations authorize immigration judges to request comments from the DOS regarding individual cases.²⁰³ This is rarely done, but it could be.

An immigration judge's skepticism alone does not support an adverse credibility determination, where the applicant's testimony is consistent.²⁰⁴ On appeal, an adverse credibility finding must be supported by substantial evidence and specific, cogent reasons.²⁰⁵ Where the applicant submits documents, the immigration judge may require some form of authentication as indicia of reliability. The applicant must have the opportunity to fulfill authentication requests and the opportunity to explain any failure to authenticate.²⁰⁶

In *Chen v. Gonzales*,²⁰⁷ the immigration judge explicitly found the asylum applicant lacked credibility, and implicitly found the documents submitted not credible. The Board of Immigration Appeals affirmed, and the Third Circuit denied the petition for review. Chen testified that in April of 2000, she was unwed and pregnant in violation of the population control policies.²⁰⁸ After her doctor's visit, she hid at her aunt's house because she thought the government would not allow her to have the baby.²⁰⁹ On April 20, 2000, four "village cadres" came to her aunt's house and took her to a hospital.²¹⁰ At the hospital she resisted and begged the cadres to let her go, but they held her, slapped her, and called her shameless.²¹¹ Chen stated that she collapsed and was dragged into an

202. *Abdulai v. Ashcroft*, 239 F.3d 542, 549 (3d Cir. 2001).

203. 8 C.F.R. §§ 208.11(c), 1208.11(c) (2007).

204. *Dong v. Gonzales*, 421 F.3d 573, 577 (7th Cir. 2005).

205. *Ahmad v. INS*, 163 F.3d 457, 461 (7th Cir. 1999).

206. *Abdulai*, 239 F.3d at 554.

207. *Chen v. Gonzales*, 434 F.3d 212, 218-19 (3d Cir. 2005).

208. *Id.* She and her boyfriend could not marry because he was under the minimum age of consent, twenty-two years old. *Id.* at 217.

209. *Id.* at 217.

210. *Id.*

211. *Chen*, 434 F.3d at 217.

operating room where doctors performed the abortion.²¹²

The immigration judge found Chen not credible even though the Country Report recognized that local population control authorities, pressured to meet population targets, still resorted to forced abortion even though it was not the official policy in China.²¹³ The immigration judge's adverse credibility determination erroneously confused the substantial evidence standard with credibility determinations, because the judge based the adverse credibility determination on a failure of proof and believed that certain documents could and should have been obtained.²¹⁴ The Third Circuit decision states, "[w]hile there are some discrepancies in her testimony, it cannot be said that his credibility determination was based 'only [on] an analysis of the internal consistency and plausibility of [Chen's] claim,' or from her demeanor or tone in testifying."²¹⁵

The strong language used in the immigration judge's denial of asylum combined with references to fraud problems in Fujian demonstrate the strong influence that reported fraud rates can have on judges. The immigration judge noted a "major problem" with document fraud in the Fujian Province, as well as the proportion of "fake documents" of those referred for investigation even though the applicant only submitted a letter from her father and an abortion certificate into the record.²¹⁶ The immigration judge, in effect, discredited the abortion certificate because it was not authenticated, while also citing the fraud report in the Asylum Profile. In addition, the immigration judge concluded that the applicant deliberately lied to gain asylum. The Third Circuit determined that the immigration judge "impermissibly blurred the line between the credibility of a claimant and the adequacy of proof to support the claim of asylum," but it still denied the petition for review

212. *Id.*

213. *Id.* at 218-19.

214. *Id.* at 221. Chen's corroboration included an unsworn letter from her father, from China, confirming that village cadres seized Chen from her aunt's house, took her to the hospital, and forced her to have an abortion. *Id.* at 218. The father's information appeared to be based on talks with Chen, not from witnessing the incident. The immigration judge noted that the following (among other things) should have been provided, but were not:

- testimony about how the cousin obtained the abortion certificate;
- authentication of the abortion certificate;
- explanation for Chen's failure to authenticate it;
- evidence that the young boyfriend existed;
- documentation of her residency at the factory dorm; and
- medical records of the doctor who diagnosed her pregnancy.

Id. at 217-19.

215. *Id.* at 219 (quoting *Abdulai*, 239 F.3d at 551 n.6).

216. *Chen*, 434 F.3d at 221.

based on the applicant's lack of corroborating evidence.²¹⁷

2. Improper Use of Fraud Rates to Attack the Credibility of Documents

Consider the same hypothetical criminal case described above. This time the defendant's mother is providing an alibi. The prosecutor attempts to submit a statistical report citing the high rate (sixty percent) of perjury by mothers trying to keep their children out of jail. The prosecutor submits the report in an attempt to discredit the witness, and make the jury think that the mother is unreliable because she is protecting the defendant, her own son or daughter. Again, the report would be inadmissible for lack of relevance, lack of probative value, and high prejudicial impact.²¹⁸

Here, reports estimating fraudulent document rates are routinely submitted and quoted widely. The issue is difficult; fraud is a serious concern. However, in asylum cases the prejudicial impact of document fraud estimates exceeds the probative value. In the hypothetical criminal case, the prosecution attempts to use the study to help discredit the defendant's alibi because she is the defendant's mother, and the study shows that mothers will perjure themselves to protect their children. The study is neither probative as to whether this particular mother is lying this particular time, nor whether she can really attest to the whereabouts of the defendant at the time of the offense. Similarly, it is not probative in the asylum context that others of the same nationality, applying for the same benefit and providing similar required documents, have submitted fraudulent documents. The credibility determinations of witnesses and documents must be based on specific, cogent reasons related to the document or immediate circumstances surrounding the document, not solely based on a high fraud rate. "Due process demands that an immigration judge actually consider the evidence and argument that a party presents."²¹⁹ A violation of procedural due process need only have the "*potential* for affecting the outcome of [the] deportation proceedings."²²⁰

In *Chen v. Gonzales*, the immigration judge implicitly found that the

217. *Id.* The Third Circuit does not describe the applicant's opportunity to explain any details about the circumstances under which she received the abortion certificate, nor why she did not authenticate the certificate.

218. FED. R. EVID. 401, 402, 403.

219. *Cham v. Attorney General of the U.S.*, 445 F.3d 683, 693 (3d Cir. 2006) (citation omitted). *See also* *Chen v. Gonzales*, 417 F.3d 268, 272-73 (2d Cir. 2005) (following *Abdulai*, and surveying reversals of the Board of Immigration Appeals by other circuits for failure to properly consider relevant evidence).

220. *Cham*, 445 F.3d at 694 (emphasis added).

“abortion certificate” lacked credibility based on fraud concerns and lack of authentication.²²¹ The Country Report points out that there is a problem with false documents and that of 109 documents referred for investigation, 66 were determined to be incorrect or fake.²²² The existence of corruption and fraud in the system does not relieve the fact finder of the duty to inquire about discrepancies that may arise in the individual case at bar. In *Xu v. U.S. Department of Justice*,²²³ “[t]he Immigration Judge [explicitly] disregarded documents because they were unauthenticated and because the State Department has reported that many documents from Xu’s region of China are subject to ‘widespread fabrication and fraud.’”²²⁴ The petitioner bears the burden of proving authenticity.²²⁵ In *Chen*, there may have been legitimate reasons to doubt the authenticity of the abortion certificate, but it is unclear whether the immigration judge’s questions gave Chen an adequate opportunity to provide that reason and why she did not have the certificate authenticated.²²⁶

Reports of a high incidence of fraud strongly influence the need for corroboration and authentication of documents. The immigration judge in your asylum case may expect documentary evidence of any period of detention, medical records for your doctor visit, identification documents, and political party membership card(s). An attempt to document your case can be made; however, it poses the risk of endangering family and friends in your home country. If you enlist your spouse’s help and have her look through your ransacked house for ID cards and medical records or to request duplicate identity documents from the government, you will still need to document as much as you can. Have your wife take photos of your house while it is still in disarray. Provide any evidence possible that the ransacked house was your home. Have your wife send any documents she discovers along

221. *Chen v. Gonzales* 434 F.3d 212, 218-19 n.6 (3d Cir. 2005) (lacking direct evidence of the abortion certificate’s authenticity and evidence explaining its issuance).

222. *Id.* at 219 n.9.

223. *Xu v. U.S. Dep’t of Justice*, 127 Fed. Appx. 553 (2d Cir. 2005) (unpublished).

224. *Id.* at 556.

225. See 8 C.F.R. § 208.13(a) (2007); *Zhang v. INS*, 386 F.3d 66, at 70-71 (2d Cir. 2004); *Qui v. Ashcroft*, 329 F.3d 140, 148 (2d Cir. 2003); 8 C.F.R. § 208.13(a) (2007); see also *Lin v. Ashcroft*, 371 F.3d 18, 22 (1st Cir. 2004) (finding reasonable the immigration judge’s refusal to credit unauthenticated documents from Southeast China, “[g]iven the undisputed government reports regarding ‘widespread fabrication and fraud.’”).

226. The Board of Immigration Appeals’ rule on corroboration in *In re S-M-J-*, now codified by the REAL ID Act, involves a three step analysis: (1) an identification of facts for which it is reasonable to expect corroboration; (2) the presence or absence of such corroboration in the record; and (3) the adequacy of applicant’s explanation for its absence (citing *Abdulai v. Ashcroft*, 239 F.3d 542, 554 (3d Cir. 2001)).

with a declaration of the events that she is aware of, including where and how she found the documents, what she recalls about any of the documents, dates of your imprisonment, and your political activities. She should document all of her efforts in detail to serve as evidence of your efforts. Still, even with these efforts, the immigration judge may demand evidence that all of these items came from your wife and proof that she really is your wife.

Credibility determinations must be made on an individualized basis. As in the hypothetical, the fact that others from your country have submitted fraudulent documents should have little or no bearing on whether any documents your wife finds and sends are authentic. Implicit and explicit use of the general fraud rates of documents to determine that any individual documents you submit are fraudulent would violate your due process right to an individualized credibility determination, and the determination must provide specific, cogent reasons.²²⁷

VI. Proposals to Prevent Fraud from Eroding Procedural Due Process and Asylum Protection

Well-planned anti-fraud measures implemented overseas and in the U.S. can preserve procedural fairness and uniformity, while ensuring refugee protection in the process.²²⁸ Refugees and immigration attorneys oppose fraud, just as the U.S. Consulate, immigration judges, Asylum Officers and others oppose fraud. Fraud undercuts political support for the whole asylum system and makes it more difficult for refugees to prove legitimate claims. However, anti-fraud measures must be implemented without interfering with the due process rights of asylum applicants.

Immigrants are unquestionably entitled to due process in removal proceedings without bias or prejudice under the Fifth Amendment.²²⁹ In adjudications, due process provides that an alien: (1) is entitled to fact-finding based on a record produced before the decision maker and disclosed to him or her; (2) must be allowed to argue on his or her own behalf; and (3) has the right to an individualized determination of his or her own interests.²³⁰

The Immigration Courts, entrusted to adjudicate asylum claims, must steadfastly and conscientiously adjudicate asylum claims without

227. *Lopez-Reyes v. INS*, 79 F.3d 908 (9th Cir. 1996). Immigration judges do not always indicate how much weight to give a document.

228. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (on the importance of procedural due process).

229. U.S. Const. amend. V. *See also Ahmed v. Gonzales*, 398 F.3d 722, 725 (6th Cir. 2005) (citing *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903)).

230. *Ahmed*, 398 F.3d at 725.

changing procedural standards. “[E]nsuring due process at a hearing before an immigration judge may be particularly important in immigration cases given such a high presumption of correctness on appeal.”²³¹ Consistent application of the correct standards of proof, authenticity and evidentiary standards, and other procedural rules ensures that refugee protection will not shrink in the face of anti-fraud measures.

The U.S. Supreme Court in *Cardoza-Fonseca* “did not elaborate the standard of proof more precisely, being of the view that a term like ‘well-founded fear’ is ambiguous to a point, and can only be given concrete meaning through a process of case-by-case adjudication. . . .”²³² Goodwin-Gill and McAdam note the difficulties of determining refugee status, including the difficulties in assessing the applicant’s credibility,²³³ as well as the importance of trustworthy country conditions information.²³⁴ Goodwin-Gill and McAdam further advise that “[a] comprehensive approach will contribute significantly to identifying refugee-related reasons for flight.”²³⁵ In the proposed steps below, the goal of protecting refugees by ensuring procedural due process remains intact by applying consistent evidentiary standards to information in the Asylum Profiles and DOS cables, as well as other reports, to ensure that the reports do not contain biased and unfairly prejudicial information as the federal government agencies combat fraud.

A. *Anti-fraud Measures to be Taken at U.S. Consulates Abroad Where the Presumption of Immigrant Intent Must be Overcome to Qualify for Most Nonimmigrant Visas and Due Process Rights are Weakest*

The DOS should stringently apply statutory restrictions on non-immigrant visa issuance. DOS cables themselves point out the high frequency of repeat applicants ultimately being issued restricted-single entry visas—evidence of intent to remain in the United States.²³⁶ Legally, this is sound policy because the law presumes that every visa applicant intends to immigrate, and most nonimmigrant visa applicants must overcome that presumption.²³⁷ Moreover, the applicant for asylum in the U.S. is entitled to greater procedural due process rights than an applicant for a nonimmigrant visa overseas.

DOS should strive to increase and share its knowledge about foreign

231. *Id.* at 725.

232. GOODWIN-GILL & MCADAM, *supra* note 14, at 58.

233. *Id.*

234. *Id.* at 545-46.

235. *Id.* at 546.

236. *See* Huddleston, *supra* note 141, at 4, 6; *see also* Marquardt, *supra* note 18, at 3, ¶ 8.

237. INA § 101(a)(14).

organizations, its processes for issuing documents, descriptions of the documents, particular number series to use as fraud indicators with greater accuracy and specificity. This information, published in the Asylum Profiles and in the DOS human rights reports may help asylum officers and immigration judges to identify fraudulent documents and fraudulent applications more easily.

B. Anti-Fraud Measures in the U.S. in the Asylum Office (Including Taking the Message Public)

Asylum officers should follow the recommendation of Consulate by incorporating a search of the Consular Consolidated Database into background checks as part of its standard procedures in asylum adjudications to identify inconsistencies before asylum is granted. This would potentially identify inconsistencies between the non-immigrant visa application and the asylum application, such as different family relationships, several stages earlier (before asylum is conferred either through the Asylum Office, or the Immigration Court). Identifying fraud early would prevent needless adjudication of asylee relative petitions, saving U.S. Citizenship and Immigration Services time and money. This would also benefit refugees because they would have the opportunity to explain any discrepancies at an earlier stage.

U.S. Citizenship and Immigration Services should include information and warnings about the use of fraudulent documents and the consequences of filing frivolous asylum applications. This information may be included on the U.S. Citizenship and Immigration Services and Immigration and Customs Enforcement websites. A concerted, highly public campaign against fraud may serve as a deterrent. In addition, U.S. Citizenship and Immigration Services may be able to partner with human rights organizations and refugee organizations to provide educational presentations to potential asylum seekers.

C. Measures in the Immigration Court to Preserve Procedural Due Process

Measures in the Immigration Court may be taken by immigration judges, Immigration and Customs Enforcement, as well as attorneys representing the asylum applicant.

1. Immigration Judges

Immigration judges are required to make individualized determinations of credibility and eligibility for asylum, without resorting to administrative notice of adjudicative facts, presuming fraud on the

basis of misleading data, and finding adverse credibility or reduced credibility on the basis of a high incidence of fraud. Immigration judges should consider respondent's objections to the evidence, considering principles underlying the FRE regarding relevance, character, experts, and statistical evidence, weighing the probative value against the prejudicial impact and considering whether admission of the evidence denies respondent his or her right to due process. Due process requires that immigration judges cease taking administrative notice of the entire contents of the Profiles and DOS cables because some of the information is not appropriate for administrative notice. Immigration judges should refrain from presuming fraud in applications and documents, and refrain from raising the standard of proof above the statutory, regulatory, and established standards.²³⁸

The Executive Office for Immigration Review should include training regarding the treatment of data and statistical evidence regarding fraud for both new and experienced immigration judges.²³⁹ The same guidance should be included in the Immigration Judge Benchbook or such other reference book now used by the Immigration Judges.

2. Immigration and Customs Enforcement Attorneys

Immigration and Customs Enforcement attorneys, like the Asylum Officers, should incorporate a search of the Consular Consolidated Database into background checks as part of its standard procedures to identify inconsistencies before asylum is granted. Even at the Immigration Court stage, this step facilitates early identification of fraudulent asylum applications and an early opportunity for the asylum applicant to explain inconsistencies.

3. Attorneys and Asylum Applicants

Counsel for asylum applicants in the Immigration Court should file written objections to the admission of the Asylum Profile and the DOS cables about fraud. The objections can be based on relevance, inadmissible character evidence, expert opinions provided beyond the scope of expertise without the opportunity to cross-examine the expert

238. The Board of Immigration Appeals and the Circuit Courts should evaluate credibility determinations that are based on high fraud rates rather than on the asylum applicant's demeanor and inconsistencies in the record to determine whether the immigration judge erroneously applied a higher standard of proof than the well-founded fear standard.

239. There is always the danger that even experienced immigration judges will make some of the mistakes described above, taking improper judicial notice, imposing a presumption of fraud, or making improper credibility determinations due to their experiences dealing with fraud in past cases.

(the author(s) of the Profiles and cables), and statistical evidence from which immigration judges may draw improper inferences.²⁴⁰ Oral objections should be made at the start of the hearing if the documents are only submitted on the day of the hearing. Counsel should argue the rationale behind FREs to attack the reliability of the evidence and to demonstrate the prejudicial impact of the fraud data and estimated fraud rates that ultimately violate the asylum applicant's due process rights. While oral objections at the beginning of the hearing will also create a record of the objection for appeal, written objections will be more thorough and will allow the immigration judge advance notice and time to review the objections.

Counsel should contact the U.S. Consulate to request a copy of the nonimmigrant visa application, if applicable, review the court's file, and request a copy of the file under the Freedom of Information Act²⁴¹ unless it will cause delay in the case. The applicant must be prepared to explain any conflicting information from prior applications. When the person entered on a visa, ask about the information provided to obtain the visa and explain that the information from the asylum application may be checked against the applicant's past visa applications and any other immigration applications.

It is the attorney's responsibility to educate their asylum applicant client about the process, including the potential for physical analysis of the document, authentication, investigation, background checks, comparison of the asylum application with previous immigration applications, and the consequences of fraud. Attorneys must probe their clients about how the client obtained certain documents, asking how, when, where, why and by whom the documents in question were acquired. Prior to the hearing, counsel must work with the applicant in order to adequately lay a foundation for documents during the hearing. Attorneys should make it a regular practice to establish the chain of custody wherever possible based on detailed interviews with the client and others, as necessary.

Attorneys should seek out experts on the conditions of the client's native country, forensics experts, and even lay people with particular knowledge or familiarity with the foreign documents, especially when the applicant is unwilling to assent to authentication under the regulations. Statements from those unavailable to testify will have the weight of affidavits if prepared and signed as unsworn declarations under

240. Written objections may only be filed if the documents are received in advance of the hearing.

241. 5 U.S.C. § 552 (providing the individual the right to request access to federal agency records or information).

28 U.S.C. § 1746 instead of merely letters. In addition, whenever it is feasible, the trial attorney should be offered the opportunity to depose a witness or to submit written interrogatories. The offer must be made in good faith; counsel for the asylum applicant and the unavailable witness must be willing to follow through, especially if the case is continued. Whenever possible, submit correspondence with the envelope or other proof of mailing and sender information.

Pro se asylum applicants should take the same measures as described above, however it is highly unlikely that a *pro se* applicant will have the means and ability to take those steps without representation by counsel. The complexities of the immigration laws, regulations, and procedures; linguistic and cultural differences; and costs of properly documenting and corroborating an asylum case, where most of the corroborating documents and witnesses reside in a foreign country, would be virtually insurmountable.

D. Investigation and Prosecution of Criminals

Immigration and Customs Enforcement and Customs and Border Protection should devote investigative and law enforcement resources to identify and prosecute criminals in the U.S. producing and providing fraudulent documents in immigration cases. They may offer other visa assistance under the INA to engage assistance in criminal prosecutions.²⁴² Any anti-fraud message disseminated by the Asylum Office must be targeted, and must be backed up by high profile enforcement and prosecution of visa consultants selling false documents and preparing fraudulent applications.

In addition, U.S. law enforcement should cooperate with police in China, Cameroon, and other “high fraud” countries to identify and prosecute people inside the sending country. There are significant challenges to engaging law enforcement in the sending country, such as corruption, U.S. law enforcement’s lack of knowledge of foreign law, and possible benefits to the sending country from successful immigration

242. See 8 U.S.C.A. § 1101(a)(15)(S) (2007). The S Visa is for non-citizens who have agreed to assist the U.S. government in investigations and criminal prosecutions leading to the arrest of individuals in connection with illegal or terrorist activities. To qualify for the S-5 Visa, the applicant must be in “possession of critical reliable information concerning a criminal organization or enterprise; is willing to supply or has supplied such information to Federal or State law enforcement authorities or a Federal or State court; and whose presence in the United States the Attorney General determines is essential to the success of an authorized criminal investigation or successful prosecution of an individual involved in the criminal organization or enterprise.” *Id.* S Visa holders may adjust status to permanent resident under INA § 245(j) if the non-citizen supplied information that “substantially contributed” to the successful investigation or prosecution of a crime. 8 U.S.C.A. § 1255(i) (2006).

of its citizens in the United States from money they earn and send home. However, fraud prevention merits attention and significant effort to preserve the asylum system and to preserve the due process of asylum seekers.

E. Department of State and USCIS

The DOS could undertake a proper statistical assessment of document fraud frequency and the frequency of asylum claims by country. This statistical evidence would help DOS, USCIS, and the Immigration Court to assess more accurately the threat and frequency of fraud in the asylum system. Unless the information about fraud becomes much more detailed, it will not necessarily improve DOS, USCIS, and immigration judges' ability to determine fraud in each individual case.

VII. Conclusion

Just as Blackstone's ratio represents a guiding principle for criminal procedure, the principle of protecting refugees should remain central and guide the administrative procedures in asylum processing. Reliance by immigration judges on general reports of fraud denies the asylum applicant an individualized determination of his or her asylum eligibility, thereby violating the applicant's due process rights. Even in the face of fraud, bias and prejudice against all applicants of a particular nationality or region, based on misleading data cannot prevail against due process protections provided by the U.S. Constitution. Prevention and early detection of fraud must be the goals in order to protect the integrity of the asylum system. In the Immigration Court, the immigration judge bears a responsibility to apply the law as it stands to provide safe haven for those who meet the statutory and regulatory requirements. In addition, investigation and enforcement of visa consultants who prepare and distribute false documents and fraudulent asylum applications must also be pursued.

In your asylum case, you ultimately did ask your wife to return to the house in your home country to find any of your identity documents and any possible evidence of your involvement with the opposition political party, detention, and persecution. She found and sent you your birth certificate, marriage certificate, and the political party identification card. She also sent a letter confirming your political involvement with the opposition party, the two times you were detained, that she took you to the doctor, and that your house had been ransacked. Your uncle provided a letter confirming his knowledge of your political activities.

The veracity of your claim, the authenticity of your documents, and the country conditions will be the key factors in your case. You will not

agree to government authentication under 8 C.F.R. § 1287.6 because you do not want to endanger your wife and uncle any further. Your case will largely depend upon your own ability to provide detailed and consistent testimony not only about the persecution that you suffered and that you continue to fear, but also details about how and when you originally obtained the documents and then how you got the documents from your home country to the United States. In addition, the outcome will depend on how the immigration judge treats the information about fraudulent asylum claims and fraudulent documents from your country. Due process demands that the immigration judge evaluate your case according to its own merits, rather than on the failings of others under the well-founded fear standard of proof provided by law.

