

A 'credible' response to persons fleeing armed conflict.

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In this short contribution I will address two key issues in relation to the plight of those who are fleeing armed conflict: firstly and more briefly, the UK's reluctance to participate in the UN's resettlement scheme for Syrian refugees; and secondly the role of 'credibility' within the process of determining eligibility for international protection.

These comments were originally compiled to stimulate discussion and to frame two further, longer, papers also presented at the University of Luxemburg in October 2014 by Blanche Tax, of the UNHCR; and by Serge Bodart, former President of the Council for Aliens Law Litigation (in Belgium). Those contributions appear elsewhere in this volume. My contribution has been updated modestly to reflect new guidance issued to asylum caseworkers in the UK, in January 2015; and the outcome of the UK general election in May 2015.

The Resettlement of Syrian Refugees

The UK's attempts to demonstrate the equivalence of humanitarian relief in the region around Syria, with refugee and subsidiary protection in the UK, are profoundly concerning. It is not that the UK is consciously failing to comply with its international and EU obligations, but rather that by even beginning to make the argument, the impression is given that international protection obligations upon the UK can be offset by foreign policy. As I have remarked in the media, the UK's position is dangerous because it gives the impression that rich states can buy their way out of giving protection to refugees.¹

The root of the problem is that the UK has declined to participate in the UNHCR's scheme for resettling vulnerable Syrian refugees. In January 2014, UK Ministers were reported as stressing instead that the UK had given £500 million in aid, and insisted that, 'it [was] better to help the hundreds of thousands of refugees displaced around Syria's borders.'² The BBC's James Landale reported that the UK government was 'reluctant to admit any Syrian refugees to the UK, preferring to focus its humanitarian aid on refugees in the region'.³

The humanitarian aid is both welcome and generous: but it is not a zero-sum game: it does not wipe away protection needs. On the 27th January 2014 these concerns were raised very vocally in the House of Commons, with MPs from all the political parties criticising the government for its lack of participation in the

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¹ See, Jamie Merrill, 'Labour fury at Government decision not to send minister to Syria summit' *Independent* (London, 4 December 2014) available at <http://www.independent.co.uk/news/uk/politics/labour-fury-at-government-decision-not-to-send-minister-to-syria-summit-9904433.html> accessed 11 June 2015.

² BBC, 'Syria: UK must accept refugees as "matter of humanity"' (*BBC News*, 20 January 2014) <http://www.bbc.co.uk/news/uk-politics-25816108> accessed 11 June 2015.

³ BBC, 'UK to act with "urgency" over Syrian refugees says PM' (*BBC News*, 29 January 2014) <http://www.bbc.co.uk/news/uk-politics-25934659> accessed 11 June 2015.

UNHCR scheme.⁴ Two days later, the Prime Minister, David Cameron, announced that the UK would be acting with 'the greatest urgency' to offer 'the most needy people' a home in the UK,⁵ and Home Secretary Theresa May announced the creation of a 'vulnerable person relocation scheme'.⁶ It was, she clarified, 'in the spirit of the UNHCR programme, but [...] not technically part of it.'⁷ The 'VPR' scheme, as it is now known, would operate alongside two other resettlement schemes already in existence, as well as the regular mechanisms in place to determine eligibility for international protection.⁸

It was then not until the 25th March 2014 that the Immigration and Security Minister James Brokenshire announced that the first group of Syrians had arrived under the scheme.⁹ At the same time, the minister said that he had agreed a ministerial authorisation, 'to allow differentiation in favour of Syrian nationals *whom we want to bring to the UK* under the VPR scheme.'

The initiation of this policy was a very significant step. However, I remain struck by the language in the Minister's statement that it is about people '*whom we want to bring to the UK*', because would seem to be based on the UK's wants rather than the refugees' needs; and it would appear that we 'want' very few.

By the 24th June 2014, a parliamentary question elicited the confirmation that just 50 people had been resettled in the UK under the scheme.¹⁰ According to the latest figures, published in March 2015, a total of 187 people have been relocated under the VPR scheme since it began.¹¹

To put this in perspective, as of June 2015 there are nearly 1.2 million UN-refugees in Lebanon,¹² making up a quarter of that country's population.¹³ When this paper was first delivered, the available data showed that there were around

⁴ Ibid.

⁵ HC Deb 29 Jan 2014, col 851.

⁶ HC Deb 29 Jan 2014, col 863.

⁷ HC Deb 29 Jan 2014, col 866.

⁸ HC Deb 29 Jan 2014, col 864.

⁹ Home Office and James Brokenshire, Written statement to Parliament (25 March 2015) <<https://www.gov.uk/government/speeches/vulnerable-persons-relocation-scheme-for-syrian-nationals>> accessed 11 June 2015.

¹⁰ UK Parliament, 'Asylum: Syria: Written question – 200675' (21 March 2015) <<http://www.parliament.uk/written-questions-answers-statements/written-question/commons/2014-06-17/200675>> accessed 11 June 2015.

¹¹ Home Office, 'Immigration Statistics, January to March 2015', Section 8.2 (21 May 2015) <<https://www.gov.uk/government/publications/immigration-statistics-january-to-march-2015/immigration-statistics-january-to-march-2015>> accessed 11 June 2015.

¹² UNHCR, 'Syria Regional Refugee Response: Inter-agency Information Sharing Portal' <<http://data.unhcr.org/syrianrefugees/regional.php>> accessed 11 June 2015.

¹³ Harriet Sherwood, 'UK has only let in 24 Syrian refugees under relocation scheme for conflict victims', *Guardian* (London, 20 June 2014) available at <<http://www.theguardian.com/world/2014/jun/20/uk-24-syrians-vulnerable-persons-relocation-scheme>> accessed 11 June 2015.

760,000 refugees in Turkey¹⁴ - this has now risen to a staggering 1.7 million,¹⁵ making Turkey the world's biggest refugee hosting country.¹⁶

The lingering impression therefore is still that the UK is reluctant to do more than comply minimally with its international obligations, and at the same time to leave hanging the implication that aid is a functional equivalent to protection. It would seem that the approach of the UK has not changed as a result of the 2015 general election, after which David Cameron remained Prime Minister, but this time with a majority in the House of Commons (the previous government was a coalition with the Liberal Democrat party). Theresa May has continued as Home Secretary, and on 13th May 2015 made the following comments in relation to the UK's refusal to participate in new EU measures to alleviate the fatal situation in the Mediterranean,

People talk about refugees, but actually if you look at those crossing the central Mediterranean, the largest number of people are those from countries such as Nigeria, Somalia and Eritrea - these are economic migrants and people who have paid criminal gangs to transport them across from Africa in non-safe boats who then have to be rescued.¹⁷

There is a crucial point missing from this familiar and dispiriting attempt to blur forced and voluntary migration: by April 2015, the single largest group attempting to cross the Mediterranean in 2015, comprising 31%, were people from Syria.¹⁸ Eritrea was second at 18%, but Theresa May's first two examples, Nigeria and Somalia, comprised only 4% and 3% respectively.¹⁹

So, very few people have been resettled to the UK. Many people attempting to cross the Mediterranean sea to Europe have died en route, including more than 1750 from January to April 2015 alone.²⁰ However, if someone fleeing Syria does make it into the EU, then they may attempt to make a claim for international protection under the Common European Asylum System.²¹ However, as we shall

¹⁴ Ibid.

¹⁵ UNHCR (n12).

¹⁶ UNHCR, 'Refugees endure worsening conditions as Syria's conflict enters 5th year' (12 March 2015) <<http://www.unhcr.org/5501506a6.html>> accessed 12 June 2015.

¹⁷ These comments were made on BBC Radio 4, and were widely reported elsewhere including *inter alia* Stephanie Linning, 'Send home asylum seekers rescued from Mediterranean, says Theresa May as she insists EU plan for migrant quotas would only encourage them', *Mail Online* (13 May 2015) <<http://www.dailymail.co.uk/news/article-3079303/Asylum-seekers-rescued-Med-sent-home.html>> accessed 12 June 2015.

¹⁸ Raziye Akkoc et al, 'Mediterranean migrant death toll '30 times higher than last year': as it happened', *Telegraph* (21 April 2015) <<http://www.telegraph.co.uk/news/worldnews/europe/italy/11548995/Mediterranean-migrant-crisis-hits-Italy-as-EU-ministers-meet-live.html>> accessed 11 June 2015. This point is also supported by data from Frontex, which has also made it clear that the Syrians and Eritreans were the top two nationalities attempting to cross the Mediterranean. See e.g. Frontex, 'Central Mediterranean Route' <<http://frontex.europa.eu/trends-and-routes/central-mediterranean-route/>> accessed 12 June 2015.

¹⁹ Akkoc et al (n18).

²⁰ Akkoc et al (n18).

²¹ Basic information can be found at European Commission, 'Common European Asylum System' <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm> accessed 12 June 2015. See also Olga Ferguson Sidorenko, *The Common European Asylum System* -

see in the next section, it can be very difficult indeed to persuade decision makers that the need for international protection is 'credible'. In the second part of this paper I shall examine the idea of credibility, in particular by reference to recent developments in the UK.

Credibility²²

The Common European Asylum system offers subsidiary protection for certain people who are fleeing from situations of international or internal armed conflict.²³ This is particularly important for those who are fleeing the conflict in Syria.

According to Article 2(e) of the EU Qualification Directive (EU QD) there must be 'substantial grounds' for believing that the person would face a 'real risk' of suffering 'serious harm'.²⁴ This is an important legal test, and it sets a clear (low) standard of proof. However, at least in the UK, there is a tendency to consider the 'believability' of claimed material facts by reference to 'credibility' before, and indeed almost to the exclusion of, consideration of real risk. The phenomenon also arises in relation to the determination of refugee status. There are two very real problems with this approach, and sadly the one amplifies the other.

The first is that the quality of credibility assessments is very poor (across Europe). The second is that the precise legal role of credibility is frequently misunderstood, leading to an impressionistic resolution of the case without proper consideration of the risk element. The whole case then centres upon credibility and, in particular, the 'general credibility' of the applicant. The next section will examine the quality of credibility assessments, and then we shall examine the legal nature of 'credibility' and its relationship to the idea of the 'benefit of the doubt' in applications for international protection.

Quality of credibility assessments

Background, Current State of Affairs, Future Direction (TMC Asser 2007); Samantha Velluti, *Reforming the Common European Asylum System — Legislative developments and judicial activism of the European Courts* (Springer 2013).

²² These comments supplement and develop those made in J A Sweeney, 'Credibility, proof and refugee law' (2009) 21(4) *International Journal of Refugee Law* 700-726 and J A Sweeney, 'The "lure" of facts in asylum appeals: critiquing the practice of judges' in Steven Smith (ed.) *Applying Theory to Policy and Practice: Issues for Critical Reflection* (Ashgate 2007), 19-35.

²³ See Art 15 Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (EU Qualification Directive). Note that the UK has not accepted the recast Qualification Directive, and therefore remains bound by Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

²⁴ On the interpretation of this see Case C-465/07 *Elgafaji v Staatssecretaris van Justitie* [2009] 2 CMLR 45.

The quality of decision-making in the UK is deeply problematic, and has been for some time now.²⁵ According to a 2013 report of the Home Affairs Select Committee (which reviewed the whole of the RSD process in the UK), in 2012 30% of appeals against initial decisions were allowed.²⁶ The latest quarterly figures released by the Home Office present a similar picture: in the year to March 2015, 28% of appeals were allowed.²⁷ If at least a quarter of initial decisions are regularly wrongly decided, it suggests certain methodological weaknesses. We must also take into account that the appeals process in the UK is woefully truncated, and so many potentially flawed decisions are never challenged. Indeed, in June 2015 the UK's High Court found that the especially atrophied appeals process for 'detained fast-track' applicants, which had been in operation for ten years, was unlawful due to the lack of procedural safeguards.²⁸

Moreover, the picture is not the same for all applicants or all regions. The Home Affairs Select Committee found that the rate of allowed appeals was greater for women than men.²⁹ And returning to the main business of today, Syria, the 2013 Home Affairs Select Committee report found that the rate of allowed appeals for applicants from Syria was a staggering 52%.³⁰

The issue for us is that within these successful appeals, the role of credibility has been central. In 2013 Amnesty International and Still Human Still Here published a joint report aptly entitled, 'A Question of Credibility: Why so many initial asylum decisions are overturned on appeal in the UK'.³¹ In 42 of the 50 randomly selected cases that the report examined, the Immigration Judge hearing the appeal indicated that, 'the primary reason for an initial decision being overturned was that the [UK Border Agency] case owner had wrongly made a negative assessment of the applicant's credibility.'³²

The 2013 Home Affairs Select Committee report devoted a whole section to what it, amongst others, has termed a 'culture of disbelief' in decision makers.³³ At the time this paper was originally delivered, this culture was both manifested in and supported by the guidance given to decision makers in the UK³⁴ (new guidance

²⁵ See Sweeney, 'Credibility, proof, and refugee Law' (n22) at p702 *et seq* for discussion of earlier materials.

²⁶ House of Commons Home Affairs Committee, *Asylum* (2013-14) HC 71 (incorporating (2012-13) HC 1072)

²⁷ Home Office, 'Immigration Statistics, January to March 2015' (n 11).

²⁸ *Detention Action v First-Tier Tribunal (Immigration and Asylum Chamber)* [2015] EWHC 1689 (Admin).

²⁹ Home Affairs Committee (n26), 12.

³⁰ *Ibid.*

³¹ Jan Shaw and Mike Kay et al., *A Question of Credibility: Why so many initial asylum decisions are overturned on appeal in the UK* (Amnesty International / Still Human Still Here 2013) <http://www.amnesty.org.uk/sites/default/files/a_question_of_credibility_final_0.pdf> accessed 12 June 2015.

³² *Ibid.*, 4 & 12.

³³ Home Affairs Committee (n26), 11 *et seq*

³⁴ Home Office, *Considering Asylum Claims and Assessing Credibility*, (8th edn, Home Office 2012)

was issued in January 2015, and is discussed further below).³⁵ The previous guidance was notable in the way that it devoted just one page to, 'Recording the consideration of a claim where asylum is to be granted', whereas Pages 44 to 59 (some 15 pages) dealt with reasons for refusal, including stock text to be used. It is a significant and welcome development that this specious menu of refusal reasons has been excised from the guidance.

This problem with credibility is not confined to the UK. The 2013 UNCHR report, 'Beyond Proof: credibility in the EU Asylum systems' brought together a range of sources from within and beyond the EU, which indicated that, 'a significant proportion of decisions to deny status are based wholly or partially on adverse credibility findings.'³⁶

Carrying out credibility assessments: Academic input and the UK Guidance

Having determined that there really is an issue in relation to credibility, we will now turn to the practice of carrying out an assessment of credibility. From the outset, we shall see that whilst there is some overlap in the different available guidance on carrying out these assessments, there is always ambiguity about their significance on the outcome of the case.

Hathaway and Foster's second edition of Hathaway's influential book on the 'The Law of Refugee Status' approaches the issue of credibility as one of examining the unsupported testimony of the applicant, noting the 'clear salience' of an applicant's own evidence.³⁷ Corroboration and wider issues of proof of an (objectively)³⁸ well-founded fear are dealt with elsewhere. Thus, Hathaway and Foster's guidance on carrying out credibility assessments is not about the strength of the case as a whole, but rather the very specific (albeit common) circumstance where the application for recognition hinges on the applicant's own testimony.

In such circumstances, Hathaway and Foster have identified four commonly used techniques to determine credibility: checking the plausibility of the claimed circumstances; checking the applicant's knowledge of relevant facts (such as the tenets of a particular persecuted faith); gauging the demeanour of the applicant; and checking the consistency of the applicant's statements.³⁹ However, they go on to demonstrate problems within each technique and advise that, '[T]he tools available to assess the credibility of an applicant's testimony are each highly

³⁵ Home Office, *Assessing credibility and refugee status*, (9th edn, Home Office 2015). NB whilst the name of this document has changed, the 'Change record' at the end of the document sees this as a revised and re-named 9th edition of the document indicated in the previous footnote.

³⁶ UNHCR, *Beyond Proof: credibility in the EU Asylum systems* (UNHCR 2013), 29.

³⁷ James C Hathaway and Michelle Foster, *The Law of Refugee Status* (CUP 2014), 138.

³⁸ Hathaway and Foster continue to be critical of the bipartite division of fear into subjective fear and objective risk, stating that 'The concept of well-founded fear is [...] inherently objective' (ibid, 92). This is in stark contrast to the UNHCR Handbook at para. 37 *et seq*, which characterizes the fear as having both objective and subjective elements (UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN doc. HCR/IP/4/Eng/REV.1, 2nd edn., Geneva, 1992).

³⁹ Hathaway and Foster (n 37), 139.

flawed.⁴⁰ In the light of these weaknesses the guidance and training materials published via the Hungarian Helsinki Committee's CREDO project are particularly welcome.⁴¹

Whilst it is fair to say that Hathaway's work in this field has been seminal, and that the new edition by Hathaway and Foster will likely continue that trend, the credibility tools that they have identified are not fully reflected in UK practice. At the time that this paper was first delivered, the Home Office credibility guidance to decision makers specified that they should consider:

- Internal credibility, in relation to the applicant's own evidence, and including the level of detail and impact of any inconsistencies;⁴²
- External credibility, in the sense of checking whether the 'material facts' of the claim are consistent with 'objective evidence';⁴³
- The benefit of the doubt where, *inter alia* the 'general credibility' of the applicant is established⁴⁴ and where there are no statutory presumptions against credibility;⁴⁵
- Plausibility, but with a prior warning against speculation;
- Documentary evidence;
- Medical evidence.

To some degree this advice (which in the above list is paraphrased) followed earlier UK guidance,⁴⁶ which itself seemed to replicate three categories of test that Amanda Weston had used to describe immigration Adjudicators' (now Immigration Judges) practice in her influential analysis published in 1998;⁴⁷ namely internal credibility, external credibility, and plausibility. However the advice summarised above clearly conflates credibility in its narrow sense (pertaining to the unsupported statements by the applicant) with wider issues on corroboration and proof (including the consideration of documentary and medical evidence). Indeed in relation to internally credible but unsupported statements, the guidance gave the troubling advice that, 'Facts which are internally credible but lack any external evidence to confirm them are deemed to be 'unsubstantiated' or 'uncertain' or 'doubtful'.⁴⁸ It is a relief that this sentence has been excised from the current guidance.

⁴⁰ Hathaway and Foster (n 37), 148.

⁴¹ Details can be found at < <http://helsinki.hu/en/credo---improving-credibility-assessment-in-eu-asylum-procedures>> accessed 15 June 2015. Note also the 2015 second volume of the CREDO training manual available at < <http://helsinki.hu/en/hhc-multidisciplinary-manual-on-credibility-assessment---second-volume>> accessed 15 June 2015.

⁴² Home Office guidance 8th edn. (n34), 13.

⁴³ Home Office guidance 8th edn. (n34), 14.

⁴⁴ By reference to Immigration Rule 339L.

⁴⁵ Such as specified in Section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004

⁴⁶ This was the guidance analysed in detail in Sweeney, 'Credibility, proof, and refugee Law' (n22).

⁴⁷ A Weston "A witness of truth" – credibility findings in asylum appeals' (1998) 12 *Immigration and Nationality Law and Practice* 87, 88.

⁴⁸ Home Office guidance 8th edn. (n34), 16 (emphasis added).

As mentioned above, the current guidance was published in January 2015, and in many respects it is an improvement. It is more coherent, more straightforwardly presented, and contains much useful guidance on making structured assessments of an applicant's claim for international protection. However it makes no reference to the CREDO materials, and still presents credibility as an issue of proof, stating that, 'Once the material facts of the case have been identified, it is then necessary to assess their credibility against the correct standard of proof.'⁴⁹ Indeed the main guidance on credibility is given under the faintly (oxy)moronic heading, 'Assessing credibility: the low standard of proof'.

The current guidance continues by stating that, 'keeping the relatively low standard of proof in mind, the claimant's statements and *other evidence* about the facts being established *can be accepted* if they are:

- of sufficient detail and specificity
- internally consistent and coherent (to a reasonable degree)
- consistent with specific and general [country of origin information]
- consistent with other evidence (to a reasonable degree)
- plausible' [emphasis added].

This, again, seems to combine the question of proof of all material facts (i.e. whether the statements *and other evidence* are 'accepted') with the narrower issue of identifying common techniques to assess the credibility of unsupported statements.

Before we return to the hotly contested relationship between proof, credibility, and also the 'benefit of the doubt' principle, I would like briefly to reiterate my observations about the notion of plausibility.

'Objective' evidence, plausibility and the 'reasonable persecutor'

There is a tendency to see information provided by the state as presumptively correct, whereas in relation to the testimony of the applicant there is evidence that there is distrust of the applicant's testimony. As to the latter, and as Hathaway and Foster have also noted,⁵⁰ Lord Walker in the UK Supreme Court recently stated that, '[the applicant's] evidence may have to be treated with caution because of his strong personal interest in the outcome of his claim.'⁵¹

As to the former, the information provided by the state is often referred to as 'Objective' evidence, reinforcing its presumptive claim to authenticity. This exposes complex power dynamics, which I have noted previously,⁵² and which is discussed further in a 2010 report of the Immigration Advisory Service (a

⁴⁹ Home Office guidance 9th edn. (n35), 11.

⁵⁰ Hathaway and Foster (n37), 138.

⁵¹ *HJ (Iran)* [2010] UKSC 31, [88], per Lord Walker. To be fair, that case is a hugely significant one in dismantling the suggestion that gay people's fear of persecution can be negated by behaving 'discreetly'. Nevertheless, Lord Walker's comments unfortunate in this context.

⁵² Sweeney (2007) n22.

charity; hereafter IAS).⁵³ In their report, ‘The Refugee Roulette: The role of country information in refugee status determination’,⁵⁴ the IAS highlighted the creation and preservation of a ‘hierarchy of knowledge’ within the RSD process, and echoed my own concerns.⁵⁵

The hierarchical superiority of ‘objective’ country of origin information is particularly troubling in the light of, for example, the observations of John Vine, the UK’s then Chief Inspector of Borders and Immigration, in 2011, that in one in six cases examined, country of origin information was used selectively.⁵⁶ A further one in eight reasons for refusal letters contained, ‘country information which was, at best, tangential to the issues relevant to the asylum claim.’⁵⁷ Significantly, the report highlighted the risk that where no information relevant to the precise application for international protection was included in the country of origin information, case owners might assume, ‘that an applicant’s evidence was not credible.’⁵⁸ It is notable that these concerns about the use of COI information were made some time *after* the *NA* case⁵⁹ in which by finding a violation of Article 3 ECHR the ECtHR had come to the opposite conclusion about a particular applicant’s risk on return, in a case where the UK had apparently put much greater weight on its own sources than those supplied by UNHCR.⁶⁰

If the state’s own evidence may be treated with some reverence by decision makers, the same cannot be said for the applicant’s own testimony. Nowhere is this clearer than in attempts to check for the ‘plausibility’ of the account given. In their examination of credibility Hathaway and Foster have called for ‘real humility’ in testing for plausibility.⁶¹

Such humility is certainly needed, with the UK Home Affairs Select Committee echoing the concerns of UNHCR that in the UK caseworkers frequently use speculative arguments to undermine credibility.⁶² Quite possibly the worst form of speculation is what might be termed the invocation of the ‘reasonable persecutor’ standard. That is to say, decision makers seem prone to judging certain asylum applicants’ escape according to the ruthless efficiency expected of

⁵³ Note that the Immigration Advisory Service (registered charity 1033192) went into administration in 2012, and a private company giving immigration advice now trades under the same name. See the records of the UK’s Charity Commission available at <<http://apps.charitycommission.gov.uk/Showcharity/RegisterOfCharities/RemovedCharityMain.aspx?RegisteredCharityNumber=1033192&SubsidiaryNumber=0>> accessed 15 June 2015.

⁵⁴ Immigration Advisory Service (IAS), *The Refugee Roulette: The Role of Country Information in Refugee Status Determination* (IAS 2010) <<http://www.refworld.org/docid/4b62a6182.html>> accessed 15 June 2015.

⁵⁵ *Ibid.*, 96.

⁵⁶ John Vine, the Independent Chief Inspector of Borders and Immigration, *The use of country of origin information in deciding asylum applications: A thematic inspection* (ICI UKBA 2011) <<http://icinspector.independent.gov.uk/wp-content/uploads/2011/02/Use-of-country-of-origin-information-in-deciding-asylum-applications.pdf>> accessed 15 June 2015, 3.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *NA v UK* App no 25904/07 (ECHR, 17 July 2008); [2008] ECHR 616.

⁶⁰ See the applicant’s arguments *ibid.*, [99].

⁶¹ Hathaway and Foster (n37), 140.

⁶² Home Affairs Committee (n26), 13.

the 'reasonable' persecutor. This has several consequences. One might argue it amounts to saying that the applicant is disbelieved because they survived. Or it might appear as if the decision maker is hypothesising that if *they* had been in the shoes of the persecutor, *they* could have done a 'better' job of the persecution.

There is some evidence that the UK's Upper Tribunal has accepted the existence of this phenomenon – and that such reasoning is unlawful. In the case of *IA v Secretary of State for the Home Department*⁶³ the applicant was an educated, single, Iraqi Sunni with three children, who had worked in Iraq as an architect and senior administrator with an international NGO. Both her car and home had been targeted with gunfire (without injury); and the National Guard had aggressively questioned the children about the absence of their father.

In an initial appeal the First Tier Immigration Judge, Judge Mensah, had said that it made 'no sense' for the National Guard to question the children if they already knew the applicant worked for an NGO.⁶⁴ According to the Upper Tribunal, in relation to the incidents of gunfire, Judge Mensah had found that, 'If they wanted to persecute her because they believed she was working for a foreign company they could have simply killed her or kidnapped her.'⁶⁵

At the Upper Tribunal it was successfully argued⁶⁶ that, *inter alia*, Judge Mensah, 'had unlawfully substituted her own view of what a reasonable persecutor would do at a number of points in the determination.'⁶⁷ In this case the decision of the First-tier tribunal judge was set aside, and the Upper Tribunal remade the decision, allowing the appeal on asylum grounds.⁶⁸ So there is clear acceptance that deploying the 'reasonable persecutor' within credibility assessments is not lawful. However, this decision is currently 'unreported', meaning that although the text is available online, it cannot ordinarily be raised before the tribunal and therefore has limited value as precedent. This does not prevent the same argument being run again independently though, but this perhaps shows that the real issue is to ensure that decisions are properly reasoned from the outset.

The new UK guidance has made an important contribution here. It clearly states that, 'Caseworkers must not base implausibility findings on their own assumptions, conjecture, or speculative ideas of what ought to have happened, [...] or how they think a third party would have acted in the circumstances.'⁶⁹ This would seem to be fairly clear discouragement of the 'reasonable persecutor' approach, and it is therefore to be welcomed.

Of course in relation to persons who are fleeing indiscriminate violence we are concerned not so much with persecution as with 'serious harm'. But the role of

⁶³ *IA v Secretary of State for the Home Department* [2013] UKAITUR AA014932011

⁶⁴ *Ibid*, [6].

⁶⁵ *Ibid*, [6].

⁶⁶ *Ibid*, [17].

⁶⁷ *Ibid*, [15].

⁶⁸ *Ibid*, [37].

⁶⁹ Home Office guidance 9th edn. (n35), 17 [emphasis added].

'credibility' in relation to the facts giving rise either to a well-founded fear of persecution *or* a real risk of serious harm is the same. This brings us to my second key point: the precise legal role of credibility assessment and its relationship to the 'benefit of the doubt'.

Credibility and the Benefit of the Doubt

In this section I will make related points about credibility and the 'benefit of the doubt'. Both are susceptible to being used to convey a variety of meanings. For example, it was noted above that the 2015 UK guidance called for decision makers to assess the 'credibility' of 'material facts' against the low standard of proof; whereas Hathaway and Foster see credibility as being about checking the applicant's unsupported statements.⁷⁰ Likewise the 'benefit of the doubt' is sometimes understood as referring to the low standard of proof in asylum cases, and sometimes as relevant to the prior question of evidential admissibility. I will show that the latter understanding not only overlaps with a narrow understanding of credibility, but adds a normative dimension to it by reminding us that where an applicant's unsupported statements are 'credible' they *should* be given the benefit of the doubt and have such statements considered when assessing whether the (low) standard of proof has been met.

The UK's Upper Tribunal has recently delivered an important (reported) determination on the issue of the benefit of the doubt in the case of *KS v Secretary of State for the Home Department*.⁷¹ This case provides a route into discussion of both the benefit of the doubt and credibility, in the light of the revised 1979 UNHCR Handbook.⁷²

The *KS* determination was promulgated in May 2014. It concerned a young Afghan who arrived in the UK in June 2008, and who immediately claimed asylum. His application was refused, and the First-tier Tribunal dismissed his appeal in January 2013. The age of the applicant was contested (he claimed to have been aged 14 on arrival). His claimed fear was of forcible recruitment into Islamist militia Hezb-i-Islami (in which his father was a commander; and in which his elder brother was active), or the Taliban; or, conversely, that he would be considered a suspect in a 2008 bombing due to his family's terrorist connections (since 2007 his house had been searched on at least two occasions).⁷³

The application was refused on the basis that the applicant had, 'failed to give a credible account' of either his age or the events back in Afghanistan.⁷⁴ Documentation provided by the applicant was deemed unreliable.⁷⁵

⁷⁰ Hathaway and Foster (n37), 139, framing the issue as that, 'it remains that decision-makers must somehow find a way to determine whether there are valid reasons to impugn the truthfulness of the applicant's testimony.'

⁷¹ *KS (benefit of the doubt)* [2014] UKUT 552 (IAC)

⁷² UNHCR Handbook (n38).

⁷³ *KS (benefit of the doubt)* (n71). The basis of the claim is outlined at [28].

⁷⁴ *Ibid*, [30]

⁷⁵ *Ibid*, [30]

The First-tier Tribunal, hearing his initial appeal, found that the applicant was around 16 years old in 2008; but that he, 'had not given a credible account of his experiences in Afghanistan or of his fears about return to that country.' The Immigration Judge hearing that appeal, Judge Knowles, then considered the guidance in paras. 214-215 of the UNHCR Handbook that there should be a 'liberal' application of the benefit of the doubt in the case of minors. Given that the applicant had, 'undertaken successfully what must have been an arduous 5 month journey to the UK'; that there was no evidence of immaturity from the medical evidence; and that he was, 'certainly mature enough to give his solicitor a very comprehensive account' of the material facts of the case, Judge Knowles found that the applicant was 'sufficiently mature' to have formed a well-founded fear of persecution. Thus, Judge Knowles continued, 'In those circumstances, I do not believe that, where issues of credibility arise, the appellant need necessarily be given the benefit of the doubt on account of his age and maturity.'⁷⁶ The argument before the Upper Tribunal was that this failure to give the benefit of the doubt was an error of law.

The Upper Tribunal reasoned in this case that the notion of a 'benefit of the doubt' cannot be considered a legal rule in and of itself.⁷⁷ On that point, the appeal by KS to the Upper Tribunal was not successful.⁷⁸ However the Upper Tribunal found enough unreasoned conclusions and non-sequiturs in Judge Knowles' decision that it could be set aside anyway, and it was listed for an expedited re-hearing.

We need to return to the point about the 'benefit of the doubt' though. The Upper Tribunal proposed (at least) three ways in which the term is deployed: as a *pervasive* principle (being considered in relation to each and every claimed fact; and at the point of considering risk); as an *end-point* consideration – that is to say before 'signing off' on the final decision as to the existence or otherwise of a well-founded fear (or real risk of serious harm);⁷⁹ and as playing a more *holistic* role. The Tribunal rejected the pervasive approach, because there will be some facts that can be established or rejected without reference to the benefit of the doubt (because they are so clear).⁸⁰ The Tribunal rejected the end-point formulation, which it understood as being rooted in the UNHCR Handbook, on the ground that it is too limited.⁸¹ Instead the tribunal stressed the more holistic approach, applying the benefit of the doubt even at an early stage of the credibility assessment (but without being pervasive).⁸² According to the Upper Tribunal, the holistic approach

'is simply no more than an acceptance that in respect of every asserted fact when there is doubt, the lower standard entails that it should not be rejected and should rather continue to be kept in mind as a possibility at

⁷⁶ Ibid, [32]

⁷⁷ Ibid, [61]

⁷⁸ Ibid, [104]

⁷⁹ Ibid, [76]

⁸⁰ Ibid, [68]

⁸¹ Ibid, [70], [72]

⁸² Ibid, [71]

least until the end when the question or risk is posed in relation to the evidence considered in the round.’⁸³

The Tribunal therefore felt that in essence the benefit of the doubt is not a legal principle *per se*, but is merely an expression, reiteration, or component of the idea that the standard of proof in asylum claims is low.⁸⁴ However, this potential approach, embodied in the quotation above, elides the distinction between the evidential admissibility of unsupported but credible statements; and the weighing of those statements (and other evidence) against the low standard of proof. At this point a detour into the EU QD and UNHCR Handbook is necessary.

The EU QD and UNHCR Handbook

The Upper Tribunal in *KS* also discussed whether the alleviating evidential rule contained in Article 4(5) QD is a benefit of the doubt rule. The Upper Tribunal actually reasoned that the term should *not* apply to that rule because Article 4(5) only applies to uncorroborated statements and, following the analysis of Noll,⁸⁵ the rule in Article 4(5) is stricter than the comparable guidance in the UNHCR Handbook.⁸⁶ I would agree that the EU QD is stricter than the Handbook, but Article 4(5) it is clearly derived *from* the Handbook and might therefore be more accurately described as a flawed or incomplete manifestation thereof. Crucially, it is at this point that usage of the term ‘benefit of the doubt’ overlaps with the correct, and narrow, understanding of credibility in the process of determining the need for international protection.

Let us just remind ourselves what the UNHCR Handbook actually says, accepting that it is not written as a set of legal provisions but as practical guidance. In para. 195, it is explained that the decision maker will have to, ‘assess the *validity of any evidence* and the *credibility of the applicant's statements*.’ It is thus clear that credibility is relevant (only) to the applicant’s statements.

In para. 196 it is explained that applicants, ‘may not be able to support [their] statements by documentary or other proof’. Although the burden is on the applicant, the decision maker may need to use, ‘all the means at [their] disposal to produce the necessary evidence in favour of the application.’ However, there will still be times when such research is not successful, and there may be other statements that are, ‘not susceptible of proof’. It is here where credibility and the benefit of the doubt first collide, with the guidance that, ‘In such cases, if the applicant's account appears *credible*, he should, unless there are good reasons to the contrary, be given the *benefit of the doubt*.’ [emphasis added].

⁸³ *Ibid*, [73]

⁸⁴ *Ibid*, [64]

⁸⁵ G Noll, *Evidentiary assessment and the EU qualification directive* (UNHCR 2005) <<http://www.unhcr.org/42bbcb092.html>> accessed 15 June 2015; note that this was partially revised and also published as G Noll, ‘Evidentiary Assessment in Refugee Status Determination and the EU Qualification Directive’ (2006) 12(2) *European Public Law* 295.

⁸⁶ *KS (benefit of the doubt)* (n71), [85].

This reference to the benefit of the doubt is therefore given very clearly in the context of a paragraph discussing the situation where the applicant *has no supporting evidence*. At this point, the conditions for giving the benefit of the doubt are not specified, except in so far as the applicant's account would have to be 'credible'. The conditions are given in para. 203.

In para. 203, it is repeated that, 'After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. [...] It is therefore frequently necessary to give the applicant the benefit of the doubt.' It is then explained that the benefit of the doubt (still clearly in relation to unsupported statements) should only be given when, 'all available evidence has been obtained and checked'. This is not about the end-point decision on fear or serious harm, but about ensuring that the decision maker has properly discharged their duties. The benefit of the doubt is then to be given (only) when the decision maker is, 'satisfied as to the applicant's general credibility', and when the (unsupported) statements are, 'coherent and plausible, and [do] not run counter to generally known facts.'⁸⁷ These are very close to the terms usually used to describe techniques for determining credibility.

Thus the UNCHR Handbook seems to suggest that the benefit of the doubt is about allowing unsupported but credible statements to count towards satisfying the standard of proof (the actual standard of proof, and the whole notion of a 'well-founded fear' is discussed at length elsewhere in the Handbook.) This is precisely the role indicated for credibility assessments in the analysis of Hathaway and Foster, noted above.⁸⁸ It is also what I have previously termed a 'narrow' understanding of 'credibility as admissibility',⁸⁹ drawing upon the work, in particular, of Kagan⁹⁰ and Noll.⁹¹ The March 2015 EASO Practical Guide on Evidence Assessment also clearly confines credibility assessment to assessing the *statements* of the applicant.⁹²

Let me recap: the Upper Tribunal reasoned in *KA* that 'the benefit of the doubt' is not a legal rule but rather a non-legal expression of the low standard of proof, which is encountered holistically (but not pervasively) throughout the determination process. However, I would develop their reasoning in relation to Article 4(5) QD (which clearly *is* a legal rule of EU law; and applies equally to refugee and subsidiary protection cases) in the following way: the expression 'benefit of the doubt' is *also* used, especially in the UNHCR Handbook, to call for the application of an alleviating evidential rule in relation to an applicant's unsupported but credible statements. Within the EU, that rule is partially, and

⁸⁷ UNHCR Handbook (n38), [203].

⁸⁸ Hathaway and Foster (n37).

⁸⁹ See Sweeney, 'Credibility, proof, and refugee Law' (n22), 710.

⁹⁰ M Kagan, 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination' (2003) 17 *Georgetown Immigration Law Journal* 367, 369.

⁹¹ Noll (2006) (n85), 310.

⁹² European Union: European Asylum Support Office (EASO), *EASO Practical Guide: Evidence Assessment* (EASO 2015) <<http://www.refworld.org/docid/55420d654.html>> accessed 9 July 2015.

imperfectly, expressed in Article 4(5) QD.⁹³ On this understanding, the term 'benefit of the doubt', as an expression, is closely connected to the legal notion of credibility (narrowly understood).

The term 'benefit of the doubt' is thus, confusingly, used as non-legal expression for two related, but distinct, ideas: that unsupported but credible statements must be taken into account when assessing whether there is a well-founded fear of persecution (or risk of serious harm); and that in carrying out such an assessment the overall standard of proof is low. I agree with the UK's Upper Tribunal that the 'benefit of the doubt' is not a legal concept in and of itself in either sense but, like it or not, it *has* come to be used in relation to two notions that certainly do have legal implications: credibility and the standard of proof.

The importance of linking the benefit of the doubt to credibility assessment

The point of linking the benefit of the doubt to 'credibility as admissibility' is that it allows for the reorientation of our understanding of credibility. In the first part of this paper, I referred to a range of reports that suggested that deeply problematic negative credibility findings have given rise to perceptions of a 'culture of disbelief' in some states. Establishing credibility has become a major hurdle, almost to the exclusion of proving a well-founded fear (or real risk of serious harm). Because there is no legal guidance on *how* 'credible' a statement needs to be, the standard of proof can be inadvertently raised.⁹⁴ Yet, admitting 'credible' statements for consideration relative to standard of proof is meant to be a rudimentary way of compensating for many applicants' lack of corroboration. It is one element of giving them the benefit of the doubt.

In English law this has been explained very clearly, even if it such clarity has not always led to understanding (indeed the 2013 Home Affairs Select Committee report noted that guidance from the senior courts is regularly ignored by initial decision makers).⁹⁵ The main case in the UK is *Karanakaran v Secretary of State for the Home Department*, in which Brooke LJ explained that decision makers will come across four types of evidence:

- (1) evidence they are certain about;
- (2) evidence they think is probably true;
- (3) evidence to which they are willing to attach some credence, even if they could not go so far as to say it is probably true;
- (4) evidence to which they are not willing to attach any credence at all.⁹⁶

Brooke LJ made it clear that it was only the fourth category of evidence that did not need to be taken into account when considering whether the standard of proof had been met. This passage confirms that the decision maker must take

⁹³ In the UK it has been transposed, with even further digression from the UNHCR Handbook, into Immigration Rule 339L.

⁹⁴ The Home Affairs Committee (n26) noted UNHCR's observations to this effect in its 2013 report, at 13.

⁹⁵ Home Affairs Committee (n26), 13.

⁹⁶ *Karanakaran v Secretary of State for the Home Department* [2000] EWCA Civ 11, [2000] Imm AR 271, [2000] INLR 122, [2000] 3 All ER 449, per Brooke LJ, [53].

into account evidence, including the applicant's unsupported statements, when considering future risk, even if they would not go so far as to say that it is probably true.

The 2013 Home Affairs Select Committee report makes reference to this four-point list, and explains its application correctly and succinctly as meaning that, 'unless the evidence presented by the applicant is demonstrably false, it ought to be accepted.'⁹⁷ The 2015 UK guidance for decision makers no longer discusses this point at all.⁹⁸

It is important that the idea of credibility is confined to the narrow question of the admissibility of unsupported statements, because otherwise there can be a temptation to fish for negative credibility indicators even where they do not relate to the core of the claim. This is particularly troubling in the UK because primary legislation requires that, 'In determining whether to *believe a statement* made by or on behalf of a person who makes an asylum claim or a human rights claim' certain behaviours are automatically damaging to the applicant's credibility.⁹⁹ These focus on the mode of arrival, such failing to claim asylum in a safe state en route,¹⁰⁰ and arrival in the UK without proper documentation.¹⁰¹ This is a troubling development,¹⁰² because these factors have little to do with whether, assessed on an individual basis, the applicant's testimony is believable. Moreover, recall that the 2015 UK guidance to decision-makers couches the whole process of assessing the claim as being about credibility. If that broad understanding of credibility is employed, then the mode of arrival may inadvertently affect consideration not only of the applicant's statements (as indicated in italicised part of the statute quoted above) but also the merits of their substantive claim of a well-founded fear (or real risk of serious harm).

Conclusion

This brief discussion has sought to demonstrate the scale of the problem in relation to credibility assessment; and to clarify the relationship between the 'benefit of the doubt' and credibility, with the purpose of trying to disentangle the common usage of those terms from their potential legal effect. We saw above, by way of introduction, the UK Home Secretary's scepticism of those who might seek international protection from Syria (to the extent of denying that they are the largest single group of people attempting to cross the Mediterranean; and branding the remainder as 'economic migrants'). Against this culture of disbelief we must foreground the benefit of the doubt, and apply the law on credibility appropriately.

⁹⁷ Home Affairs Committee (n26), 13.

⁹⁸ The *Karanakaran* case is mentioned briefly on p12, but there is no attempt to summarise its key points (Home Office guidance, 9th edn. (n35)).

⁹⁹ Section 8(1) Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (emphasis added).

¹⁰⁰ Section 8(4) Asylum and Immigration (Treatment of Claimants, etc) Act 2004

¹⁰¹ Section 8(3)(a) Asylum and Immigration (Treatment of Claimants, etc) Act 2004

¹⁰² See Hathaway and Foster (n37), 150 *et seq*, especially at p152; see also Sweeney, 'Credibility, proof and refugee law' (n22), 716.

The term 'benefit of the doubt' is not in and of itself a legal concept (on this I agree with the UK's Upper Tribunal). However, it masks two very important points that do carry legal weight: that there is national and EU law, and significant international guidance, on the admissibility of an applicant's unsupported statements; and that the overall standard of proof in international protection cases is low. If these points are not sufficiently distinguished or adequately addressed, then in particular cases there could be an error of law.

'Credibility' is likewise prone to two common usages. It may, incorrectly in my view, be used broadly as shorthand for the strength of the case as whole. Not only is this legally imprecise, but also it may lead to the amplification of credibility factors from matters of evidential admissibility into questions of proof. It may also result in the enquiry beginning with the general credibility of the applicant rather than the facts on record (in the UK the AI(ToC)A 2004 is particularly awkward in this respect). The second, narrower, understanding of credibility overlaps with one dimension of the benefit of the doubt, and sees it as confined to the admissibility of the applicant's unsupported statements, which should be allowed to enter into the balance towards satisfying the low standard of proof as long as they are 'credible' in the sense of not being demonstrably false.

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