

## Credibility, Proof and Refugee Law

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### 1. Introduction

To be recognised as a refugee in the UK, an asylum seeker must prove ‘to a reasonable degree of likelihood’ that they have a well founded fear of persecution for one of the reasons specified in the 1951 UN Refugee Convention.<sup>1</sup> Applicants will tend to have little in the way of documentary evidence, and a lot will depend on what they say and how they say it. This is said to involve assessing their credibility.

Credibility assessments are usually understood to involve checking for three things: internal consistency, external consistency (congruence with known facts), and plausibility.<sup>2</sup> But this does not tell us *how* internally consistent, *how* externally consistent, or *how* plausible the applicant’s story would need to be in order to be ‘credible’. Does an individual really need to ‘prove’ credibility, and what is the extent of the relationship between credibility findings and the outcome of the case?

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<sup>1</sup> As amended by the 1967 Protocol; Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (UN Refugee Convention); Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267; *R v Secretary of State for the Home Department ex parte Sivakumaran and others* [1988] 1 AC 958, [1987] UKHL 1, [1988] 1 All ER 193, [1988] Imm AR 147, [1988] 2 WLR 92. This article concentrates on applications for recognition as a refugee, but the same issues of credibility, proof and fact handling skills arise equally when applicants assert that their removal from the UK would violate the European Convention on Human Rights or European Union law.

<sup>2</sup> A. Weston “‘A witness of truth’ – credibility findings in asylum appeals’ (1998) 12 *Immigration and Nationality Law and Practice* 87-89 at 88 is often credited with identifying these categories.

The UN Refugee Convention makes no mention of credibility either in relation to the refugee definition in Article 1A(2) or the prohibition on refoulement in Article 33(1), yet many applications for asylum in the UK are rejected specifically because there are doubts about the ‘credibility’ of the application.<sup>3</sup> The assessment of credibility has been described as ‘often the single most important step’ in determining refugee status.<sup>4</sup>

Despite its importance, the term ‘credibility’ is used in several different ways in the UK and elsewhere, with a range of descriptive intentions and legal consequences. It is ‘conceptually elusive and adjudicatively influential.’<sup>5</sup> The contribution of this article is to unpick the multiple significances of the term, in order to refine the legal significance of credibility assessments and their relationship to questions of proof.

In response to some of the concerns expressed about the quality of asylum decision making in the UK, special advice on credibility in the form of an ‘Asylum Policy Instruction’ (API) has been issued.<sup>6</sup> The API gives some useful and welcome technical advice on how to make credibility findings, but it is deeply problematic on the threshold for ‘being credible’ and on the legal significance of credibility findings upon the outcome of the application for asylum.

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<sup>3</sup> G. Clayton, *Textbook on Immigration and Asylum Law* (Oxford: OUP, 2<sup>nd</sup> edn., 2006), 408.

<sup>4</sup> M. Kagan, ‘Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination’ (2003) 17 *Georgetown Immigration Law Journal* 367-415 at 367.

<sup>5</sup> G. Coffey, ‘The Credibility of Credibility Evidence at the Refugee Review Tribunal’ 15 *IJRL* 377-417 (2003), 377; also on Australia see S. Norman, ‘Assessing the Credibility of Refugee Applicants: A Judicial Perspective’ 19 *IJRL* 273-292 (2007).

<sup>6</sup> API ‘Assessing Credibility in Asylum and Human Rights Claims’ (2006, rebranded 2008), available at UK Border Agency, ‘Guidance and Instructions’ <<http://www.bia.homeoffice.gov.uk/policyandlaw/guidance/>> (Accessed 17 September 2009)

The following analysis will examine the API itself, the UK's primary legislation, Immigration Rules and case law, EU law, and guidance provided by the Office of the United Nations High Commissioner on Refugees (UNHCR). Part one introduces the UK's API and reviews the three common techniques for determining credibility. Part two identifies the existence of divergent 'broad' and 'narrow' interpretations of the significance of credibility in the refugee status determination process. The API is shown to overlook this distinction, conflating an understanding of credibility as loose shorthand for the strength of the case with a narrower understanding of credibility as an evidential issue. Part three introduces some basic concepts from the law of evidence in order to elaborate on credibility as an evidential issue, in order to demonstrate that the threshold of 'being credible' can be distinguished from 'being proven'. Part four examines the UK's legal rules on giving the benefit of the doubt to credible statements, and criticises the extent to which 'general credibility' issues unrelated to evidential admissibility, such as the promptness of the application for asylum, are allowed to impact upon credibility findings. Part five returns to the standard of proof in asylum cases, and explains how credible but unproven statements may play an important role in satisfying it. A close reading of the *Karanakaran*<sup>7</sup> case is undertaken, which disputes the API's interpretation of its findings. The conclusion recommends the deletion of the API on credibility, and proposes some succinct advice to decision makers in the UK and elsewhere on the significance and process of assessing credibility.

## **1.1 'Credibility' and the quality of asylum decision making in the UK**

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<sup>7</sup> *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.

The quality of asylum decision making in the UK has been a cause for concern for some time,<sup>8</sup> and since 2003 the UNHCR Quality Initiative Project has been assisting the UK government to improve its refugee status determination (RSD) process. Given the importance of credibility to the RSD process, concern over the quality of decision making in the UK has, inevitably, involved concern over decision makers' approach to credibility.

The attitude of decision makers and the techniques used to discredit and disbelieve applicants' testimony has been especially problematic. The UNHCR's second report produced under the Quality Initiative Project identified a need for further training of decision makers to counter the onset of a 'refusal mindset'.<sup>9</sup> Elsewhere decision makers have been described as possessing an 'agenda of disbelief'.<sup>10</sup> Also in its second report, the UNCHR identified that a significant

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<sup>8</sup> House of Commons Home Affairs Committee, 'Asylum Applications' HC (2003-04) 218-I; National Audit Office, Report by the Comptroller and Auditor General, 'Improving the Speed and Quality of Asylum Decisions' HC (2003-04) 535; E. Smith, *Right First Time? Home Office Interviewing and Reasons for Refusal Letters* (London: Medical Foundation for the Care of Victims of Torture 2004); see also the research compiled in Independent Asylum Commission, *Fit for Purpose Yet? The Independent Asylum Commission's Interim Findings* (London: IAC 2008). The Government's responses to the IAC's interim findings are tracked through the subsequent reports, available at <http://www.independentasylumcommission.org.uk/> (accessed 30 July 2009). The IAC is discussed further below in the text at fn. 15.

<sup>9</sup> UNHCR, *Quality Initiative Protect: Second Report to the Minister* (UNHCR 2005), at 17. Although initially confidential, all the reports and the UK Government's responses to them are now available at <http://www.bia.homeoffice.gov.uk/sitecontent/documents/aboutus/reports/unhcrreports/> (accessed 30 July 2009).

<sup>10</sup> J. Ensor, A. Shah, M. Grillo 'Simple myths and complex realities – seeking truth in the face of section 8' (2006) 20 *Immigration, Asylum and Nationality Law* 95-111 at 95; the Independent Asylum Commission Interim Report n8 above at 2 & 20 also noted the observation of a 'culture of disbelief' in decision makers.

number of caseworkers, including those in senior positions, incorrectly interpret key refugee law concepts.<sup>11</sup>

There have been several important developments in the way that asylum applications are decided since the UNHCR Quality Initiative Project began, and several areas of improvement have been identified.<sup>12</sup> The biggest changes include the radical reorganisation of the government department that handles applications for asylum,<sup>13</sup> and the implementation of the ‘New Asylum Model’: a case management system announced in 2005 and characterised by the segmentation of claims according to priority and complexity, and the ‘ownership’ of each application from end-to-end by a single case worker.<sup>14</sup> Resulting improvements, although with several areas of continued concern, have been confirmed by the Independent Asylum Commission.<sup>15</sup>

In its fourth report on the Quality Initiative Project, the UNHCR observed that assessing credibility and establishing the facts of the case remained a ‘challenging

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<sup>11</sup> UNHCR, Quality Initiative Protect: Second Report to the Minister, n. 9 above at 1& 11; the Government response (see n9 above) did not address this point directly, although it devotes considerable attention to training and monitoring.

<sup>12</sup> See UNHCR, Quality Initiative Project: Fourth Report to the Minister (UNHCR 2007).

<sup>13</sup> Applications for asylum are within the remit of the Home Office. Within this, they were handled by the Immigration and Nationality Directorate, which became the Border and Immigration Agency on 1 April 2007. Since 1 April 2008 they are handled by ‘UKBA’ – the UK Border Agency which, whilst awaiting full agency status, describes itself as ‘a shadow agency’ of the Home Office. Details of the changes within the Home Office can be found at [http://www.cabinetoffice.gov.uk/border\\_review.aspx](http://www.cabinetoffice.gov.uk/border_review.aspx) (accessed 16 September 2009).

<sup>14</sup> Home Office ‘Controlling our Borders: Five year strategy for asylum and immigration’ CM6472 (2005) at 35 et seq; for the process itself see <http://www.ukba.homeoffice.gov.uk/asylum/process/processoverview/> (accessed 16 September 2009).

<sup>15</sup> The Commission is an NGO commissioned by the Citizen Organising Forum (<http://www.cof.org.uk>) to review the UK asylum process between October 2006 and July 2008. The third and final report was still particularly concerned about the caseload of NAM caseworkers: Independent Asylum Commission, Third Report of Conclusions and Recommendations: Deserving Dignity (London: IAC 2008), at 13.

area' for a significant number of decision makers.<sup>16</sup> It detailed the development of a best practice guide on credibility. This was to be used as the basis for a new API, a draft of which UNHCR noted it was pleased to have had the opportunity to comment upon.<sup>17</sup> Thus, amongst the measures designed to improve both the quality and consistency of decision making, an API on credibility was issued by the Home Office in 2006.<sup>18</sup>

There are some 43 APIs, arranged thematically, along with another 13 'Asylum Policy Update' notices (APUs) explaining recent changes in the law and policy. The APIs and APUs are influential but non-legislative documents designed to help decision makers by drawing together law and good practice. The UK Border Agency website simply states that the APIs '*are* the Government's policy on asylum. They are followed by asylum case owners in the UK Border Agency' [emphasis added].<sup>19</sup> The UK has rejected the UNHCR recommendation that case workers should be educated to university level.<sup>20</sup> Thus the APIs must play a role in bridging

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<sup>16</sup> UNHCR, Fourth Report to the Minister n. 12 above, at 2.

<sup>17</sup> UNHCR, Fourth Report to the Minister n. 12 above, at 3.

<sup>18</sup> API 'Assessing Credibility', n. 6 above.

<sup>19</sup> UK Border Agency, 'Guidance and Instructions'

<<http://www.bia.homeoffice.gov.uk/policyandlaw/guidance/>> (Accessed 16 September 2009).

<sup>20</sup> UNHCR recommended that a university degree, 'together with asylum specific competencies,' would be the desirable minimum educational qualification for asylum casework: UNHCR, Quality Initiative Project: First Report to the Minister (UNHCR 2005), 10, available at <<http://www.bia.homeoffice.gov.uk/sitecontent/documents/aboutus/reports/unhcrreports/>> (accessed 16 September 2009). The Home Office responded by confirming a policy of requiring two 'A' levels was in place for external candidates; that degree level qualification was 'not necessary for external candidates provided a comprehensive and realistic competency or accreditation framework is adopted'; and that specifying minimum qualifications for internal candidates 'would not be in line with current Home Office policy, equality or diversity guidelines': Tony McNulty, 'Minister's Response to First Report', 2, also available at <<http://www.bia.homeoffice.gov.uk/sitecontent/documents/aboutus/reports/unhcrreports/>> (accessed 16 September 2009). The minimum qualification to commence an undergraduate degree in law at

the gap between law and practice by making complex legal and conceptual issues accessible to decision makers.

It might be observed initially that the array of thematic guidance provided by the APIs and APUs, which ranges from the general to the specific, from the procedural to the substantive, is not the clearest or most concise way of rendering the principal legal sources accessible to case workers. Nevertheless, the publication of the API on credibility follows similar moves in other legal systems to provide special guidance on this issue, such as the lengthy advisory paper, ‘Assessment of Credibility in Claims for Refugee Protection’ produced by the Canadian Immigration and Refugee Board in 2004.<sup>21</sup>

## **1.2 Three techniques for determining credibility**

The UK’s API characterises the techniques for accepting or denying credibility as checking for ‘internal credibility’, ‘external credibility’ and ‘plausibility’. These are the three categories of test that Amanda Weston used to describe immigration Adjudicators’ practice in her analysis published in 1998.<sup>22</sup> It might therefore be noted that by formally adopting these categories, the API has converted Weston’s description into rudimentary prescription.

Nevertheless, it is in this section of the API that the most progress is made in terms of giving practical advice to decision makers. There have been a number of significant academic studies published that demonstrate the vulnerable position of

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many UK universities is three ‘A’ levels, with many of the leading institutions requiring all three to be at the highest grade.

<sup>21</sup> Immigration and Refugee Board, Refugee Protection Division, ‘Assessment of Credibility in Claims for Refugee Protection’ (2004).

<sup>22</sup> Weston, n. 2 above, 88.

asylum applicants.<sup>23</sup> From the content of the API, it appears that the publication of such works is starting to have an effect.

Although in relation to internal credibility decision makers are told to watch for the level of detail and introduction of inconsistencies, the API clearly indicates that there may be mitigating circumstances in some cases such as ‘mental or emotional trauma, inarticulateness, fear, mistrust of authorities, feelings of shame, painful memories particularly those of a sexual nature’.<sup>24</sup> However the advice that decision makers must only ‘try to ensure’<sup>25</sup> that any inconsistencies are put to the applicant so that they have chance to explain them does not go nearly far enough.

In relation to ‘external credibility’ decision makers are reminded that if the applicant’s statements are not consistent with objective country information they must put that inconsistency to them in order for them to have the opportunity to account for the discrepancy. Decision makers are also reminded that the absence of objective country information to support a claimed fact does not necessarily mean an incident did not occur.<sup>26</sup>

Finally, in relation to potentially the most subjective of all grounds for credibility findings, plausibility, decision makers are reminded not to construct their own theories of how the applicant or others in the account ought to have behaved, or to assess their behaviour against what would be plausible in the UK. This goes some

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<sup>23</sup> For example H. Baillot, S. Cowan, V. Munro, ‘Seen but not heard? Parallels and dissonances in the treatment of rape narratives across the asylum and criminal justice contexts’ (2009) 36 *Journal of Law and Society* 195-219; J. Cohen, ‘Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers’ 13 *IJRL* 293-309 (2002); J. Millbank, “‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations’ 21 *IJRL* 1 (2009); J. Herlihy & S. W. Turner, ‘The Psychology of Seeking Protection’ 21 *IJRL* 171 (2009).

<sup>24</sup> API ‘Assessing Credibility’, n. 6 above, 9.

<sup>25</sup> API ‘Assessing Credibility’, n. 6 above, 8.

<sup>26</sup> API ‘Assessing Credibility’, n. 6 above, 9.



way to avoiding the implicit construction of a hypothetical ‘reasonable persecutor’ against which to judge the plausibility of alleged persecutors’ actions.<sup>27</sup> Applications should not be rejected simply because the decision maker can imagine a ‘better’ way to have carried out the alleged persecution.

Although the advice in this section of the API may help improve the quality of decision making, the application of the tests could be made more objective. The introduction to the API states that decision makers will often have to decide whether ‘*they* believe’ the applicant’s evidence [emphasis added].<sup>28</sup> Later, the API seems resigned to the fact that assessing a claim’s credibility ‘inevitably involves an element of subjectivity on the decision maker’s part’,<sup>29</sup> although granted its advice is specifically designed minimize subjective decision making. Michael Kagan’s approach to objective credibility assessment is an improvement upon this, by reminding decision makers that the question is not whether *they* believe the applicant, but whether there is a reasonable basis for the applicant to be believed.<sup>30</sup>

### **1.3 The legal sources of the UK’s API on credibility**

The real problem with the API does not concern its practical advice about making credibility findings, but its explanation of the legal impact of credibility findings upon the outcome of the case. This problem stems from the ambitious but ultimately flawed attempt to draw together within the API a fairly wide range of materials of

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<sup>27</sup> J. Sweeney, ‘The “lure” of facts in asylum appeals: Critiquing the practice of judges’ in S. Smith (ed.) *Applying Theory to Policy and Practice: Issues for Critical Reflection* (Aldershot: Ashgate 2007), 19-35, 27.

<sup>28</sup> API ‘Assessing Credibility’, n. 6 above, 2.

<sup>29</sup> API ‘Assessing Credibility’, n. 6 above, 8.

<sup>30</sup> Kagan, n. 4 above, 403.

differing legal statuses.<sup>31</sup> It is necessary therefore briefly to review the relationship between these materials.

According to its introduction, the UK's API on credibility 'takes into account' primary legislation, the UK's Immigration Rules, the EU Qualification Directive,<sup>32</sup> the UK case law and UNHCR Handbook on Procedures and Criteria for Determining Refugee Status.<sup>33</sup> It should be 'read alongside' the more general APIs on 'Considering the Asylum Claim' and 'Considering Human Rights Claims'.<sup>34</sup> It is notable and unfortunate that the API does not make reference to the 1998 UNHCR 'Note on Burden and Standard of Proof in Refugee Claims',<sup>35</sup> since this also gives specific advice on determining credibility.

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<sup>31</sup> Although it does not state it in the introduction, the API on credibility also at various points directs its readers to what it names as APIs on 'Gender Issues in the Asylum Claim', 'Medical Evidence', 'Conducting Asylum Interviews', 'Certification under section 94 of the NIA Act 2002' and 'Further representations and fresh claims'. These titles do not map onto the APIs available from UKBA. For example, there is no API on or entitled 'medical evidence' (although there is an API entitled 'Medical foundation', which gives advice on dealing with applicants who have a medical report prepared by registered charity the Medical Foundation for the Care of Victims of Torture, and an APU notice on applications raising Article 3 ECHR medical grounds). All the APIs are available from <http://www.bia.homeoffice.gov.uk/policyandlaw/guidance/> (Accessed 15<sup>th</sup> September 2009).

<sup>32</sup> 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 [2004] OJ No L304/12.

<sup>33</sup> UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees: UN doc. HCR/IP/4/Eng/REV.1 (2nd edn. Geneva 1992).

<sup>34</sup> It is not totally clear to which other APIs the credibility API is referring at this point. It is understood that the first reference is to the API actually entitled, 'Assessing the Asylum Claim'. There is no API on 'Considering Human Rights Claims', although there are separate APIs on 'Article 8 ECHR', 'ECHR – European Convention on Human Rights' and 'Humanitarian Protection'.

<sup>35</sup> UNHCR, 'Note on Burden and Standard of Proof in Refugee Claims': 16 December 1998 available at <http://www.unhcr.org/refworld/docid/3ae6b3338.html> (accessed 16 September 2009); it is noted below in the text at fn 45, in agreement with Kagan (n. 4 above), that even this document is inconsistent in its use of the term 'credibility'.

As mentioned above, the UN Refugee Convention makes no mention of credibility, but the influential UNHCR Handbook on Procedures and Criteria for Determining Refugee Status<sup>36</sup> nevertheless uses the term at several points. The Handbook is not binding on state parties to the UN Refugee Convention, but it is of considerable persuasive authority. Despite this authority, the UK Border Agency API on the UNHCR states clearly that ‘if there is a discrepancy between the Handbook and UK law or UK Border Agency policy, law and policy will take precedence.’<sup>37</sup>

The Immigration Act 1971 is the legal foundation of the UK’s immigration laws.<sup>38</sup> The first dedicated provisions on asylum came in the form of the Asylum and Immigration Appeals Act (AIAA) 1993, which in Section 1 defines the claim of asylum as one asserting that to be removed from the UK would be contrary to the UK’s obligations under the Refugee Convention.<sup>39</sup> Section 2 AIAA 1993 prohibits the UK’s Immigration Rules from putting in place any practice that would be contrary to the Refugee Convention.

The Immigration Rules are issued under section 3(2) of the 1971 Act, and enjoy a comparable (although not identical) legal status to delegated legislation.<sup>40</sup> They contain much of the authoritative guidance on the operation of the immigration

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<sup>36</sup> UNHCR Handbook, n. 33 above.

<sup>37</sup> API ‘The United Nations’ High Commissioner for Refugees’ (2006, rebranded 2009), available from UK Border Agency, ‘Guidance and Instructions’ <<http://www.bia.homeoffice.gov.uk/policyandlaw/guidance/>> (accessed 16 September 2009)

<sup>38</sup> For an historical introduction to UK legislation and its judicial supervision see e.g. G. Care, ‘The judiciary, the state and the refugee: The evolution of judicial protection in asylum – a UK perspective’ (2006) 28 *Fordham International Law Journal* 1421-1456.

<sup>39</sup> R. Cholewinski, ‘Enforced Destitution of Asylum Seekers in the United Kingdom: The Denial of Fundamental Rights’ 10 *IJRL* 462-498 (1998) at fn 54 notes that whilst this provision pins UK law to the Refugee Convention, it does not necessarily incorporate it.

<sup>40</sup> See generally S. Juss, ‘Rule-making and the Immigration Rules – A retreat from law’ (1992) 13 *Statute Law Review* 150-164.

and asylum processes in the UK. In recent years, the Immigration Rules have been used as one of several means of transposing EU law on refugees. EU law on this topic has been gathering in pace since the Treaty of Amsterdam in 1998,<sup>41</sup> and presently takes the form of three principal directives; the Qualification Directive, the Reception Directive,<sup>42</sup> and the Procedures Directive.<sup>43</sup> It is the first of these that contains rules relevant to credibility.

The flaw of the API on credibility is to present these disparate materials as if they are consistent on the significance of credibility in the RSD process and its relationship to basic concepts in refugee law such as the benefit of the doubt and the standard of proof. They are not. In particular, there are two very different interpretations given to the significance of credibility detectable in these sources; one broad and one narrow.

## 2. Broad and narrow approaches to credibility

The introduction above alluded to the general consensus that assessing credibility is a very important stage in the RSD process. However, that consensus does not extend to exactly what it means to assess credibility. Michael Kagan's analysis identified two

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<sup>41</sup> For the background see, E. Guild, 'The Europeanisation of Europe's asylum policy' 18 IJRL 630-651 (2006); on the EU Qualification Directive see H. Lambert, 'The EU Qualification Directive, its impact on the jurisprudence of the United Kingdom and international law' (2006) 55 ICLQ 161-192; R. Thomas, 'Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined' (2006) 8 *European Journal of Migration and Law* 79-96.

<sup>42</sup> Council Directive 2003/9/EC on the minimum standards for the reception of asylum seekers [2003] OJ No L 31/18.

<sup>43</sup> Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ No L 326/13.

main approaches,<sup>44</sup> which will here be termed broad and narrow interpretations of credibility.

The broadest interpretation is that credibility is about whether the application is meritorious and, consequently, successful. On a broad interpretation of credibility, therefore, to describe a claim as ‘credible’ is to say that the applicant’s statements are true and that they warrant international protection. It is shorthand for expressing the strength of the case. This usage of the term ‘credible’ is fairly widespread. Indeed, as Kagan observed, even UNHCR has occasionally referred to the ‘overall credibility of the applicant’s claim’.<sup>45</sup>

Kagan advocates a narrower view of credibility that sees the conclusion that a particular statement is ‘credible’ as more contingent.<sup>46</sup> It is less about the outcome of the case, or even the conclusive proof of material facts, and more of a pre-requisite evidential step.<sup>47</sup> A ‘credible’ but otherwise unsupported statement is one that is not certainly true, not yet proven but, because it is plausible, consistent, and reflects generally known facts, must not be dismissed from the consideration of whether the applicant has a well founded fear of persecution. The UNHCR Handbook describes

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<sup>44</sup> Kagan, n. 4 above, 369.

<sup>45</sup> UNHCR Note on Burden and Standard of Proof, n. 35 above, para. 11, quoted by Kagan n. 4 above, 369 at fn9, who also observes that this paragraph in fact uses credibility in both its broad and narrow senses.

<sup>46</sup> Kagan n. 4 above, 371; see also Hathaway & Hicks’ summary of similar rules in several jurisdictions: J. Hathaway & W. Hicks ‘Is there a Subjective Element in the Refugee Convention’s Requirement of a “well-founded” fear’ (2005) 26 *Michigan Journal of International Law*, 505-562; c.f. Norman, n. 5 above, 291, who states that credibility is ‘about making findings of fact’.

<sup>47</sup> G. Noll, ‘Evidentiary Assessment in Refugee Status Determination and the EU Qualification Directive’ (2006) 12 EPL 295-317, 310 et seq.

admitting unsupported but credible statements as evidence as giving asylum seekers the ‘benefit of the doubt’.<sup>48</sup>

The present analysis shows not only that it is possible to distinguish broad and narrow views of credibility, but also that the narrow view is preferable since it facilitates a clearer demarcation of the applicable legal concepts.

## **2.1 The UK’s API and its predominantly ‘broad’ approach to credibility**

The API summarises elements of the narrow understanding of credibility, namely the techniques for determining credibility and the conditions to be met before an applicant gains the benefit of the doubt, but it amplifies the relevance of the applicant’s general credibility and presents credibility findings as going to the strength of the case overall rather than just to the admissibility of evidence. The orientation of the API towards this broad interpretation of credibility begins in its introduction:

The process of determining whether an applicant is in need of international protection often requires a decision maker to decide whether they believe the applicant’s evidence about past and present events and how much weight they attach to that evidence. In determining this, decision makers *must assess* the *credibility of the applicant* and the evidence that they submit. [emphasis added]<sup>49</sup>

This instruction suggests from the outset that the ‘credibility of the applicant’, and not just the evidence, is an issue whenever the occurrence of a past or present event is in

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<sup>48</sup> UNHCR Handbook, n. 33 above, para. 196; Noll has also described this use of the term ‘credibility’ in the Handbook as referring to ‘source credibility’: G. Noll, ‘Evidentiary Assessment Under the Refugee Convention: Risk, Pain and the Intersubjectivity of Fear’ in G. Noll (ed.), *Proof, Evidentiary Assessment & Credibility in Asylum Procedures* (Leiden: Martinus Nijhoff, 2005), 141-159, 150.

<sup>49</sup> API ‘Assessing Credibility’, n. 6 above, 2.

dispute. This means that in addition to examining the internal or external consistency and plausibility of the account overall, decision makers are directed to look at factors such as the promptness and mode of the application for asylum as credibility issues, and in isolation from the question of whether a well founded fear exists. We shall return to personal, or general, credibility below.<sup>50</sup>

The centrality of credibility is stressed further into the API, where it is stated that,

In assessing the *credibility of a claim as a whole*, decision makers *must assess* the credibility of claimed facts about past and present events that go to the core of the claim.<sup>51</sup> [emphasis added]

This confirms the adoption of a broad approach to credibility findings, allowing them to impact upon the case ‘as a whole’. There is no distinction between the credibility of evidence and the proof of facts, and no distinction between unsupported statements and other types of evidence.

This is exacerbated by the way that the API does not sufficiently explain the relationship of credibility to other issues raised within it, such as the burden of proof, the consideration of evidence submitted by the applicant, and the establishment and consideration of the material facts of the claim.<sup>52</sup> Perhaps most importantly, the API on credibility also omits any mention of Immigration Rule (IR) 339J or Article 4(3)

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<sup>50</sup> In section 4.3 below it is shown that the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 also contributes to the elevation of ‘general credibility’ as a factor in refugee status determination in the UK.

<sup>51</sup> API ‘Assessing Credibility’, n. 6 above, 8.

<sup>52</sup> Of course it might be argued that the fault is with the title of the API on credibility, rather than its contents.

EU QD – which are in fact the main provisions on assessing applications for asylum.<sup>53</sup>

IR 339J and Article 4(3) EU QD stress that the assessment of applications for recognition as a refugee must be individual, impartial and objective. Both list a range of factors that must be taken into account. The provisions on credibility and the benefit of the doubt follow in IR 339L and Article 4(5) Qualification Directive, and it is clear that they are supplemental. They apply when an individual's statements are not supported by documentary or other evidence (i.e. they outline the narrow understanding of credibility).

In its conclusion the API states that by following the approach outlined within it, 'decision makers should be able to establish the past and present facts of the claim'.<sup>54</sup> This approach appears to present testing credibility as a broad, alternative, unifying means by which all factual questions in asylum cases may be determined. Moreover since credibility is now equated with conclusively 'establishing' the facts, it is logical that the testing for internal consistency, external consistency, plausibility, and 'general credibility', is carried out stringently. Without reference to the applicable law on the standard of proof in refugee cases, it seems that the applicant must nevertheless 'prove' their credibility.

### 3. The narrow approach: credibility as admissibility

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<sup>53</sup> The API does summarise Article 4(1) EU QD and IR 339I, which state that it is the applicant's duty to present as soon as possible the elements required to substantiate their claim: API 'Assessing Credibility', n. 6 above, 3. The Immigration Rules and API both substitute the phrase 'material factors' where the Directive had used the term 'elements'.

<sup>54</sup> API 'Assessing Credibility', n. 6 above, 13.



The concept of credibility in its narrow sense can work in favour of the applicant at least as much as it may form the basis of a negative decision. The UNHCR advice explains that the burden of proof is upon the applicant, but that in some circumstances the decision maker must ‘use all the means at his disposal to produce the necessary evidence in support of the application’.<sup>55</sup> It goes on,

Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. 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.<sup>56</sup>

The key here is that UNHCR sees credibility as an alternative to proof, and not a synonym for it. It is about giving the benefit of the doubt to a credible account in circumstances when proof has not been possible. ‘Being credible’ is different both to ‘being proven’ and to ‘being true’.

Because credibility and proof are demonstrably not synonymous, it can be confirmed that the threshold of ‘credible’ is lower even than the low standard of proof applicable in asylum cases. This realisation should caution decision makers against too readily equating minor inconsistencies or stories of narrow escapes with implausibility and a lack of internal or external credibility. In order more fully to understand this argument some basic evidential concepts are explored here. A broad approach to credibility, seeing credibility as truth, would obscure the distinction

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<sup>55</sup> UNHCR Handbook, n. 33 above, para. 196; on the shared elements of the burden of proof see also B. Gorlick, ‘Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status’ 15 *IJRL* 357-376 (2003), 361.

<sup>56</sup> UNHCR Handbook, n. 33 above, para. 196.

between ‘credible’ and ‘proven’ consequently raising the threshold of credibility and more readily denying applicants the benefit of the doubt.

### 3.1 Types of evidence

The UK’s API on credibility is sufficiently clear that an applicant for asylum will not have to prove each fact with documentary or other evidence.<sup>57</sup> It quotes the UNHCR Handbook’s observation that ‘cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule’.<sup>58</sup> The API stresses that ‘applicants often **cannot** substantiate their statements by independent documentary or other evidence’<sup>59</sup> [emphasis per the original].

Citing IR 339I the API goes on to state that evidence will consist of written statements, asylum interviews, and other documentary evidence. However, it does not clarify that documentary and other evidence submitted by the applicant or the state has a dual use.<sup>60</sup> In the first place, documentary or other evidence may in and of itself demonstrate a well founded fear of persecution, regardless of what the applicant has said and whether the decision maker believes it.<sup>61</sup> It is only in the second place that documentary or other evidence may be used to determine credibility in its narrow sense: whether the applicant’s unsupported statements are broadly consistent with

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<sup>57</sup> API, ‘Assessing Credibility’, n6 above, 3 & 4.

<sup>58</sup> API, ‘Assessing Credibility’, n6 above, 4; quoting UNHCR Handbook n. 33 above, para. 196.

<sup>59</sup> API, ‘Assessing Credibility’, n6 above, 4.

<sup>60</sup> Weston, n. 2 above, 88.

<sup>61</sup> Kagan gave the example of a Jew fleeing Nazi Germany in 1940 or a Tutsi fleeing Rwanda in 1994 who had made an entirely false claim, but who might nevertheless qualify for international protection on the basis of documentary or other evidence about their ethnicity and ongoing genocide in their country of origin: Kagan, n. 4 above, 370. It is probably fair to say that cases like this are rare in practice.

known facts. If they are, then they should be given the benefit of the doubt and admitted as evidence towards satisfying the standard of proof.

### **3.2 Some evidential concepts**

It is generally accepted that formal rules of evidence are not appropriate for asylum cases because of the particular predicament in which asylum seekers they find themselves. In the UK a further justification is that the RSD process is a form of administrative decision making on behalf of the Secretary of State for the Home Department (the Home Secretary), and the route of appeal is not to a court but to an administrative tribunal: the Asylum and Immigration Tribunal.<sup>62</sup> Nevertheless, and in order further to distinguish ‘credibility’ from ‘proof’, it can be helpful analytically to distinguish between the concepts of materiality, relevance, admissibility and weight.<sup>63</sup>

#### *3.2.1 Materiality*

Starting with materiality, this is the process of determining which factual claims made by the applicant would, if they were proven, be key (i.e. material) to their legal recognition as a refugee. If the applicant’s situation does not give rise to any facts that would be material to refugee status, then they do not have a claim for asylum.

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<sup>62</sup> See R. Thomas, ‘Evaluating tribunal adjudication: administrative justice and asylum appeals’ (2005) 25 *Legal Studies* 462-498, 469.

<sup>63</sup> Anthony Good’s work on anthropology in asylum cases makes a similar observation in introducing his chapters on credibility, weight, and proof in turn: A. Good, *Anthropology and Expertise in the Asylum Courts* (Abingdon: Routledge-Cavendish 2007), 187; On other lessons to be learned from criminal justice, see A. Popovic, ‘Evidentiary Assessment and *Non-Refoulement*: Insights from the Criminal Process’, in G. Noll (ed.), *Proof, Evidentiary Assessment & Credibility in Asylum Procedures* (Leiden: Martinus Nijhoff, 2005), 27-53.

In an asylum application this means that the decision maker will have to extract the material facts from the potentially voluminous factual claims made by the applicant. The UK's API summarises this point well where it states that,

A material fact goes to the core of a claim and is fundamental to why an individual fears persecution, and will be central to the decision that will be made. It is the role of the decision maker to identify which facts are material and which facts are not.<sup>64</sup>

This stage shapes the rest of the enquiry because the material facts operate as a set of conditions which, if met, result in legal recognition of refugee status. The rest of the enquiry examines pieces of evidence to determine if they contribute to proving the material facts and thereby meeting the overall standard of proof. It is here where the API's use of evidential terminology becomes clouded. The API's advice that the decision maker is required 'to form a view on the extent to which they think each material fact is credible'<sup>65</sup> is especially muddled: 'facts' must be 'proven'; only distinct pieces of 'evidence' should be subjected to 'credibility' analysis.

### *3.2.2 Relevance*

The second key evidential concept is relevance. Of each piece of evidence submitted, the decision maker must decide if it is relevant to one of the material facts.

It is disturbing that the UK's API states that some facts, such as failing to apply for asylum until leave to remain on other grounds has been denied, 'may be

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<sup>64</sup> API 'Assessing Credibility', n. 6 above, 6.

<sup>65</sup> API 'Assessing Credibility', n. 6 above, 7.

relevant to an assessment of the applicant's credibility even though they are not directly material to the substance of the claim itself.<sup>66</sup>

There are no grounds whatsoever for enquiring into the credibility of the applicant unless it bears upon the material facts of the case since, as established above, credibility in and of itself is not part of refugee definition. These 'non-relevant' facts, the API advises, may be important when the benefit of the doubt is considered.<sup>67</sup> This advice is not consistent with the API's more helpful later statement that, 'It is generally unnecessary, and sometimes counter-productive, for the decision maker to focus upon minor or peripheral facts that are not material to the claim.'<sup>68</sup>

### *3.2.3 Admissibility*

If a piece of evidence is relevant to a material fact then the decision maker must decide if there is any reason why it should not be admitted as evidence. This is the concept of admissibility. In criminal law, for example, there are often complex exclusionary rules about suppressing illegally obtained evidence.

Credibility in asylum applications is not an exclusionary evidential rule, but rather an alleviating evidential rule. This understanding is supported by Gregor Noll's close analysis of the Article 4(5) EU QD, to which we shall turn shortly.<sup>69</sup> As an alleviating evidential rule, the law on credibility gives applicants the benefit of the doubt by allowing the admission of evidence that would normally be suppressed – as

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<sup>66</sup> API 'Assessing Credibility', n. 6 above, 6.

<sup>67</sup> API 'Assessing Credibility', n. 6 above, 6.

<sup>68</sup> API 'Assessing Credibility', n. 6 above, 8.

<sup>69</sup> Noll, n. 47 above.

long as it is 'credible'. To conclude that an unsupported statement is credible should be merely to conclude that it is admissible as evidence.

#### *3.2.4 Weight*

Finally, if the evidence is relevant to a material fact and admissible, the decision maker must ascribe some weight to it. It is perhaps only at this stage that what is presently understood as the 'general credibility' of the applicant should be an issue. Some evidence will carry much weight, some will not. Some will carry no weight at all. This goes for all evidence, including the applicant's credible statements and any documentary or expert evidence produced. The decision maker must conclude whether the cumulative weight of all the relevant and admissible evidence is sufficient to meet the standard of proof.

In summary, this section has reviewed the concepts of materiality, relevance, admissibility and proof. If 'credibility as admissibility' is clearly distinguished from issues of weight and proof, then a narrow and neutral interpretation of credibility can be applied more readily. To be admissible as evidence an unsupported statement does not have to be proven; it merely has to be credible. This, in turn, focuses the decision maker on the determinative question of whether the applicant has proven to the applicable standard that they have a well founded fear of persecution, rather than on the more elastic tests of internal and external credibility or inherent plausibility.

The standard of proof in asylum applications is discussed in section 5 below. Meanwhile, in the next section, the role of the benefit of the doubt in relation to 'credibility as admissibility' is explored in order further to explain why the threshold of 'being credible' must be set low.

## 4. Credibility and the benefit of the doubt

The UK's API on credibility attempts to summarise the law on giving the benefit of the doubt to credible but unsupported statements. The main problem encountered thus far is that without clearly identifying the supplemental role of credibility findings as elements of an alleviating evidential rule, the threshold of 'credible' is placed too close to 'proven'. However there is a further problem. Without being pinned directly to the admissibility of evidence, additional conditions unrelated to the consistency or plausibility of the account are introduced before the benefit of the doubt is given and the statement or claim as a whole is accepted as 'credible'. However not all of the problems stem from the API itself: the source law in the form of IR 339L (implementing Article 4(5) EU QD),<sup>70</sup> especially as amended by the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, is problematic in its own right.

### 4.1 The approach of the API to the benefit of the doubt

The UK's API on credibility introduces the alleviating evidential rule in IR 339L thus,

Where a material claimed fact cannot be corroborated by objective country information or other evidence but appears to be internally credible and the applicant is credible in relation to other material facts, the decision maker should consider giving the applicant the benefit of the doubt and accepting the claimed material fact.<sup>71</sup>

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<sup>70</sup> Secretary of State for the Home Department, 'Statement of Changes in Immigration Rules' (Cm 6918, 2006); some parts of the EU QD are implemented by the Refugee or Person in Need of International Protection (Qualification) Regulations 2006.

<sup>71</sup> API 'Assessing Credibility', n. 6 above, 9.

The API then lists the specific conditions that, according to IR 339L, must be met before the individual can gain the benefit of the doubt. It is significant that the API suggests that even where the conditions are met the decision maker should only ‘consider’ giving the benefit of the doubt. By contrast the Immigration Rules specify certain conditions which, if fulfilled, will result in the acceptance of an unsupported statement.

#### **4.2 The content of the alleviating evidential rule**

The content of the alleviating evidential rule embodying the benefit of the doubt is supplied by IR 339L, and the API stresses that ‘**all**’ the conditions listed there must be met [emphasis per the original].<sup>72</sup> The conditions, listed in the API and deriving from the Immigration Rules, are that,

- (i) the person has made a genuine effort to substantiate his asylum claim or establish that he is a person eligible humanitarian protection or substantiate his human rights claim;
- (ii) all material factors at the person's disposal have been submitted, and a satisfactory explanation regarding any lack of other relevant material has been given;
- (iii) the person's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the person's case;
- (iv) the person has made an asylum claim or sought to establish that he is a person eligible for humanitarian protection or made a human rights claim at

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<sup>72</sup> API ‘Assessing Credibility’, n. 6 above, 10.



the earliest possible time, unless the person can demonstrate good reason for not having done so; and

(v) the general credibility of the person has been established

These conditions for accepting an unsupported statement are a mixture of pure credibility, such as point (iii), and other wide discretionary considerations.<sup>73</sup> It is notable that in its introduction to these conditions the API has seemingly added a circular and further requirement; that to gain the benefit of the doubt the applicant must be ‘credible in relation to other material facts’.<sup>74</sup> This does not appear in the actual list of conditions in IR 339L or Article 4(5) EU QD.

The normal sense of giving the ‘benefit of the doubt’ would be a presumption in favour of accepting the statement. This is the understanding of the UNHCR which, it can be recalled, advises that where a statement cannot be substantiated, or where it is not susceptible of proof then, ‘if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.’<sup>75</sup> The Immigration Rules and API turn this simple advice on its head, dissembling it into a series of successive hurdles each of which could deny the benefit of the doubt.

### **4.3 ‘General Credibility’ and the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004**

The final condition for gaining the benefit of the doubt listed in IR 339L and reproduced in the API is that ‘the general credibility of the person has been established’. Recall also that the introduction to the API indicates that decision

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<sup>73</sup> Thomas, n. 41 above, 91.

<sup>74</sup> API ‘Assessing Credibility’, n. 6 above, 9.

<sup>75</sup> UNHCR Handbook, n. 33 above, para. 196.

makers ‘must assess the credibility of the applicant’ as well as the evidence that they submit.<sup>76</sup>

The only guidance on the meaning of ‘general credibility’ in IR 339L comes in the form of IR 339N, which states that in determining it the Secretary of State will apply the provisions in section 8 Asylum and Immigration (Treatment of Claimants, etc.) Act (AI(ToC)A) 2004. This provision, and background to it, is summarised at length in the UK’s API on credibility.<sup>77</sup>

Section 8 AI(ToC)A 2004 requires decision makers to take certain behaviour as damaging to the applicant’s credibility. Noting that this section ‘plainly has its dangers’ if it were read as a direction as to how fact finding should be conducted,<sup>78</sup> the Court of Appeal has offered an alternative construction of section 8(1) that would not offend constitutional principles such as the separation of powers: the behaviour listed in section 8 should be taken into account ‘as *potentially* damaging the claimant’s credibility’ [emphasis added].<sup>79</sup> In the alternative, the Court of Appeal added that the same provision could read as requiring that the listed conduct should be taken into account ‘when assessing any damage to the claimant’s credibility’.<sup>80</sup>

Section 8(2) states that damaging behaviour is anything ‘that the deciding authority *thinks*’ is designed to conceal information, is designed to mislead, or is designed to obstruct or delay the process [emphasis added]. In addition to these general categories of damaging behaviour, section 8(3) AI(ToC)A 2004 then specifies

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<sup>76</sup> API ‘Assessing Credibility’, n. 6 above, 2

<sup>77</sup> API ‘Assessing Credibility’, n. 6 above, 12 et seq.

<sup>78</sup> *JT (Cameroon) v Secretary of State for the Home Department* [2008] EWCA Civ 878, per Pill LJ at para. 19; on these dangers and their implications for the separation of powers, see Thomas, n. 41 above, 95 and Ensor et al, n. 10 above, 96.

<sup>79</sup> *JT (Cameroon) v Secretary of State for the Home Department*, n78 above, para. 20, per Pill LJ.

<sup>80</sup> *ibid.*

certain prohibited actions that ‘shall’ be treated as designed to conceal information or to mislead. These include failing without reasonable explanation to produce a passport, producing a fake passport, and the destruction, alteration or disposal without reasonable explanation of a passport, ticket or other travel document. Finally, the failure without reasonable explanation to answer a question of the deciding authority is also deemed to mislead or conceal and, therefore, to damage the applicant’s general credibility.

It can be observed firstly that the types of behaviour listed are precisely those to which even ‘genuine’ refugees may frequently have resort.<sup>81</sup> Secondly, the safeguard of providing a reasonable explanation may well be workable,<sup>82</sup> but it is a distracting pre-requisite that works as a barrier to considering the real question of whether the applicant has a well founded fear of persecution.<sup>83</sup> These issues could be considered together without being seen as additional hurdles.

Moreover, sections 8(4) to 8(6) AI(ToC)A 2004 specify certain behaviours that do not benefit from the ‘reasonable explanation’ safeguard at all, namely failing to take advantage of a reasonable opportunity to make an application for asylum in a third country en route; failure to make application before being notified of an immigration decision; and failure to make an application before being arrested under immigration powers.<sup>84</sup>

Section 8 AI(ToC)A 2004 concentrates attention upon the applicant’s means and itinerary of travel, and their behaviour in the country in which they claim asylum. The same may be said of the requirement in IR 339L that in order to gain the benefit

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<sup>81</sup> Ensor et al, n. 10 above, 96; Gorlick, n. 55 above, 371.

<sup>82</sup> Ensor et al n. 10 above demonstrate how these provisions may be used beneficially.

<sup>83</sup> See also Thomas, n. 41 above, 93.

<sup>84</sup> For further analysis of these see Thomas, n. 41 above, 94.

of the doubt the application must have been made ‘at the earliest possible time’. Attempts to punish or discourage particular behaviour have no logical relation to a rule about the alleviation of an evidential burden. Likewise there is no necessary link between behaviour since the alleged events giving rise to the fear of persecution and the truthfulness of those allegations. It is, as Thomas put it, ‘an unreasonable evidential presumption’.<sup>85</sup>

It is perfectly legitimate for the RSD process to shape the behaviour of applicants towards administrative efficiency, but it should never be done by threats to reduce their chances of success by undermining their credibility. To do so would fatally compromise the objectivity of the process. Examination of the applicant’s travel itinerary or behaviour in the UK may tell decision makers whether they are a ‘good customer’, whether they are convenient and co-operative, but it will not reveal very much about whether they have a well founded fear of persecution.

The only rational link between evidence about the promptness or mode of the applicant’s claim could be to subjective fear, in the sense that these behaviours may be indicative of dishonesty; that fear of persecution is not the applicant’s principal motivation. If this is the argument that is being made, then it should be clearly articulated as an issue of proof, and not be confined to the admissibility of evidence.

Given these concerns about its content, the most troubling element of section 8 AI(ToC)A 2004 is its potential to put the notion of credibility centre stage in the determination of refugee status, rather than confining it to applying the benefit of the doubt (i.e. through IR 339L). Section 8 AI(ToC)A 2004 begins by stating simply 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, a deciding

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<sup>85</sup> Thomas, n. 41 above, 93.

authority shall take account, as damaging the claimant's credibility, of any behaviour to which this section applies. [...]

This broad interpretation of credibility gives the impression that credibility is a legitimate consideration in relation to believing *any* statement, not just the unsupported statements that are being considered under rule 339L. The UK's API on credibility reinforces this impression, stating that the 2004 Act,

provides a framework for the consideration of credibility issues in asylum and human rights applications [...]. In deciding whether or not to believe a statement made by or on behalf of an applicant, [the] authorities must regard certain specified behaviour as damaging to the credibility of the applicant.<sup>86</sup>

This, surely, is wrong. As Noll has observed in his analysis of the Qualification Directive, the applicant's credibility 'at large' is not relevant to the overarching question of whether there is a risk of harm on return: only the credibility of the applicant's statements about those risks is relevant.<sup>87</sup>

The UK API's summary of section 8 AI(ToC)A is, however, mildly helpful in that it clearly reminds decision makers that the behaviours listed are not to be given more weight than other factors that impact on credibility. Unfortunately it also adds that credibility 'can be undermined in other ways and, depending on the circumstances, it may be appropriate to refuse on other credibility grounds entirely.'<sup>88</sup>

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<sup>86</sup> API 'Assessing Credibility', n. 6 above, 12.

<sup>87</sup> Noll, n. 47 above, 312.

<sup>88</sup> API 'Assessing Credibility', n. 6 above, 14.

Nevertheless, it admits that points in favour of the applicant may outweigh those against, even though the negative points include ‘section 8 points’.<sup>89</sup>

Again fairly helpfully, the API reminds decision makers that a ‘poor immigration history does not, on its own, justify the rejection of a claim’.<sup>90</sup> Decision makers are reminded to give due weight to all the facts of the case, including background information.<sup>91</sup>

From the forgoing analysis it can be seen that the role of the benefit of the doubt in the UK is not altogether clear. Whilst the content of the alleviating evidential rule in Article 4(5) EU QD is spelled out in the Immigration Rules and summarised in the API, its significance to the outcome of the case is amplified by section 8 AI(ToC)A 2004. The amplification of credibility from an alleviating evidential rule to a decisive factor is all the more worrying given the introduction of a range of factors unrelated to evidence about the existence of a well founded fear that AI(ToC)A 2004 suggests will undermine applicants’ ‘general credibility’.

## 5. Credibility and proof

Since credibility is an element of an alleviating evidential rule, it is anathema to ask asylum seekers to ‘prove’ credibility.<sup>92</sup> To show that a statement is credible is not the same as to show that it is true. Indeed this would be to impose a higher standard in relation to evidential admissibility than in relation to the applicable standard of proof for the case as a whole, which is usually placed fairly low in asylum cases because of

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<sup>89</sup> API ‘Assessing Credibility’, n. 6 above, 14.

<sup>90</sup> API ‘Assessing Credibility’, n. 6 above, 12.

<sup>91</sup> API ‘Assessing Credibility’, n. 6 above, 12.

<sup>92</sup> Kagan, n. 4 above, 374.

the recognition that refugees face inherent difficulties in proving a well founded fear of persecution.<sup>93</sup>

As noted in the introduction above, in the UK applicants must demonstrate to ‘a reasonable degree of likelihood’ that they will be persecuted for a Convention reason if returned to their own country.<sup>94</sup> UK law, it will be shown shortly, also recognizes that the test for a well founded fear is a single, composite one applicable instantaneously to past facts and prospective risk. In spite of making a cross reference to paragraph 6.4. of the API on ‘Assessing the Claim’,<sup>95</sup> which gives a perfectly adequate explanation of the law on proof to ‘a reasonable degree of likelihood’,<sup>96</sup> the API on credibility itself presents a partial reading of the leading case of *Karanakaran* and shatters the composite test.

### **5.1 The API and *Karanakaran***

The API introduces the case by stating that the Court of Appeal in *Karanakaran* ‘outlined an approach to assessing evidence of past and present material facts in asylum claims’.<sup>97</sup> This is not, in fact, what the *Karanakaran* case did. This section shows that *Karanakaran* is about the standard of proof in asylum cases, and the

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<sup>93</sup> Note Sedley LJ’s observations on this point in *Karanakaran*, n. 7 above, para. 15; on fear and proof generally see Hathaway & Hicks, n. 46 above; J. Hathaway, ‘Third Colloquium on Challenges in International Refugee Law: The Michigan Guidelines On Well-Founded Fear’ (2005) 26 *Michigan Journal of International Law* 491-503; Gorlick, n. 55 above; see also H E Cameron, ‘Risk theory and "subjective fear": the role of risk perception, assessment, and management in refugee status determinations’ 20 *IJRL* 567 (2008), criticising the approach of the Canadian Immigration and Refugee Board to ‘subjective fear’ in credibility assessments.

<sup>94</sup> *Sivakumaran*, n. 1 above.

<sup>95</sup> API ‘Assessing Credibility’, n. 6 above, 3; the API on ‘Assessing the Asylum Claim’ is again incorrectly referred to at this stage as being entitled ‘Considering the claim’; see n. 34 above

<sup>96</sup> API ‘Assessing the Asylum Claim’, n. 34 above, 12.

<sup>97</sup> API ‘Assessing Credibility’, n. 6 above, 7.

relationship between proving past events and future risk. Crucially, the case explains that both are to be proven to the lower *Sivakumaran*<sup>98</sup> standard (a reasonable degree of likelihood) because they are part of a single, composite test. The case also explains that the facts of the case should be considered cumulatively rather than in isolation.

The UK API's explanation of the *Karanakaran* the UK's API begins by stating that,

Decision makers must consider *each material fact* about the past or present. If the application falls to be refused, they should state in the reasons for refusal letter which elements are accepted or not accepted and why, **before** proceeding to the assessment of a future risk of persecution. [italics added; bold as per the original]

This passage clearly recommends both disaggregating the facts and separating their consideration from the question of prospective risk. The conclusion of the API states that, by following the approach the API has outlined, decision makers 'should be able to establish the past and present facts of the claim'. It continues,

Once these facts have been established, decision makers will *then* need to consider if there is a future risk of persecution, and if the criteria for refugee status, humanitarian protection or discretionary leave apply to the applicant. [emphasis added]<sup>99</sup>

On the consideration of separate facts, the Court of Appeal in *Karanakaran* actually stated that it had been wrong for the Immigration Appeal Tribunal to 'consider each

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<sup>98</sup> *Sivakumaran*, n. 1 above.

<sup>99</sup> API 'Assessing Credibility', n. 6 above, 13.



matter in isolation as opposed to considering their potential cumulative effect'.<sup>100</sup>

Sedley LJ drew attention to the assenting view of Kirby J in the Australian High Court case of *Wu Shan Liang*, which had explained that,

[T]he decision-maker must not, by a process of factual findings on particular elements of the material which is provided, foreclose reasonable speculation upon the chances of persecution emerging from a consideration of the whole of the material.<sup>101</sup>

Most importantly, *Karanakaran* confirms that proving a well founded fear of persecution is a single composite question incorporating past and present facts and risk. Brooke LJ explicitly confirmed the approach of the Immigration Appeal Tribunal in *Kaja*,<sup>102</sup> which had described it as a 'one-stage process'. The Tribunal had considered that if there were a two-stage process, where proof of present and past facts was followed by an assessment of risk, then any uncertainties in the evidence would be excluded from the second stage. This, summarised Brooke LJ, 'could not be right' according to the Tribunal.<sup>103</sup>

Sedley LJ in *Karanakaran* arrived at the same conclusion by citing with approval Simon Brown LJ's judgment in *Ravichandran*, which had stated that,

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<sup>100</sup> *Karanakaran*, n. 7 above, per Brooke LJ para. 115; on this point see also Gorlick, n. 55 above, 364.

<sup>101</sup> *Wu Shan Liang* (1996) 185 CLR 259, per Kirby J para. 26; cited in *Karanakaran*, n. 7 above, per Sedley LJ para. 17.

<sup>102</sup> *Kaja* [1994] UKIAT 11038, [1995] Imm AR 1.

<sup>103</sup> *Karanakaran*, n. 7 above, per Brooke LJ para. 52.

In my judgment the issue whether a person or group of people have a ‘well-founded fear ... of being persecuted for [Convention] reasons’ ... raises a single composite question.<sup>104</sup>

Sedley LJ’s judgment in *Karanakaran* continued, confirming the composite question doctrine in a passage that merits quotation at length,

While [...] it may well be necessary to approach the Convention questions themselves in discrete order, how they are approached and evaluated should henceforward be regarded not as an assault course on which hurdles of varying heights are encountered by the asylum seeker with the decision-maker acting as umpire, nor as a forum in which the improbable is magically endowed with the status of certainty, but as a unitary process of evaluation of evidential material of many kinds and qualities against the Convention’s criteria of eligibility for asylum.<sup>105</sup>

It would seem, therefore, that the API’s summary of *Karanakaran* is highly problematic. It could also be argued that, since *Karanakaran* deals with the standard of proof rather than credibility *per se*, the API on credibility has no real need to go into it all. However, Brooke LJ’s explanation in *Karanakaran* of the decision in *Kaja* refers to the significance of evidence to which decision makers attach ‘some credence’.<sup>106</sup> It is to this which we shall turn now.

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<sup>104</sup> *R v Immigration Appeal Tribunal & SSHD ex parte Ravichandran* [1996] Imm AR 97, [1995]

EWCA Civ 16; cited in *Karanakaran*, n. 7 above, per Sedley LJ para. 19.

<sup>105</sup> *Karanakaran*, n. 7 above, per Sedley LJ para. 19.

<sup>106</sup> *Karanakaran*, n. 7 above, per Brooke LJ para. 55.

## 5.2 Credence and credibility

In a very significant passage of *Karanakaran*, which the UK's API on credibility reproduces, Brooke LJ explained exactly what sort of evidence the decision in *Kaja* identified that decision makers would come across, and which they must take into account:

- (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.

The effect of *Kaja* [Brooke LJ continued] is that the decision-maker is not bound to exclude category (3) evidence as he/she would be if deciding issues that arise in civil litigation.<sup>107</sup>

Note that this is about 'evidence'. If an unsupported statement is not credible, then it is not admissible as evidence and does not fall within any of these four categories. However if, applying the benefit of the doubt, a decision maker holds that a statement is credible then, according to *Karanakaran* such evidence (to which the decision maker is willing to attach some credence even though they would not say it was probably true) must be taken into account when considering whether a well founded fear of persecution has been proven to a reasonable degree of likelihood.

This confirms that past events may be proven to a standard lower than a balance of probabilities, but should not suggest that proving past events can be

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<sup>107</sup> *Karanakaran*, n. 7 above, per Brooke LJ para. 55-56.

mechanically separated from the proof of prospective risk. The same, low, standard of proof applies to both elements because they are part of a single question.

This is borne out further in the *Karanakaran* judgment where Brooke LJ stated,

[It] would be quite wrong to exclude matters totally from consideration in the balancing process simply because the decision-maker believes, on what may sometimes be somewhat fragile evidence, that they probably did not occur.<sup>108</sup>

The point is that some statements, and indeed some events, may contribute towards satisfying the standard of proof even if they are not certainly true, or not even probably true. Lord Brooke LJ's description of the *Kaja* determination expresses this in better known terms, where he noted that the tribunal was influenced by the 'notorious' difficulty asylum seekers face in proving the facts of their case;

This did not mean that there should be a more ready acceptance of fact as established as more likely than not to have occurred. On the other hand, it created a more positive role for uncertainty.<sup>109</sup>

Thus facts that are not 'certain' may nevertheless enter into the balance when assessing whether the standard of proof has been met. This demonstrates clearly the role of credible statements about unproven facts. However since the API does not distinguish between the admissibility and the weight of evidence, such that the threshold of 'credible' is set too close to 'proven', then applicants are denied the benefit of 'category (3) evidence' contributing to satisfying the standard of proof.

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<sup>108</sup> *Karanakaran*, n. 7 above, per Brooke LJ para. 103.

<sup>109</sup> *Karanakaran*, n. 7 above, per Brooke LJ para. 53.

Indeed the API exacerbates this by wrongly stating that the Court of Appeal in *Karanakaran* considered that,

[The] proper approach to looking at evidence of past and present events is not to look at these events in terms of standard of proof (so decision makers should not assess whether there is a reasonable degree of likelihood that a past event happened). Instead decision makers must assess whether a past or present event occurred, taking into account all available evidence, and come to a clear conclusion on each material fact.<sup>110</sup>

Quite aside from the attempt to eschew the law on standards of proof, this passage reduces Brooke LJ's *Karanakaran* categories from four to two: whether the past or present event 'occurred' or did not occur. This is too absolute, requiring a firm decision as to whether the alleged occurrence really happened. The double effect of the API's explanation of *Karanakaran* is both to preclude any benefit from the low standard of proof in asylum cases and to reduce the amount of evidence to be weighed towards meeting whatever standard of proof *is* applied.

The understanding of Brooke LJ's use of the term 'credence' in his third category of evidence dovetails with the explanation of credibility as admissibility given above. Due to the evidential difficulties faced by applicants for asylum, an alleviating evidential rule may be applied in their favour. The decision maker must then take evidence admissible under this rule into account when considering future risk, even if they would not go so far as to say that it is probably true.

Unlike the API, the *Karanakaran* judgment also reminds decision makers that they should consider not only risk to the individual, but also the 'seriousness of the

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<sup>110</sup> API 'Assessing Credibility', n. 6 above, 7; note that the API on 'Assessing the Asylum Claim' n. 34 above, also contains a similar form of words at para. 6.2.

consequences if it were to eventuate'.<sup>111</sup> As Brooke LJ notes, the seriousness of the harm that might befall the applicant if their statements were true was one of the justifications for the low standard of proof applied to risk arrived at in *Sivakumaran*.<sup>112</sup>

## 6. Conclusion

UK asylum law and policy frequently stresses that the burden of proof is upon the applicant.<sup>113</sup> In one sense this is true. However as Gorlick<sup>114</sup> and Noll<sup>115</sup> would remind us, the Refugee Convention suggests that the burden is shared, and the state must bear some of the responsibility not only for evaluating the facts but also for ascertaining them.

From one perspective, domestic RSD processes *are* a process of ascertaining evidence. The interviews and appeals may comprise a series of attempts by the state to investigate and to establish the facts and merits of the case. Out of fairness both to citizens of the host state and to people who do have a well founded fear of persecution, it is a function of the RSD process to distinguish between meritorious and unmeritorious applications. Nevertheless the process of distinction must be lawful, humane, and objectively reasoned.<sup>116</sup>

However, despite good law on the topic of credibility and proof, the foregoing analysis shows that recent UK policy focuses the 'investigation' overwhelmingly

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<sup>111</sup> *Karanakaran*, n. 7 above, per Brooke LJ para. 113.

<sup>112</sup> *Karanakaran*, n. 7 above, per Brooke LJ para. 44.

<sup>113</sup> API 'Assessing Credibility', n. 6 above, 3.

<sup>114</sup> Gorlick, n. 55 above, 361.

<sup>115</sup> Noll, n. 47 above, fn 20.

<sup>116</sup> On the treatment of failed applicants, see J. Sweeney, 'The Human Rights of Failed Asylum Seekers in the UK' (2008) *Public Law* 277-301.

upon the ‘credibility’ of applicant, without distinguishing the broad and narrow significances of that term or its relationship to notions of proof. The consequence is an exaggeration of the impact of general credibility issues on the outcome of the case, and the application of a high but unstated standard for statements, or claims as a whole, to be deemed ‘credible’.

It is easy to see why ‘broad’ credibility assessments might be an attractive way to dispose of cases. As John Barnes, then Vice President of the Immigration Appeal Tribunal put it, asylum adjudication involves ‘specialist legal knowledge in this arcane jurisdiction’.<sup>117</sup> By contrast assessing credibility in general, and plausibility in particular, may often be seen as an exercise in common sense.<sup>118</sup> If no statements are credible there is no foundation for the claim, no need to grapple with the more arcane legal elements of refugee status determination, and no need to quantify the existence of a future risk. Moreover since ‘credibility’ findings are about the facts they also tend to be nearly immune from appeal.<sup>119</sup>

Using Weston’s three credibility tests conclusively to establish (or to deny) past facts underestimates the complexity of handling facts and the epistemological

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<sup>117</sup> J. Barnes, ‘Expert Evidence - The Judicial Perception in Asylum and Human Rights Appeals’ 16 *IJRL* 349-357 (2004), 350.

<sup>118</sup> Weston, n. 2 above, 88.

<sup>119</sup> Kagan, n. 4 above, 368; in the UK context, note the limited possibilities for the Court of Appeal to allow challenges to the AIT’s findings of fact, as detailed in *E and R* [2004] EWCA Civ 49; *Gheisari v SSHD* [2004] EWCA Civ 1854, and *R (Iran) and others* [2005] EWCA Civ 982; by contrast, when negative decisions can be appealed, they are set aside at a high rate: The IAC’s initial report found that there were difficulties accessing the appeal system, but that the high rate of cases won when they were appealed (around 25 per cent) was itself an indicator of poor quality initial decisions (IAC n. 8 above, 41). They did not fully accept the (then) Border and Immigration Agency argument that successful appeals were the result of a ‘range of factors’ including not only the quality of initial decision making but also, ‘frequently’, changes in the country of origin or individual circumstances. See IAC First Report of Conclusions and Recommendations: Saving Sanctuary (London: IAC 2008), 25.

issues raised by **the** choosing a means of determining them.<sup>120</sup> The optimistic conclusion of the UK's API, that by following its advice decision makers 'should be able to establish the past and present facts of a claim', appeals to the need of decision makers for simple solutions to complex evaluative problems.

One of the most influential thinkers about the law of evidence is William Twining, who has observed that fact handling skills are taught less intensively to lawyers (where they are taught at all) than rule handling skills, mainly because legal education tends to focus on decisions of the higher courts in 'hard' cases where the facts have been determined at first instance.<sup>121</sup> One of the consequences of lawyers' lack of exposure to thinking about the nature of facts is, as Anthony Good notably observed, that lawyers tend to think of facts as 'philosophically unproblematic'.<sup>122</sup> For experts called upon to appear in the tribunals, facts are 'always products of a particular theoretical approach, and "truth" is at best provisional and contested'.<sup>123</sup> From this perspective the challenge of establishing past facts is not quite so different to proving a future risk since both are processes of actively constructing, rather than passively discovering, knowledge.<sup>124</sup>

If their potential to discover 'truth' is kept in perspective, and if their application is not skewed by considerations of 'general credibility', the common tests of consistency and plausibility can play a very important role in domestic RSD

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<sup>120</sup> This is no criticism of Weston's analysis, but rather a note of caution against naively converting it into an apparently foolproof means of establishing the facts.

<sup>121</sup> W. Twining, 'Taking Facts Seriously' reprinted in W. Twining, *Rethinking Evidence: Exploratory Essays* (Oxford: Blackwell, 2<sup>nd</sup> edn., 2006), 15; see also W. Twining, 'Taking Facts Seriously - again' in the same volume, lamenting that the advice of the first essay, originally published in 1980, 'has had almost no impact'.

<sup>122</sup> A. Good, 'Expert Evidence in Asylum and Human Rights Appeals: an Expert's View' 16 *IJRL* 358-380 (2004), 377.

<sup>123</sup> *ibid.*

<sup>124</sup> This point is discussed in greater depth in Sweeney, n. 27 above.



processes. They facilitate the identification and admissibility in evidence of statements that are not proven but are nevertheless credible. The notion of credibility works with the benefit of the doubt to compensate for the evidential difficulties faced by asylum seekers, and recognizes the potentially grave consequences of incorrectly rejected applications.

To the UK system, one main recommendation can be made: the current API on credibility should be deleted. In spite of UNHCR's involvement in its drafting,<sup>125</sup> it is not an adequate summary of the domestic or international law on credibility. Instead, a revised relatively plain-English paragraph on credibility should be incorporated into para. 6.2 of the API on 'Assessing the Asylum Claim', to read thus:

#### Credibility

Decision makers must take into account unsupported statements that are credible (albeit unproven) when considering whether the applicant has a well founded fear of persecution, even if the decision maker would not go so far as to say that a particular statement is probably true. An unsupported statement is credible if it is generally internally consistent, congruent with known facts, and plausible. The applicant's general credibility is only relevant to the extent that it may assist in deciding whether a particular unsupported statement is credible. Factors governing general credibility are mandated in section 8 Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

This paragraph is not intended to summarise the entire process of assessing the legal and factual elements of an asylum claim. It is intentionally concise on the techniques for establishing credibility, so as to prevent the impression that they provide an

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<sup>125</sup> UNHCR, Fourth Report to the Minister n. 12 above, at 3.

infallible and technical means of discovering truth – or that refugees never lie or exaggerate.<sup>126</sup> The reference to ‘general credibility’ is included reluctantly, but since it is specified in primary legislation it is at present unavoidable.

With the legal status of credibility more clearly outlined in the general API on ‘Assessing the claim’, a separate multidisciplinary API on ‘Good practice in the determination of credibility’, incorporating the guidelines on gender issues,<sup>127</sup> could make the ample research on the psychological vulnerability of asylum applicants accessible to decision makers.<sup>128</sup> To the extent that it is focussed specifically upon the legal role of credibility, the proposal here provides a clearer guide to how that concept can operate in the RSD process and, with the reference to the AI(ToC)A 2004 removed, it could be used outside the UK context.

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<sup>126</sup> Hathaway & Hicks n. 46 above, 533.

<sup>127</sup> API ‘Gender Issues in the Asylum Claim’, n. 31 above.

<sup>128</sup> For example the research cited at fn. 23 above.