

Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined

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Introduction

To be recognised as a refugee it is necessary for the asylum claimant to demonstrate that they have a well-founded fear of persecution for one of the convention reasons. This test is usually broken down into two principal components: the subjective element of whether the claimant fears persecution and the objective element of whether there are reasonable grounds for believing that the subjective fear of persecution is objectively well-founded. While much legal analysis has been devoted to the legal tests governing the determination of refugee status (e.g. the meaning and application of “persecution”, “membership of a particular social group” and the “internal flight alternative”), the majority of claims are determined on their individual factual circumstances. If an individual making an asylum or human rights claim cannot persuade the decision-maker that their claim is properly to be regarded as credible, then they are unlikely to be recognised as a refugee or as a person otherwise in need of international protection; the application of legal tests are therefore rendered largely redundant. As the United Kingdom Immigration Appeal Tribunal has explained, “[f]indings of credibility are one of the primary functions of the . . . [asylum decision-maker] . . . , since they lead to the establishment of much of the factual matrix for the determination of the case. In some cases, but by no means all, the issue of credibility may be the fulcrum of the decision as to whether the claim succeeds or fails.”¹ In short, credibility is at “the core of the asylum process.”²

The task of assessing credibility raises a number of questions of crucial importance to the determination of asylum and human rights claim. What is credibility? Why is credibility so important to the determination of asylum and human rights claims? What difficulties are involved in the assessment of credibility and how should decision-makers approach the task? In addressing these questions, this paper

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¹ *SW v Secretary of State for the Home Department (Adjudicator’s questions) Somalia* [2005] UKIAT00037, para. 20. The Immigration Appeal Tribunal, the independent judicial tribunal in the UK with responsibility for determining appeals against initial asylum decisions of the Immigration and Nationality Directorate, was renamed as the Asylum and Immigration Tribunal in April 2005. See further R. Thomas, “Evaluating Tribunal Adjudication: Administrative Justice and Asylum Appeals”, *Legal Studies* 25/3 (2005) pp. 462–498. Most, though not all, Tribunal determinations referred to below may be accessed from its website <www.ait.gov.uk/>.

²C. Blake, “Judging Asylum and Immigration Claims: The Human Rights Act and the Refugee Convention”, *Public Money & Management* 21/3 (2001) pp. 25, 27.

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will consider the problematic nature of the task of assessing the credibility of asylum claimants and examine relevant provisions in EU and UK law which concern the assessment of credibility. It will be seen that legislators have increasingly sought to guide the assessment of claimants’ credibility and that the content of such assessment frameworks tend to favour the negative assessment of credibility. As asylum has become an increasingly contested area of policy in which policy-makers may be under intense political and media pressure, they have sought to condition the assessment of credibility through the elaboration of guidance to decision-makers. Furthermore, the procedure through which decisions are made can exert considerable influence over their substantive content. While this paper will consider the issue of assessing credibility and the possible impact of EU law primarily from the perspective of UK law, it may be of relevance for those interested in asylum adjudication more broadly.

1. The Assessment of Credibility: General Comments

What is “credibility” and what is involved in assessing the credibility of an individual who has applied for international protection? Perhaps it is best to begin by understanding the task of asylum decision-making itself. The central focus for the asylum decision-maker is whether removal of an individual from the country of application will amount to a potential breach of either the Refugee Convention or the European Convention on Human Rights. This task requires the decision-maker to assess the nature and risk to the individual claimant of his or her removal. On the one hand, the decision-maker is under a legal obligation to ensure that genuine applicants who qualify for international protection are not returned to their country of origin. To recognise genuine claimants is to fulfil the humanitarian objectives of the convention and protect fundamental human rights – the right to life and freedom from torture. On the other hand, the decision-maker will also be concerned to ensure that non-genuine applicants are refused in order to maintain ordinary immigration control. After all, not all claimants – even victims of past persecution or torture – will qualify for international protection; furthermore, given the substantial differences in global living standards, it would be naïve to suppose that some claimants do not claim asylum for the purpose of economic betterment as they do not qualify for entry under ordinary immigration rules.

Asylum decision-making then involves a continuing risk of making two types of error: either refusing refugee status to the genuine claimant or granting refugee status to the non-genuine claimant. The error costs of incorrect decisions either

way – returning refugees to face persecution or undermining the public interest in enforcing legitimate immigration control – are substantial. The asylum decision-maker will continuously have before them the risk of either being unduly lenient – and therefore risk falling into error by granting status to the undeserving – or unjustifiably mistrustful – and therefore risk committing error by refusing the truly genuine claim. It is in this context that the decision-maker must assess whether or not the claimant is credible, whether the account and story they have presented is truthful and plausible in order to determine the risk of persecution or ill-treatment.

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In order to assess credibility, the decision-maker will have to examine the facts as advanced by the claimant to determine whether they are true and whether they are relevant in coming to a decision. Asylum claims typically raise many complex and detailed factual questions; the decision-maker must take into account all the relevant information when evaluating the risk of persecution or ill-treatment on return.³ While the decision-maker will have to be conscious of the dangers of making unfair adverse credibility findings against a claimant, they will also need to be satisfied that they believe the claimant's account before deciding in their favour. The decision-maker will also have to consider the complexity of individuals' motives for seeking asylum, the political background in the countries from which they have come, their mode of entry into the receiving country in addition to the legal tests contained in the Refugee Convention and the European Convention on Human Rights.

There are three principal categories under which an asylum claim may be found to be lacking in credibility.⁴ First, there may be internal inconsistencies in the claimant's story where the claimant has changed the nature of their claim or rendered an inconsistent account. Second, there may be external inconsistencies, i.e. inconsistencies between the claimant's factual account and the objective evidence concerning conditions in the country of origin. Thirdly, a claimant's credibility may involve an assessment of the plausibility or apparent reasonableness or truthfulness of their claim. This assessment can in turn involve a judgment by the decision-maker as to the likelihood of something having happened based on evidence and inferences.

While the assessment of credibility may be described simply as requiring the weighing up of evidence and of indicating what is believed and that which is not, the task is one of considerable difficulty for a number of reasons. First, unlike ordinary civil litigation, the asylum decision-maker will not be able to choose between two sides presenting different versions of the same events; instead, the only evidence typically adduced in asylum claims will be the claimant's own account as supplemented by country reports. Many claimants will be compelled by circumstances to rely solely on their own evidence to prove their case in light of

the notorious difficulties for them in acquiring other evidence. While this may make it difficult for claimants to demonstrate their case, it also means that any asylum system is likely to be open to exploitation and abuse by those who do not feel themselves bound to tell the truth. This is why the personal credibility of each claimant becomes so important in the determination of asylum and human rights claims. By adopting the lower standard of proof, asylum law seeks to compensate for the evidential difficulties associated with proving a claim for international protection. Whether expressed in the language of “reasonable degree of likelihood” or “real risk”, the lower standard of proof reflects the difficulties of proving the degree of

³ For discussion in the UK context, see *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449.

⁴ A. Weston, “‘A witness of truth’ – credibility findings in asylum appeals”, *Immigration & Nationality Law & Practice* 21/3 (1998) pp. 87, 88–89; G. Coffey, “The Credibility of Credibility Evidence at the Refugee Review Tribunal”, *International Journal of Refugee Law* 15/3 (2003) pp. 378, 385–395.

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future risk of persecution or ill-treatment by recognizing a more positive role for uncertainty.⁵

Nevertheless, in many cases the evidence presented may be beset by numerous problems and there may still be a substantial degree of evidential uncertainty concerning the facts of the claim which cannot be resolved through the application of the lower standard of proof. For example, many applicants will arrive without any form of identification, such as a passport. The decision-maker will then have to determine whether this is an unavoidable consequence of the claimant’s inability to seek asylum without recourse to illegal routes of entry or because of they are making a false claim by seeking to convince the decision-maker that they are from a different country from that of their own nationality and/or seeking to delay their removal. In such ‘disputed nationality’ cases, the decision-maker can only consider the evidence presented in order to assess the credibility of the individual’s claim that he or she is actually a national of the country they claim to be from.⁶ Past experiences of claimants may also present unusually difficult problems. Applicants who have been victims of torture, rape or persecution may be extremely reluctant to disclose their past experiences. A decision-maker may decide that late disclosure of such experiences may be evidence that they have been manufactured specifically in order to support a weak claim; alternatively, the credibility of a claimant who does disclose such experiences immediately may be doubted on the basis that any reasonable person having suffered such treatment would be unwilling to disclose them. Even when the claimant can present

additional documentary or corroborative evidence, the decision-maker will have to decide whether or not this evidence is reliable. For instance, a psychiatrist's report diagnosing post-traumatic stress disorder may provide corroboration of a claim that the individual has suffered psychological trauma; on the other hand, the decision-maker will also have to bear in mind that a psychiatrist will not usually assess the claimant's (their patient) credibility and there may be other obvious causes for the individual's depression and anxiety, such as facing removal to their country of origin which may not be a pleasant place to which to return.⁷

Thirdly, there are difficulties arising from the process of giving evidence. Non-genuine claimants may embellish their account with apparently credible evidence while genuine claimants may present confused or inconsistent evidence. In the UK, the Tribunal has held that it is perfectly possible for the decision-maker to believe

⁵ In UK law, the burden of proof for a claim under the Refugee Convention is whether there is a "reasonable degree of likelihood" of future persecution. For a claim under Article 3 ECHR, the test is whether there is a "real risk" of torture or ill-treatment. Both tests have been held to amount to the same standard of proof. See *Sivakumaran v Secretary of State for the Home Department* [1988] AC 958; *Kacaj v Secretary of State for the Home Department (Article 3 – Standard of Proof – Non-State Actors) Albania* [2002] Imm AR 213. The Refugee Qualifications Directive uses the phrase "a well-founded fear of being persecuted or a real risk of suffering serious harm".

⁶ See *Asif Khan v Secretary of State for the Home Department (Disputed Nationality – Removal Directions) Afghanistan* [2002] UKIAT04412.

⁷ See *HE v Secretary of State for the Home Department (DRC – credibility and psychiatric report) Democratic Republic of Congo* [2005] Imm AR 119, 125–127; *XS v Secretary of State for the Home Department (Kosovo – Adjudicator's conduct – psychiatric report) Serbia and Montenegro* [2005] UKIAT00093.

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that a claimant is not telling the truth about some matters, has exaggerated the story to make his or her case better, or is simply uncertain about matters, but still to be persuaded that the centre-piece of their story stands.⁸ A truthful witness may make mistakes because of nerves or forgetfulness or because of the experiences that they have suffered. At the same time, it does not follow that a claimant who falters over what might appear to be peripheral matters to their claim is in all cases a truthful witness while a person who has made up their story may nevertheless get the central elements correct. It has been argued that the presence of discrepancies in a claimant's account may result from the fallibility of human memory and should therefore be excluded from the assessment of credibility.⁹ However, such inconsistencies may equally be indicative of a non-genuine claim: it is for the

decision-maker to decide by considering the facts and circumstances of the individual claim. The decision-maker “will have to use his common sense and experience to make his findings. He will have to consider whether an account which frays at the edges from time to time is nevertheless a truthful one or alternatively whether the witness has got himself into difficulties in unplanned departures from a pre-rehearsed and unreliable script.”¹⁰ The decision-maker will also need to be fully aware that while the way in which the evidence has been given by a claimant may be an element in the assessment of credibility (for instance, if the claimant was evasive or hesitant when questioned), there is a danger in relying solely upon the way in which evidence has been delivered rather than its content; “judging demeanour across cultural divides is fraught with danger”.¹¹ Furthermore, as most claimants will not speak the language of the country of application, interpretation is necessary but in practice may inhibit effective communication.¹²

There are also organizational constraints on the assessment of credibility. The increased number of asylum claims received by European countries over the last 15 years has required a corresponding increase in the number of decision-makers, including both government administrators making initial decisions and immigration judges determining appeals against initial refusal decisions, in order to process the number of claims. An increased number of decision-makers may raise concerns as to the consistency of approach in the assessment of credibility. At the same time, an increased volume of applications may prompt governments to speed up the processing of claims thereby reducing the time available for decision-makers to assess claims as thoroughly as they might wish. While it may be complained that the

⁸ *Secretary of State for the Home Department v Chiver* [1997] INLR 212, 220.

⁹ See J. Cohen, “Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers”, *International Journal of Refugee Law* 13/3 (2002) pp. 293–309; J. Herlihy, P. Scragg and S. Turner, “Discrepancies in autobiographical memories – implications for the assessment of asylum seekers: repeated interviews study”, *British Medical Journal* 324 (2002) pp. 324–327.

¹⁰ *K v Secretary of State for the Home Department (Democratic Republic of Congo)* [2003] UKIAT00014, para. 10.

¹¹ *B v Secretary of State for the Home Department (Democratic Republic of Congo)* [2003] UKIAT00012, para. 7.

¹² See R. Rycroft, “Communicative Barriers in the Asylum Account”, in P. Shah, (ed.), *The Challenge of Asylum to Legal Systems* (London: Cavendish Publishing 2005) pp. 223–244.

assessment of a claimant's credibility may differ between one decision-maker and another, it is neither efficient nor cost-effective to allow claimants to pursue successive applications and appeals until they receive a decision in their favour. In the UK, for instance, the Tribunal has emphasized that in light of the importance of finality in decision-making, caution is required before endorsing any practice which would enable claimants, dissatisfied with an adverse credibility finding, to be allowed to seek further evidence with which to take issue with those findings when such evidence could have been made available beforehand.¹³

The devotion of personnel full-time to the task of determining claims may encourage specialization and such staff will, in light of the consequences of wrong decisions, wish to reach accurate decisions. At the same time, being presented constantly with claims of torture or persecution may also induce compassion fatigue and an organizational culture of disbelief toward claimants. Legitimate public concern that the asylum system is being abused by false applicants in search of economic betterment may prompt legislation specifying standards for the assessment of credibility in order to reduce the scope for abuse and exploitation of the process. Such legislation should at the same time confer sufficient discretion to the decision-maker to take into account the distinctive factual circumstances of the individual case before them.

Perhaps the most intractable issue in the assessment of credibility arises from the decision-makers' own presence of self, the values which they inevitably bring to the task of deciding whether the claimant's story is credible. Asylum claimant populations are often highly diverse – the UK, for instance, receives asylum claims from 146 different nationalities – and originate largely from non-western countries. There is a risk that decision-makers will take decisions from their own western assumptions unaware of the importance of cultural differences between themselves and claimants. In the UK, the Independent Race Monitor, who monitors governmental authorisations to discriminate on national and ethnic grounds in the operation of immigration functions, recently concluded from a sample of asylum decisions that a significant number of applicants' accounts are disbelieved because apparently western assumptions had been used to judge claimants' actions and that there were indications of a tendency to disbelieve.¹⁴ "Credibility", a British Parliamentarian has noted, "is a way by which the interviewer is able to express his ignorance of the world. What he finds incredible is what surprises him".¹⁵ While the decision-maker's

¹³ *YV v Secretary of State for the Home Department (Fresh credibility evidence) Sri Lanka* [2004] UKIAT00124, para. 20.

¹⁴ M. Coussey, *Annual Report of the Independent Race Monitor 2004–05* (London: Home Office, July 2005), para. 3.21.

¹⁵ Hansard HL Deb., vol. 659, col. 1681, April 5, 2004 (Earl Russell). In *Ibrahim Ali v Secretary*

of State for the Home Department [2002] UKIAT07001, para. 3, the Tribunal noted that “[w]hat may be plausible for a person in a western environment may be completely implausible for someone in a non-western environment . . . [decision-makers] . . . must take great care in not allowing their own perceptions and values to influence that judgment.” See also C. Jarvis, “The Judge as Juror Re-visited”, *Immigration Law Digest* 9/4 (2003) pp. 16–32. For an extended argument in favour of developing a cultural jurisprudence of asylum law, see S. Juss, “Toward a Morally Legitimate Reform of Refugee Law: The Uses of Cultural Jurisprudence”, *Harvard Human Rights Journal* 11 (1998) pp. 311–354.

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own background values should be downplayed, they are likely to be unarticulated and implicit and therefore so deeply ensconced within the decision-makers’ own personal psychology and social upbringing that they simply cannot be left of the decision-making function.

In this context, it is recognised that objective country evidence may perform a crucial role in the assessment of credibility by showing that adverse inferences based on the claimant’s evidence can be apparently reasonable when based on an understanding of life in a western country but are less reasonable when the circumstances of life in the country of origin are exposed.¹⁶ However, the problems concerning the assessment of credibility are only further complicated by the controversy surrounding objective country evidence used in asylum decision-making: is it really possible to collect wholly objective evidence regarding the conditions, culture and norms in countries from which refuge is being sought? In the UK, the debate over objective country evidence, which has become particularly contested, has two principal dimensions. First, the country evidence reports produced by the Home Office, the government department responsible for initial asylum decision-making, have been criticised for various basic inaccuracies and for being partisan.¹⁷ As a Parliamentary Select Committee has noted, these reports are not accepted by all parties to the refugee determination process to be “authoritative, credible and free from political or policy bias”.¹⁸ Secondly, while asylum applicants may commission an academic or other person with specialist knowledge of conditions in the relevant country to provide expert evidence, the Tribunal has waged a turf war with such country experts in order to maintain its hegemony over the decision-making process. On the one hand, the Tribunal has been able to marginalise country expert reports by impugning the impartiality and reliability of the expert concerned; on the other hand, country experts have argued that the Tribunal’s frequent reliance on ‘objective evidence’ concerning countries conditions is misguided as the ‘truth’ is always more provisional, contested and theory laden than legal processes habitually acknowledge.¹⁹ By way of illustration, we can point to the Tribunal’s rejection of the Court of Appeal’s advice that, in light of the extremely difficult task of assessing the credibility of someone from a different cultural and political background, the Tribunal needs all the help

provided by a country expert report.²⁰ In response, the Tribunal retorted that it was used to making appropriate allowances for the cultural

¹⁶ See, e.g., *MM v Secretary of State for the Home Department (DRC – plausibility) Democratic Republic of Congo* [2005] Imm AR 198, 202.

¹⁷ See N. Carver (ed.), *Home Office Country Assessments: An Analysis* (London: Immigration Advisory Service Research & Information Unit 2003).

¹⁸ House of Lords European Union Committee, *Handling EU asylum claims: new approaches examined* (2003–04 HL 74), para. 115.

¹⁹ See A. Good, “‘Undoubtedly an Expert’? Anthropologists in British Asylum Courts”, *Journal of the Royal Anthropological Institute* 10 (2004) pp. 113–133; A. Good, “Expert Evidence in Asylum and Human Rights Appeals: an Expert’s View”, *International Journal of Refugee Law* 16/3 (2004) pp. 358–379. For a response from a senior immigration judge of the Tribunal, see J. Barnes, “Expert Evidence – the Judicial Perception in Asylum and Human Rights Appeals”, *International Journal of Refugee Law* 16/3 (2004) pp. 349–357.

²⁰ *R (Es Eldin) v Immigration Appeal Tribunal* (Court of Appeal, 29.11.2000, unreported), para. 18 (Brooke LJ).

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differences of claimants; while the views of country experts ought to be taken with due seriousness, that did not necessarily imply ready acceptance of their views.²¹ Though the Tribunal does not always reject expert country evidence, it will usually only accept an expert’s report if satisfied that the expert concerned is properly to be regarded as reliable and impartial.²² In short, while country evidence may be of assistance when assessing credibility, it can hardly be described as a panacea in light of its highly contested nature.

Finally, we might note that as an exercise in assessing risk, asylum adjudication is, as with any form of risk assessment irrespective of context, dependant upon the ascription of not just probability but also value to potential outcomes.²³ In other words, how decision-makers assess the risk of persecution on return will depend on how much weight and value they are personally willing to ascribe to the protection of foreign nationals relative to that of maintaining legitimate immigration control. Despite the guidance of the UNHCR handbook that the decision-maker should not be influenced by the personal consideration that the applicant may be an ‘undeserving case’, a decision-maker’s own sense of the moral worthiness or deservingness of an individual claimant relative to the importance of maintaining immigration control may in practice perform a decisive or at least significant role in decision-making.²⁴

There can be little doubt that asylum decision-making, involving an assessment of future risk for the claimant often on the basis of limited information, is amongst the most problematic, difficult and complex forms of decision-making in the modern state. Decision-makers may feel pulled in different directions in light of both the considerable evidential uncertainty and a complex combination of facts pointing both ways in favour of awarding or refusing international protection. A decision is, however, required: either the claimant is in need of protection or not. Put simply, asylum claims must be determined and the credibility of claimants must be assessed. The truthfulness of an uncorroborated asylum claim may often be unknowable and decision-makers, unlike academics, do not have the benefit of being able subsequently to revise their opinions. What is most important is that the decision-maker takes into account all the relevant information and then decides what weight is properly to be attached to it. As the UK courts have recognised, what decision-makers ultimately make of the material presented to them is a matter for their “own conscientious judgment”.²⁵

2. The Assessment of Credibility in EU Law

Having considered the problematic nature of credibility, this section and the next will examine the introduction of recent legislative standards concerning the assess-

²¹ *Zarour v Secretary of State for the Home Department* (01TH00078), paras. 20–21.

²² For a more detailed discussion, see A. Good, *Anthropology and Expertise in Asylum Courts* (forthcoming).

²³ J. Steele, *Risks and Legal Theory* (Oxford: Hart Publishing 2004), pp. 24–25.

²⁴ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva: UNHCR 1992), para. 202.

²⁵ *Karanakaran*, no. 3 above, 479 (Sedley LJ).

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ment of claimants’ credibility in EU and UK law. While the assessment of credibility raises a number of difficulties, the task of formulating general legislative standards for the assessment of credibility itself raises its own issues which might be briefly alluded to. First, the use of general standards concerning the assessment of credibility reflects a compromise balance between the advantages and disadvantages of having guidance for decision-makers that must handle a high volume of complex casework. The elaboration of general standards has the advantage of assisting decision-makers by providing them with guidance for the performance of their task. Such guidance may also promote consistency in decision-making. At the same time, however, it is important that the standards

afford decision-makers sufficient discretion to enable them to take into account the distinctive factual circumstances of each individual case. Some balance must therefore be struck but whether it is the best compromise available will be open to debate.

A second issue concerns the precise content of the legislative standards. For instance, will the standards facilitate the positive assessment of credibility in the applicant's favour (for instance, by specifying factors which may lead a decision-maker to make a positive credibility finding)? Alternatively, will the standards enumerate circumstances or types of behaviour on the applicant's behalf which damage or undermine credibility? Ultimately, the content of the legislative standards will be a result of the political choice by the legislator. Irrespective of the adequacy or otherwise of the content of the standards, the fact that they have received legislative approval will, from the perspective of the decision-maker, enhance their legitimacy. Legislative standards can though only provide a broad framework in which decisions are taken; they cannot determine the outcome of individual cases. However, the broad policy underlying the standards may perform an influential role in steering decision-making and legitimising certain trends in the assessment of credibility. A further point to note is that specific guidance as to the assessment of credibility is not the only means available to the legislator to influence decision-making; the specification of the decision-making process is also likely to influence the substantive decision-making outcomes. Attention will now be focused on the implications of recent developments in EU law for the assessment of credibility.

The principal provision concerning the assessment of claimants' credibility in EU law is Article 4 of the Refugee Qualifications Directive.²⁶ Article 4(1) states that Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection; in cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application. Such elements consist of the applicant's statements and all documentation at the applicants' disposal regarding their (and that of their relatives) age, background, identity, nationality, country and place of previous residence, previous asylum application, travel routes, identity, travel documents and the reasons for applying for international protection. This provision would appear implicitly to confirm the guidance contained in the UNHCR handbook that while

²⁶ Council 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 (29 April 2004) OJ 2004, L 304/12.

the burden of proof rests on the claimant, the duty to ascertain and evaluate all the relevant facts is shared between the claimant and the decision-maker.²⁷

The Directive then proceeds to list the relevant factors which are to be taken into account in the assessment of applications. Article 4(3) states that the assessment of a claim will include taking into account: (a) all relevant facts as they related to the country of origin at the time of taking the decision on the application; (b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm; (c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm; (d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country; and (e) whether the applicant could reasonably be expected to avail himself of the protection of another country where he could assert citizenship. The effect of this provision, to require the relevant factors concerning a claim to be taken into account, should be read alongside relevant provisions in the Procedures Directive concerning the process of collecting facts. This Directive states that Member States are to ensure that: applications are examined and decisions are taken individually, objectively and impartially; precise and up-to-date country information is obtained; and that the personnel examining applications and taking the decisions have the knowledge with respect to the standards applicable in asylum law.²⁸ Member States are also under an obligation to take appropriate steps to ensure that personal interviews are conducted in conditions which allow applicants to present the grounds for their applications in a comprehensive way and, to this end, shall ensure that the interviewer is sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant's cultural origin or vulnerability, insofar as it is possible to do so and ensure interpretation to ensure appropriate communication.²⁹

The general effect of these provisions would appear to facilitate the positive assessment of credibility. The Directives specifying what facts are to be taken into account in the assessment of a claim; require decisions to be taken objectively and impartially on the basis of up-to-date country information. With respect to victims of torture, the Qualifications Directive states that the fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.³⁰

²⁷ UNHCR, no. 24 above, para. 196.

²⁸ Amended Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (9 November 2004), Interinstitutional File 2000/0238, Art. 7(2).

. ²⁹ Procedures Directive Art. 11(3).

. ³⁰ Qualifications Directive Art. 4(4).

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While the Directives introduce measures favouring the positive assessment of credibility, they also introduce a number of measures which may militate against assessments of credibility in claimants' favour. The Procedures Directive, for instance, includes a list of grounds upon which the examination procedure may be accelerated. These grounds include the following circumstances: if a claimant fails without good reason to comply with the obligation to submit as soon as possible all elements needed to substantiate the application;³¹ or has made inconsistent, contra- dictory, unlikely or insufficient representations which make the claim clearly uncon- vincing;³² or failed without reasonable cause to make the application earlier having had an opportunity to do so then the determination of the claim may be acceler- ated.³³ As a claimant may either be unable or unwilling to comply with these requirements in light of their experiences, there is a substantial risk that their claim may be accelerated and not receive sufficient or adequate consideration.

Other provisions in the Procedures Directive aimed at ensuring quick and cost-effectiveness processing of the claim may at the same time have the effect of adversely affecting the assessment of claimants' credibility. The asylum interview, for instance, is usually a critically important source of information concerning the details of an individual's claim and integral to the assessment of a claimants' cred- ibility. The Procedures Directive contains some safeguards such as interviewer and interpreter competence but it also introduces some limitations on the process of interviews which may adversely affect credibility assessment. While the Directive states that Member States shall allow applicants the right to legal assistance and rep- resentation, it also clearly envisages that claimants will not be afforded free legal assistance and representation at the interview and initial decision-making stage though it may be provided at the appeal stage.³⁴ Further, the Directive only requires that Member States ensure that "a written report is made of every personal inter- view, containing at least the essential information regarding the application".³⁵ The practical consequences of these limitations for the assessment of credibility may be considerable. Many claimants will, of course, not be in a position to pay for the cost of a representative and will in practice be

without legal assistance and representation at the substantive interview. There is an obvious risk that the written record of interviews may be inaccurate or incomplete, that interviews conducted without a representative present may not be conducted properly and that interpreters may not provide a competent and comprehensive interpretation of the questions and answers. Furthermore, a claimant whose first language is not usually that of the country of application will not, in the absence of representation, be able to check the accuracy and veracity of the written record of interview.

Such concerns have recently been articulated by the UK courts in the case of *Dirshe* which concerned a challenge to the refusal of the Immigration and Nationality Directorate to tape-record asylum interviews. The Court of Appeal recognised that legal representation at the interview stage provides an important

.³¹ Procedures Directive Art. 23(4)(k).

.³² Procedures Directive Art. 23(4)(g).

.³³ Procedures Directive Art. 23(4)(i).

.³⁴ Procedures Directive Art. 13.

.³⁵ Procedures Directive Art. 12(1).

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safeguard against faulty interpreting or inadequate or inaccurate record keeping by decision-makers. In light of the decision of the UK Government to withdraw free legal representation from initial asylum interviews, the court held that it would be procedurally unfair for the Immigration and Nationality Directorate not to tape-record substantive asylum interviews.³⁶ As the court noted, “[a] tape recording provides the only sensible method of redressing the imbalance which results from the . . . [decision-maker] . . . being able to rely on a document created for him without an adequate opportunity for the applicant to refute it.”³⁷ The consequence of this decision in terms of the Procedures Directive is apparent. While the Directive allows Member States to introduce or maintain more favourable standards on asylum procedures than those set out in the Directive, it is notable that the minimum standards contained in the Directive – lack of funded representation and written record only of interviews – are considered to be conducive to potential unfairness in at least one Member State. In any event, the Directive further specifies circumstances in which a personal interview may be omitted altogether where, for instance, the decision-maker considers the application to be unfounded.³⁸

Further major procedural limitations on the assessment of credibility are also evident in the Procedures Directive, in particular the introduction of non-suspensive appeals as a minimum standard for Member States. Allowing applicants the opportunity to appeal against the refusal of their claim only from outside the country of application clearly has significant consequences for the procedural context for the assessment of credibility.³⁹ For instance, recent experience in the UK indicates that appellants pursuing an appeal from outside the country of application may be placed at a significant disadvantage as the appeal decision-maker will not have any opportunity to hear oral evidence from the appellant; furthermore, if the appellant's credibility is challenged, they will have little opportunity to answer this as they are not present before the court or tribunal.⁴⁰ Appellants seeking to overturn an initial negative credibility assessment through the process of a non-suspensive appeal may then face considerable obstacles. Experience elsewhere in the immigration context strongly suggests that appellants who have their appeal determined with an oral hearing are more likely to be successful than those whose appeals are determined solely on the basis of paper documentation.⁴¹ Furthermore, it cannot be discounted

³⁶ *R. (Dirshe) v Secretary of State for the Home Department* [2005] EWCA Civ 421.

³⁷ *Ibid.*, para. 19. In response to this decision, the Immigration and Nationality Directorate changed its policy so that it will now "record substantive asylum interviews upon request except where asylum claimants have public funding for a representative or interpreter to attend the interview or have the resources to fund a representative or interpreter to attend the interview themselves" (Hansard HC Deb., vol. 434, col. 241W, June 6, 2005 (Tony McNulty MP, Minister of State)).

³⁸ Procedures Directive Art. 10(2)(c).

³⁹ See R. Byrne, "Remedies of Limited Effect: Appeals under the forthcoming Directive on EU Minimum Standards on Procedures", *European Journal of Migration and Law* 7/1 (2005) pp. 71–86. See also D. Ackers, "The Negotiations on the Asylum Procedures Directive", *European Journal of Migration and Law* 7/1 (2005) pp. 1–33.

⁴⁰ S. Woodhouse, *Annual Report of the Certification Monitor 2004* (London: Home Office, July 2005), para. 102.

⁴¹ R. Thomas, "Immigration appeals for family visitors refused entry clearance", *Public Law* (2004) pp. 612, 631–639.

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that affording an applicant a non-suspensive appeal may perform some unconscious self-fulfilling influence on the decision-maker's approach to the appeal; 'if the appellant can only appeal from outside the country because their claim has been certified as clearly or manifestly unfounded, then there is probably little

substance to the claim.’ In short, as decision-making processes can indirectly influence substantive outcomes, limitations imposed on the procedure for assessing asylum claims may load the dice against the positive assessment of a claimants’ credibility.

A final provision concerning the method of assessing claimants’ credibility is article 4(5) of the Qualifications Directive, which states that where aspects of the claimant’s account are not supported by documentary or other evidence, those aspects shall not need confirmation when certain conditions are met. These conditions are: (a) the applicant has made a genuine effort to substantiate his application; (b) all relevant elements, at the applicant’s disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given; (c) the applicant’s statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant’s case; (d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and (e) the general credibility of the applicant has been established. The purpose of article 4(5) would appear to be to allow for determination processes to make allowance for the recognised difficulty claimants experience in substantiating their claim through documentary or other evidence by specifying those aspects of the claimant’s account which do not require confirmation. The provision would appear to have been based to some extent on guidance in the UNHCR handbook. Paragraphs 203 and 204 of the handbook recognise that if a claimant has made a genuine effort to substantiate his story, there may still be a lack of evidence for some of his statements; it is frequently necessary to give the claimant the benefit of the doubt when all available evidence has been obtained and checked and the decision-maker is satisfied as to the applicant’s general credibility. Furthermore, the claimant’s statement must be coherent and plausible and not run counter to generally known facts.⁴² Unlike the handbook, however, article 4(5) stops short of exhorting the decision-maker to give the claimant the benefit of the doubt. The implication of the provision would though appear to be that a claimant adducing evidence, which meets the stated conditions, is to be accepted as credible. It is the conditions, however, which provide fairly wide latitude to the decision-maker to determine whether or not the inability to provide corroboration has been justified. The applicant must have made a *genuine* effort; provided a *satisfactory* explanation; their statements must be *coherent and plausible*; and have established their *general credibility*. So while a claimant may not need to provide corroborative evidence, it will be for the decision-maker to exercise their judgment to decide whether or not the relevant conditions have been satisfied.

By contrast, the position in the UK is that it is not necessary for a claimant to corroborate their claim with documentary or other evidence; their statement alone

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⁴² UNHCR, no. 24 above, paras. 203 and 204.

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evidence though whether or not it is accepted and what weight is attached to it are separate matters.⁴³ However, more recently the Tribunal has recognised that the fact that corroboration is not required does not mean that the decision-maker is required to leave out of account the absence of documentary evidence which might reasonably be expected.⁴⁴ In any event, it is also important to note that corroborative evidence may not be reliable. The simple fact that both the claimant and a witness have corroborated each other's evidence does not prove they are telling the truth; both may be lying.⁴⁵ Furthermore, documentary evidence may have limited evidential value.⁴⁶

3. The Assessment of Credibility in UK Law

While EU law contains provisions which both promote the positive and negative assessment of credibility, UK law has long contained provisions tending toward the negative assessment of credibility.⁴⁷ The Immigration Rules, administrative rules which contain the practice to be followed in the administration of UK immigration control, state that the asylum decision-maker will have regard to matters which may damage an asylum applicant's credibility and formerly listed some seven matters which could be taken as damaging credibility; for instance, the failure without reasonable explanation to apply forthwith upon arrival, destruction of travel documentation would be taken as damaging credibility.⁴⁸ Furthermore, as the rules state, if the decision-maker "concludes *for these or any other reasons* that an asylum applicant's account is not credible, the claim will be refused".⁴⁹ Recent changes to the rules reduced the matters which may damage credibility from seven to two – if the claimant has adduced manifestly false evidence in support of his claim or has otherwise made false representations either orally or in writing and that the applicant has lodged concurrent claims for asylum in the UK or in another country. However, these changes do not indicate any weakening in the legislative disposition toward negative credibility assessments. On the contrary, the most recent trend has been the elevation of negative criteria from the realm of administrative rules to primary legislation and thereby providing a stronger steer for decision-makers to assess credibility negatively.

⁴³ *Kasolo v Secretary of State for the Home Department* (13190).

⁴⁴ *ST v Secretary of State for the Home Department (Corroboration – Kasolo) Ethiopia* [2004] UKIAT00119, para. 15.

⁴⁵ *Secretary of State for the Home Department v AB (Witness corroboration in asylum appeals) Somalia* [2004] UKIAT00125, para. 4.

⁴⁶ *Tanveer Ahmed v Secretary of State for the Home Department (Documents unreliable and forged)* [2002] Imm AR 318.

⁴⁷ On the UK refugee determination process, see generally M. Symes and P. Jorro, *Asylum Law and Practice* (London: LexisNexis 2003); National Audit Office, *Improving the Speed and Quality of Asylum Decisions* (2003–04 HC 535).

⁴⁸ See further D. Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (London: Sweet & Maxwell, 2004) pp. 280–282.

⁴⁹ Immigration Rules (1994 HC 395), rule 341 (emphasis added).

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The relevant provision is section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. Under this section, a deciding authority – which includes both an initial administrative decision-maker and an appeal tribunal – when determining whether to believe a statement made by a claimant, has to take into account, as damaging the claimant’s credibility, any behaviour of the claimant which is designed or likely to conceal information, mislead, or obstruct or delay the handling or resolution of the claim or the taking of a decision in relation to the claimant. The section specifies that certain kinds of behaviour shall be treated as designed or likely to conceal information or mislead: the failure without reasonable explanation to produce a passport on request to an immigration official; the production of a document which is not a valid passport as if it were; the destruction, alteration or disposal, in each case without reasonable explanation, of a passport, a ticket or other travel document; and a failure without reasonable explanation to answer a question asked by the decision-maker.⁵⁰

The policy justification for section 8 is that it will deter and reduce the scope for abuse and promote consistency in the treatment of those who perpetrate it. By requiring certain behaviour to be taken into account as damaging a claimant’s credibility, the intention is that the provision will induce claimants to co-operate and be honest in the determination of their claim. As the government has explained, “[w]here a person makes an asylum or human rights claim, we believe it is reasonable to expect them to be open and co-operative with those deciding the claim and to lodge the claim as soon as they can (including in another safe country if they reach one before arriving in the United Kingdom)”.⁵¹ The principal concern with section 8 is that it establishes an unreasonable evidential presumption that just because the claimant has behaved in a specified manner, their general credibility to be a refugee in need of international protection is presumed to have been damaged. For instance, the UNHCR handbook recognizes that claimants

may, owing to their experiences, feel apprehensive and be afraid to speak freely and give a full and accurate account of their case and further that untrue statements by themselves are not a reason for refusing refugee status.⁵² Delays in either claiming asylum or revealing the full details of the claim may result not from the claimant's lack of credibility but from the claimant's personal shame resulting from the torture, sexual violence or other persecutory treatment they have suffered.

In perhaps (partial) recognition of such concerns, section 8 does, at least in part, establish a rebuttable presumption rather than an absolute rule. For instance, a claimant may be able to provide a reasonable explanation for their failure to answer a question asked by a deciding authority.⁵³ The utility of this opportunity may though be doubted. For instance, if a claimant is unwilling to answer a question owing to its sensitivity, then they may be similarly unwilling to provide an explanation for their reluctance to answer. While the decision-maker must take into

⁵⁰ Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, s. 8(3).

⁵¹ Immigration and Nationality Directorate, Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 – Implementation Factsheet, <www.ind.homeoffice.gov.uk/ind/en/home/laws_policy/legislation/act_implementation.html?> (visited 11 August 2005).

⁵² UNHCR, no. 24 above, paras. 198 and 199. ⁵³ Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, s.8(3)(e).

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account the behaviour as damaging the claimant's credibility, it will nevertheless be for the decision-maker to decide on the facts of the individual case the extent to which credibility has been damaged.

While certain kinds of behaviour are subject to a "reasonable behaviour" proviso, other kinds of behaviour listed in section 8 are presumed to damage a claimant's credibility irrespective of any reasonable explanation. A claimant's failure to take advantage of a reasonable opportunity to make an asylum or human rights claim while in a safe country; a failure to make such a claim before being notified of an immigration decision (e.g. refusal of leave to remain in the UK), unless the claim relies wholly on matters arising after the decision; and a failure to make a claim before being arrested under immigration powers (unless there was no reasonable opportunity to make the claim before the arrest or the claim relies wholly on matters arising afterwards) are to be taken into account as damaging credibility irrespective of any reasonable excuse or explanation.⁵⁴ As a matter of policy it is considered that there is no legitimate reason why someone should not claim

asylum in a safe country or not claim asylum until after they have received a decision on another matter or only claim asylum after being arrested. While there have certainly been examples of tribunal determinations where a belated asylum claim made only after a threat of deportation will undermine credibility, the generality of a rule that credibility is damaged in such cases runs against the grain of the independent adjudication of each individual claim; it is, of course, possible that a claimant may nevertheless have a reasonable explanation for such delay.⁵⁵

One objection to the obligation to take into account as damaging credibility a claimant's failure to claim asylum in a safe country is that there is no logical reason why such a failure should undermine a claimant's credibility in general. If an individual has preferred to lodge an asylum claim rather than another country they have passed through en route, then the imposition of a presumption of damaged credibility to be a refugee may compromise the fairness of the decision-making process. Furthermore, recent case-law supports the view that the fact that a claimant has not sought international protection in the first safe country does not by itself undermine the credibility of their claim. In *Adimi* the High Court held that there was some element of choice open to a claimant regarding the country in which they might seek asylum.⁵⁶ The Tribunal subsequently recognised that a presumption of adverse implications for credibility owing to a failure to claim asylum en route had "largely fallen into disrepute",⁵⁷ while the leading immigration law judge, Collins J., noted that such a failure "cannot conceivably by itself throw doubt on whether . . . [the claimant] . . . is indeed a genuine asylum seeker."⁵⁸ The effect of section 8, however, is to resurrect this presumption. In seeking to justify this reversal, the gov-

⁵⁴ Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, s.8(4), (5) and (6). See also the Immigration (Claimant's Credibility) Regulations SI 2004/3263.

. ⁵⁵ See, e.g., *TP v Secretary of State for the Home Department (Credibility) Zimbabwe* [2004] UKIAT00159.

. ⁵⁶ *R. v Uxbridge Magistrates' Court Ex p. Adimi* [2001] QB 667.

. ⁵⁷ *Secretary of State for the Home Department v IA HC KD RO HG (Risk – Guidelines – Separatist)*

Turkey CG [2003] UKIAT00034, para. 41. ⁵⁸ *R (Degirmenci) v Immigration Appeal Tribunal* [2003] EWHC Admin 324, para. 11.

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ernment has argued that it is usually reasonable to require a person to make a claim for international protection in the first safe country they reach; furthermore, even if a person's credibility is damaged, it is for the deciding authority to decide

on the extent to which credibility has been damaged in light of the facts of the individual case.⁵⁹ While a Parliamentary human rights committee has accepted this justification, it has also stressed that decision-makers should at all times be conscious that a claimant whose credibility is deemed to be damaged could nevertheless be telling the truth.⁶⁰ The Tribunal though has stated that when a person appears to be telling the truth about having passed through a number of countries on his or her journey to the UK, the effect of this aspect of section 8 will be to draw clear and specific attention to certain features of the evidence as aspects which must (by statute) be regarded as casting some doubt upon the credibility of the person's claim to be a refugee.⁶¹

A broader concern with section 8 is that as it applies to the determination of claims by both administrative decision-makers and independent judicial decision-makers, it has the effect of interfering with the integrity of the judicial process. Unlike the Immigration Rules, which are instructions to initial decision-makers within the Immigration and Nationality Directorate, section 8 must also be applied by the Tribunal. One can sense something of the unease that section 8 has prompted by considering the recent guidance promulgated by the Tribunal to the 540 immigration judges in the UK who decide asylum appeals. The Tribunal has stated that “[g]iven the terms of section 8, it is inevitable that the fact-finding process is somewhat distorted, but that distortion must be kept to a minimum . . . although section 8 of the 2004 Act has the undeniably novel feature of requiring the deciding authority to treat certain aspects of the evidence in a particular way, it is not intended to, and does not, otherwise affect the general process of deriving facts from evidence”.⁶² As the Tribunal has emphasized, it is the task of the decision-maker – whether official or judge – to look at all the evidence in the round to determine whether it is sufficient to discharge the burden of proof; the fact-finder must consider all the evidence, and despite the words of section 8, it is for the fact-finder to decide which parts of the evidence have greater or less importance. We can therefore detect here an effort by the Tribunal to minimize the distorting effect of this culmination of legislative pressure on the independent appeal system to reach negative credibility assessments and to maintain the integrity of the fact-finding process. While it remains to be seen how section 8 will be applied in practice, it is fairly evident that the Tribunal envisages potential difficulties. As the Tribunal has noted, section 8 “has the incidental effect of interfering with the well-established rule that the finder of fact . . . should look at the evidence as a whole, giving each item of it such weight as he or she considers appropriate. That is unfortunate, and may in

⁵⁹ Hansard HL Deb., vol. 659, cols. 1682–1685, April 5, 2004 (Baroness Scotland of Asthal, Minister of State).

⁶⁰ Joint Committee on Human Rights, *Asylum and Immigration (Treatment of Claimants, etc.) Bill* (2003–04 HL 35 HC 304), para. 32.

⁶¹ *SM v Secretary of State for the Home Department (Section 8: Judge's process) Iran* [2005] UKAIT00116, para. 8.

⁶² *Ibid.*, paras. 9–10.

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some circumstances be difficult to manage.”⁶³ In short, a provision such as section 8 may have the dual effect of establishing a framework for negative credibility assessments and increasing the already substantial difficulties presented to the decision-maker in judging credibility.

Conclusion

This paper has examined the importance of credibility assessments for the determination of asylum and human rights claims and examined relevant provisions governing the assessment of credibility in both EU and UK law. It has been seen that the function of deciding whether or not an individual has presented a credible claim to be a refugee is often a highly complex, difficult and intractable task for decision-makers. Decision-makers have to make decisions under numerous evidential, practical and organisational constraints. Ultimately, the correct determination of claims is dependant upon decision-makers' own integrity and conscientious judgment.

Legislators have increasingly sought to guide how decision-makers approach the task of assessing the credibility of asylum claims. The reasons why policy-makers have provided such guidance are not, however, uniform. The principal objective of the EU law has been to establish minimum standards in the determination of asylum claims across the EU. The Qualifications Directive introduces guidance for decision-makers concerning credibility assessments to ensure that decision-makers take into account the full range of factual circumstances concerning a claim. This guidance is to be welcomed as a minimum standard. However, at the same time, the Procedures Directive introduces some potential limitations on the decision-making process which may adversely affect the assessment of a claimant's credibility.

By contrast, UK law has recently introduced measures explicitly aimed at conditioning decision-making to ensure that certain types of behaviour will be taken into account as damaging claimants' credibility. As policy-makers have come under increasing pressure to deal with asylum, they have resorted to legislation which may adversely affect the determination of claimants' credibility. While EU law may achieve this adverse affect through the minimum procedures introduced by the Procedures Directive, UK law has adopted a much more explicit tactic of specifically designated certain behaviour as damaging a claimants' credibility. It

remains to be seen exactly how decision-makers will respond to these provisions.

While this paper has examined some of the principal issues relating to the assessment of credibility but has not sought to provide an exhaustive analysis, much more work is required to understand the task of decision-makers, the practical and organisational pressures under which they operate, the form of procedure (adversarial or inquisitorial) most appropriate to assessing credibility, the influence of personal and western values on decision-making and the influence of the legal rules. Perhaps what is required is detailed empirical investigation of how decision-makers assess credibility and how the rules are applied; only with such research might we be in a better position to appreciate the intractable problem posed by assessing credibility and to consider ways of ameliorating the difficulties.

⁶³ Ibid., para. 7.