

## Chapter 2

# The Lure of ‘Facts’ in Asylum Appeals: Critiquing the Practice of Judges

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### Introduction

In common language we often complain that something works ‘in theory’, but not ‘in practice’. The refugee status determination (RSD) process in the UK is much the same. However, this chapter also looks at ‘theory’ and ‘practice’ in a rather different sense too.

Immigration judges focus overwhelmingly upon questions of ‘fact’ and, specifically, asylum seekers’ ‘credibility’, to the exclusion of more legal-definitional issues (Clayton, 2004, 398; Thomas, 2006, 79). The suggestion made here is that by doing so, immigration judges are lured away from thinking theoretically. Dealing with ‘facts’ appeals to a sense of the ‘practical’, where asylum decisions can be justified on grounds of plain common sense (Weston, 1998, 88).

The aim of this chapter is to use the example of immigration judges to show the practical problems that flow from attempting to take complex decisions whilst in denial of their theoretical context. The Chapter proceeds in four parts; First, the RSD process itself is sketched, in order to introduce the topic and to explain the importance of focusing upon asylum appeals. Second, the legal elements that constitute the definition of a refugee are introduced, in order to see the interplay between (apparently common sense) questions of credibility and fact on the one hand and (apparently more difficult) questions of law on the other. This part continues by showing that there is a marked tendency to over-simplify the RSD process by emphasizing the former at the expense of the latter. Third, the ‘common sense’ approach of immigration judges is outlined and critiqued. Unreported legal ‘determinations’ obtained by the author through his volunteer work with failed asylum seekers provide the data for this section. Particular attention is paid to the way in which immigration judges assess the believability of alleged persecutors’ actions. Finally, the theoretical complexity of thinking about facts is demonstrated. Although it seems that immigration judges are lured away from thinking theoretically, they are still engaged in the inherently theoretical process of reasoning from general (legal) principles to actual practice. However, theory is not just a tool for being critical of the practice of immigration judges. Alain de Botton’s popular philosophy book, *The Consolations of Philosophy*, showed how great philosophical works might have some practical benefit to the way we live and view our everyday lives (de Botton,



2001). Following Alain de Botton's lead, legal theory is shown to provide some 'consolations' for immigration judges.

### **The Importance of Asylum Appeals**

Immigration judges (formerly 'adjudicators') sit in the Asylum and Immigration Tribunal (AIT). The AIT replaced the Immigration Appeal Tribunal (IAT) on 4 April 2005 (see Hooper, 2005; Thomas, 2005). The AIT deals with appeals against (among other things) the Home Secretary's initial decision to refuse asylum. Around 80 per cent of initial decisions result in a refusal to recognise refugee status (Home Office, 2005, 3). The quality of initial decisions has been strongly criticised (Home Affairs Committee, 2004, 3 et seq.; Clayton, 2004, 13; National Audit Office, 2004). The Home Office is now working with the United Nations High Commissioner for Refugees (UNHCR) to improve the initial decision-making process (UNHCR, 2005). In the meantime, overwhelmingly negative initial decisions of dubious quality give rise to many asylum appeals. The implications of a negative decision, namely any combination of detention, removal, and voluntary return (encouraged by the forced destitution of failed asylum seekers, now including those with families), exacerbate the demand upon the appellate bodies as failed asylum seekers attempt to challenge the decision in their case (see Gibney and Hansen, 2003; Phuong, 2005).

Further rights of appeal from the AIT are heavily circumscribed. As well as legal rules about exactly what can be appealed, there are very tight time limits and public funding for legal advice in asylum cases has been cut (Hooper, 2005; Thomas, 2005). This means that the first stage of the appeal process is often the first and only substantive hearing the asylum seeker will have (Asylum Aid, 1999, 72).

Most of the asylum-seeking respondents who participated in this research were in the bottleneck created by this state of affairs; they had made an unsuccessful appeal against an initial decision but were unable to take the case further. However, they took issue with many of the statements made by the adjudicator or immigration judge in the first stage of the appeal. Parties to the case are given a written copy of the determination (in English), but determinations are not easily available for study by NGOs or academics (Electronic Immigration Network, 2006).

Clearly this has some methodological implications for the present study. I have been reliant upon written determinations supplied by failed asylum seekers I have met through volunteer work with 'The Harbour Project North East'. The organisation works with destitute failed asylum seekers until they voluntarily return to the state from which they have claimed asylum or are removed there. The sample therefore cannot be fully representative because the determinations supplied are necessarily negative decisions. Nevertheless, since it is established that the vast majority of asylum applications initially fail, the relatively small number of determinations discussed here can be taken as examples from within an objectively verified trend.



## **Over-simplifying the RSD Process**

### *The Refugee Definition*

Under the 1951 Geneva Convention Relating to the Status of Refugees, known as either the 'Geneva' or the 'Refugee' Convention, an asylum seeker must show they have a 'well founded fear' of persecution for one of a number of grounds (Article 1A(2) Refugee Convention, as amended; see Hathaway, 1991; UNHCR, 1992; Clayton, 2004). Article 33(1) of the Refugee Convention prohibits states expelling or returning someone to another state where they might suffer persecution. This, known as the principle of 'non-refoulement', is what compels states to grant asylum to those on its soil who meet the Convention definition of a refugee (Clayton, 2004, 346).

In addition to the obligations flowing from the Refugee Convention, the immigration judge must also separately consider whether the UK's obligations under the 1950 European Convention on Human Rights (ECHR) are engaged. An EU directive has been adopted that will provide a unified European definition of a refugee, taking into account the Refugee Convention, the ECHR, and existing EU Law (EU Qualification Directive; Lambert, 2006). It came into effect on 10 October 2006.

The activities of immigration judges when they apply elements of the refugee definition in asylum appeals can be seen as classic instances of legal reasoning. The same can be said for the interpretation of the relevant articles of the ECHR, or the EU directive. The decision maker must apply abstract legal rules to the case at hand and, in so doing, will have to interpret those rules. The issues at stake are easily recognised as questions of 'law'. This type of legal reasoning is perhaps a paradigm example of the philosophical process of reasoning from abstract (legal) norms to actual practice. Such reasoning is considered far from a matter of 'common sense'; John Barnes, then Vice President in the Immigration Appeal Tribunal, stated that it involves 'specialist legal knowledge in this arcane jurisdiction' (Barnes, 2004, 350).

The reality of the RSD process is that these difficult legal definitional questions are only rarely discussed. The bulk of the 'determination' is often given over to what are labeled 'findings of fact and credibility', and the application of asylum law to them is downplayed.

### *Facts and Proof*

Asylum seekers must show that they have a 'fear' of persecution; this is about proving that something may transpire in the future. Since we cannot, with any degree of certainty, know what will happen in the future, this issue is a difficult one to resolve.

It is generally accepted that 'fear' in this context has both subjective and objective elements (see Hathaway, 1991; UNHCR, 1992; Clayton, 2004). The subjective element (that is actually fearing persecution) is often relatively straightforward. The more complex process is examining whether the subjectively held fear is objectively 'well-founded'.

The standard of proof in respect of both elements of fear is meant to be low (see Gorlick, 2002). Neither the strict 'beyond a reasonable doubt' criminal standard nor



the lesser ‘on the balance of probabilities’ civil standard applies. According to the leading case of *Sivakumaran* there must simply be ‘a reasonable likelihood’ or a ‘serious possibility’ that the applicant’s fear will materialise if they are returned. It is important to the argument made below that proving past events should be considered part of the process of determining a well-founded fear to this standard, rather than a pre-requisite step (*Kaja*, 1995; *Karanakran* 2000).

It is worth briefly considering how the apparently low standard of proof applied to elements of the appellant’s testimony can be used against them in a rather insidious way. Take the case of ‘A’, who I met at the Harbour Project in January (2005). His appeal was heard in November 2004. ‘A’ is a homosexual man from the Democratic Republic of Congo (DRC). His case involved, amongst other things, allegations that he was raped whilst in custody for political activities in the DRC. In respect of the rapes, the adjudicator stated:

I accept that those rapes took place on the lower standard of proof (‘A’ case, para. 29).

By coupling the findings with a re-statement that a low standard of proof has been used, the adjudicator instantly casts doubt on whether the rapes actually took place. This is troubling because, for ‘A’, instead of the lower burden of proof making it easier for him to establish the material facts, it implies that he has not *conclusively* established that the rapes ever took place. Ultimately the case failed because the adjudicator found that the rapes did not form a ‘systematic campaign of persecution’ (‘A’ case, para. 29), and that although the UK presented some comparative advantages for a homosexual, there was no real impediment to his returning to the DRC.

In summary, there is a common recognised legal threshold for proving material facts and prospective risk. Both these intimately connected factors help to determine whether an asylum seeker’s fear is ‘well-founded’ within the terms of the Refugee Convention.

### *Credibility and Over-simplicity*

In looking at the question of ‘fear’ the applicant’s testimony is given pre-eminence (Hathaway, 1991, 83) because asylum seekers tend only rarely to have corroborative evidence (UNHCR, 1992; Thomas, 2006, 81, para. 196; Weston, 1998, 87). With little scope for corroboration, the immigration judge looks to the personal credibility of the applicant to assess whether the material facts are proven to the requisite standard (Thomas, 2006, 81). Although the credibility of the applicant, such as whether they have deliberately misled the decision-maker, is a relevant consideration, the personal credibility of the appellant and the proof of material facts (leading to a well-founded fear) become conflated. This is often expressed as determining whether the evidence presented by the appellant ‘is credible’ (Thomas, 2005, 473).

This can be seen in ‘B’s case, which was heard in November 2004. I met ‘B’, a human rights activist from Russia, at the Harbour Project in Autumn 2005. We shall examine the reasoning in this case further below. At this stage we need to see the effect of disputing the ‘credibility’ of the appellant’s testimony. After a lengthy and



unsystematic account of the main witnesses' evidence the adjudicator begins his 'findings of fact' at paragraph 66 by stating:

that the appellant's story has been largely consistent and in many respects is consistent with the objective evidence. I however have to look at whether it is reasonably likely she was involved as claimed as consistency does not equate to it *being credible* ('B' case, para. 66, emphasis added).

Thus, the matter of proving material facts becomes a credibility issue. Instead of merely finding that the material facts are not proven to the required standard, the adjudicator's conclusions become a stinging attack on the personal credibility of the asylum seeker and her husband:

As with all of the appellants [sic] evidence I only have her word to go on. She and her husband in my judgement are witnesses upon whose word I can place no reliance for the reasons I have already given...

I had the benefit of seeing appellant [sic] and her husband giving evidence and being cross-examined at length. I formed the view that this account of repeated detention ill-treatment and harassment as a result of human rights involvement has been fabricated. I do not accept any of the incidents to which the appellant has made reference occurred are reasonably likely to be true [sic] ('B' case, paras 81–2).

There is no further heading as to findings in terms of the Refugee Convention, but para. 83 continues:

The question I must ask myself is what is reasonably likely to happen to her on her return to Russia. I do not accept it is reasonably likely anyone will be interested. She left the country using her own passport on a properly issued Visa and will be able to return. The appellant has failed to establish that she is a refugee ('B' case, para. 83).

This finding is rather imprecise, but can be interpreted as follows. The first sentence is a reference to Article 33(1) of the Refugee Convention (the principle of non-refoulement). The second sentence suggests that, because of the aforementioned findings of fact, there is no well-founded fear of persecution and so the principle of non-refoulement is not engaged. The third sentence probably goes to the question of whether there are any other impediments to the appellant's return (but incorrectly assumes that refugees never flee with valid documentation (UNHCR, 1992, para. 47)). The fourth sentence clearly suggests that the paragraph as a whole can be taken as a finding on the application of the Refugee Convention to facts of the case.

The application of European human rights law to the facts is similarly brief at paragraphs 84–6, where the adjudicator attempts to summarise the applicable law but, without relating it to the substance of the case at hand, simply concludes that:

Given the findings I have made it is clear the human rights appeal must fail ('B' case para. 86).



The only ‘findings’ thus far made are those in respect of the ‘credibility’ of the appellant’s account so it is assumed that, in the light of these findings in respect of the material facts, no further legal issues need to be examined.

The ‘B’ determination fits the pattern suggested above by concentrating upon the ‘credibility’ of the appellant’s account of material facts to the virtual exclusion of prospective risk (or the application of any other legal elements of the refugee definition).

In addition to minimising legal analysis, this approach presents an over-simplified view of what decisions on the ‘credibility’ of the appellant’s account entail. Firstly, the conflation of personal credibility and the proof of material facts such as in the ‘B’ case obscures that these factual findings are nevertheless legally complex. As suggested above, ‘pure’ credibility, that is to say the *personal credibility of the appellant*, will be an issue in some cases (Kingori; Weston 1998, 87; see s8 Asylum and Immigration (Treatment of Claimants) Act 2004). However, findings on the *credibility of the account* also involve the proof of material facts giving rise to a ‘well-founded fear of persecution’. Not all conclusions on the material facts are reflective of the appellant’s credibility, and the question of a well-founded fear should be fully considered in any case. The ‘credibility of the account’ thus involves complex legal-definitional questions, but it is presented a non-specialist form of reasoning; the apparently more straightforward and familiar business of identifying a liar.

Secondly, unpicking the material facts alleged by the appellant in their testimony focuses all our attention on the account of *past* events and, by doing so, provides a false contrast between proving past events and proving prospective risk (notwithstanding that in legal terms they are both composite elements of the same test of ‘well-foundedness’). Although the difficulty of proving something in the future will transpire is recognised it seems that, by contrast, determining past events is somehow simpler. Even a tentative exploration of legal theory shows that thinking about facts is never this simple.

By focusing so much upon the ‘credibility’ of the account, immigration judges have thus presented an over-simplified version of the RSD process. It appears to be a non-legal inquiry into past events. This in turn paves the way for intuitively appealing common sense decisions, rather than any form of ‘specialist’ legal reasoning.

## **‘Common Sense’ and Credibility**

### *Types of Credibility Decision*

Writing in a practitioner-focused journal, Amanda Weston identified three broad types of credibility finding in asylum appeals (Weston, 1998, 88). Firstly, immigration judges frequently point to perceived ‘internal inconsistencies’ as undermining the appellant’s credibility. This might be where the appellant gives different accounts of their story at different times. Clearly such behavior might justifiably undermine the credibility of the asylum seeker. Conversely, in his candid reflection upon his time as an adjudicator Tony Talbot has also added that a ‘perfectly logical and consistent account [was] often more likely to raise [his] suspicions of a ‘packaged story’ than an account which reflects all the oddities and quirks of real ‘life’ (Talbot, 2004, 29).



This is a good point, but also raises an awkward problem: An inconsistent story is unlikely to be believed, but then neither will a consistent one.

Asylum Aid and Amnesty International have criticised the over-use of internal inconsistency to deny refugee status, especially where a peripheral inconsistency is taken to undermine the core of the case (Hathaway, 1991, 85; 1999, 30; Gorlick, 2002, 12; Amnesty International, 2004, 20). There are many reasons why refugees may give several different accounts over time, particularly in cases involving rape or torture. Moreover, there are sound academic and medical explanations of why both the memory recall of traumatised witnesses and their ability to give an account of events, is impaired (Scheppele, 1994; Cohen, 2003). The well-known 'Henderson guide' to asylum appeals provides some useful authority for arguing that asylum seekers should at least have the opportunity to address any perceived inconsistencies in their testimony (Henderson, 2003).

As I suggested above, so called findings of fact and credibility tend to be rooted in an isolated examination of past facts rather than linking them to the proof of prospective risk. The appeal of the internal inconsistencies argument is linked to the assumption that such facts are conclusively provable. Internal inconsistencies grate with the apparent certainty that characterises past events, in contrast to the more nebulous idea of prospective risk. Moreover, these inconsistencies are clear to anyone who reads the account of the case. The judge, therefore, appears to play only a minimal role in actually settling the case; the inconsistencies speak for themselves.

A second category of credibility finding relates to what Weston terms 'external inconsistency' (Weston, 1998, 88). Here the asylum seeker's account might seem at variance with the available objective evidence about the country of origin. Where it does not match, the truthfulness of the account and therefore the appellant's personal credibility are undermined.

Again, there is clearly some force to this sort of argument. Indeed, Weston argues that understanding the background and context is the 'only way' that an adjudicator can avoid the dangers of subjectivity (Weston, 1998, 88). However, there is a problem with arguing that if the events described by the appellant are not clearly in line with the formal 'objective evidence' then they cannot be true. Firstly, the Home Office relies heavily upon reports produced by its own 'Country Information Policy Unit', but these reports have been criticised for painting a more positive outlook of the conditions in countries that they cover than is actually the case (IAS, 2003; Good, 2004, 362; IAS, 2005). Secondly there is a tension because an important purpose of the appellant's testimony is to provide further evidence about the country of origin and, in particular, their relationship to it (Hathaway, 1991, 86). Immigration judges should not underestimate the capacity of asylum seekers to provide new and interesting material that could contribute further to an understanding of the context, in addition to what is presented in the Home Office's own reports. The same caution should be expressed when dismissing expert reports commissioned by appellants (Good, 2004; Jones and Smith, 2004, cf. Barnes, 2004).

The real difference between the asylum seekers' evidence and the Home Office reports is that the former must be assessed by the immigration judge, whilst the latter is already deemed 'true'. This tips the scales in favor of the 'objective' evidence and, at the same time, reduces the scope of the immigration judge actively to engage



with both sources. In other words, once again, the supplied 'objective' evidence that immigration judges merely present is allowed to outshine evidence that requires interpretation and analysis by them.

These first two types of finding clearly have a place in the consideration of asylum appeals; the problem is with relying upon them to too great an extent. Both appeal to some kind of easily verifiable, tangible, problem with the appellant's story. Both downplay the active decision-making of the immigration judge in favor of apparently allowing the facts to speak for themselves.

The third and final type of finding that Weston identified is where immigration judges cite the 'inherent implausibility' of the facts as described (Weston, 1998, 88). These sorts of findings can be made without reference to any other tangible evidence. They are so plain, so obvious, that no further explanation is needed; common sense points to the same conclusion as reached by the immigration judge.

For example, in the case of 'B' the adjudicator quickly dismissed the appellant's husband's account (described at para. 42) of escaping from some police officers who were beating him:

I do not accept it is reasonably likely the appellants [sic] husband was able to escape from his abduction in the manner claimed. It is inherently implausible that whilst lying on the ground and being kicked and beaten by three armed officers one of whom pulled a knife on him he would be able to get up and escape through the woods whilst they shot at him. It is my judgement that this element of the appellants [sic] husband's claim has been fabricated and he was never abducted ('B' case, para. 69).

These are the most troubling sort of findings on an appellant's credibility. As is often the case where 'inherent implausibility' findings are made (Weston, 1998, 88), the finding in this case is poorly reasoned. It does not explain what is implausible. What if the police officers enjoyed watching their victim run away, scaring him with gunfire? Having beaten and humiliated him, they might not have intended actually to kill him. He would nevertheless be terrified for his life, and unable to account for his survival. This is just speculation, but where speculation is possible there is nothing 'inherent' about the findings.

The finding thus depends upon unstated assumptions about the motives, and 'efficiency', of persecutors. These assumptions are not self-evident, but are made by the judge.

In the next section we shall examine these types of finding further and argue that they are cleverly cloaked in the language of obviousness and objectivity, but tend actually to be rooted in the subjective views of the immigration judge. That is to say that on the face of it, they allow the facts to 'speak for themselves' much in the same way as the internal and external inconsistencies arguments. However, the immigration judge has played an integral role in actively constructing the notion of what might be termed a 'reasonable persecutor', against which implicitly to judge the 'credibility' of the behavior described by the appellant.



*Inherent Implausibility and the 'Reasonable Persecutor'*

In law the idea of the 'reasonable man' or 'reasonable person' is often used by judges as an analytical tool, particularly in the determination of liability in negligence (Mullender, 2005, 681; see, for example *Hall v Brooklands Auto Racing Club* [1930]). The question is whether by his allegedly negligent act or omission the defendant falls below the standard expected of the 'reasonable person'. If he did not behave like the 'reasonable person' then we will impose liability upon him. The idea of the 'reasonable person' is designed to bring some objectivity to the process of determining liability. It appeals to community norms about the level of care we owe to each other.

The approach of the immigration judge to constructing a 'reasonable persecutor' has a very different effect. If the alleged persecutors fall short of the standard to be 'expected' of a 'reasonable persecutor' then the story is disbelieved. However, there can be no community benefit from arriving at a generally agreed minimum level of persecution that we expect of alleged persecutors. Unlike the 'reasonable person', they do not live up to community norms. This argument is not merely a normative one suggesting that we ought not to construct a standard against which to judge the efficiency of persecutors, it suggests that the process by which we have arrived at the notion of a 'reasonable person' cannot apply to the 'reasonable persecutor'. Thus, instead of appealing to a collectively constructed sense of what we expect from a persecutor, we shall see that the findings tend to be based upon the immigration judge's impression of how the persecution could have been better executed.

We can now return to 'B's case (the Russian human rights activist). She has claimed asylum in the UK with her husband and two young children. She alleges having suffered persecution by the authorities including the murder of her brother, several arrests and beatings for both she and her husband (one of which was discussed above), the kidnap and return of one her children and ultimately, a failed attempt to kill her in a car 'accident' in which her cousin died. These actions were allegedly taken after she helped her late brother, also a journalist, to store some sensitive material about corruption and other unlawful activities during an electoral campaign.

The facts of the case as presented in the determination are complex, not least because the adjudicator is unable to establish whether key figures in the case are in fact siblings or cousins ('B' case, para. 21). Nevertheless, it is possible to identify some key elements leading to the adjudicator's ultimate refusal of the application for asylum, which we saw above. Most significant for this part of the Chapter is the way in which the adjudicator casts doubt upon 'B's account of the car 'accident'. As well as citing the 'inherent implausibility' of surviving the accident relatively unscathed, the adjudicator states at para. 71:

I do not accept it is reasonably likely that if the police were chasing them to create some kind of accident that they would not then stop to ensure that their aim had been achieved ('B' case, para. 71).



In this rather chilling finding the adjudicator is assuming that in order for the appellant's story to be believable the persecutor must have acted with a 'reasonable' degree of 'efficiency'. Apparently a 'reasonable', normal, unexceptional persecutor would not have allowed 'B' to survive the accident. Before unpicking the implications of this assumption further, however, we shall examine another case.

The case of 'C' was heard by an immigration judge under the new appeal structure in July 2005. I met 'C' in January 2006. 'C' is a school teacher from Iraq, who arrived in the UK in March 2003. Part of the decision in 'C's case hinged upon whether the immigration judge believed his account of hiding from his feared persecutors at his brother's house in Iraq for a short time, prior to claiming asylum in the UK. In respect of this part of the case, the immigration judge again uses the 'reasonable persecutor' model. At para. 40 the immigration judge states:

I think that the Appellant began to embellish his account... I agree with the Secretary of State that his account of the efforts being made by the INA, the Ba'ath Party and the families of his friends to find him between the time he ran to his brother's and left the country, is far-fetched. I agree that surely one of them would have followed his brother from the family home in an effort to find the Appellant. I think this element of his account is greatly exaggerated ('C' case, para. 40).

Apparently a 'reasonable persecutor' would have found the appellant and therefore the story must be false. It should be noted here that, unlike 'B's case, in dismissing the appeal this determination does examine other matters going to the question of well-founded fear in addition to the material facts asserted ('C', paras 42–7). Nevertheless, like the 'B' case above, this case also highlights the means by which the judge chooses to consider alleged material facts. The model of a 'reasonable persecutor' is not a stable means of assisting this consideration.

Firstly there can be no such thing as a 'reasonable persecutor'. In substantive terms people involved in persecution cannot be said to observe normal rules of reasonableness (Hathaway, 1991, 81; Clayton, 2004, 399). The 'reasonable person' expresses the bare minimum we would expect from unexceptional people. The inventive capacity for cruelty displayed by persecutors makes constructing a cross-cultural standard of their expected minimum level of competence as persecutors very difficult (as well as undesirable) (on cross-cultural reasonableness see Henderson, 2003, 2 citing *Kasolo*). If there is no objective or reasonable standard that we expect from persecutors, then it would seem that the immigration judge is simply arguing that with hindsight the persecution could have been handled more efficiently. It is an impossibly high standard to require that to be believable the alleged persecutor must be described as having behaved with clinical 'efficiency', because if they did so then the appellant could not have escaped them to claim asylum in the UK in the first place.

Secondly, there is a logical problem that relates to exactly what is being proved. J.L. Montrose's classic discussion of the laws of evidence discussed the necessity of distinguishing between 'brute facts' and 'propositions of fact'. A brute fact could be a mathematic statement such as 'two plus two equals four' (Montrose, 1954, 534). In the reasonable persecutor cases the judge will usually be dealing with propositions of fact. Montrose argues that there is a further distinction between a



*particular* proposition of fact and a *general* proposition of fact (Montrose, 1954, 534). A particular proposition of fact would assert the past or present existence of a particular fact, such as the particular asylum applicant having been persecuted in precisely the way described. A general proposition of fact would be more akin to a scientific law, such as Pythagoras' Theorem.

In the 'reasonable persecutor' cases the immigration judge mistakes the type of fact that is actually being established. The asylum seeker does not claim that *all* persecutors would behave in the way that they described. Such a general proposition of fact would be a weak one to make based on their alleged individual experiences. To take their argument as such overstates the case that they are trying to make and by doing so the immigration judge instantly undermines the argument's strength. Further, the immigration judges seem to make a general proposition of fact that persecutors *always* act in a particular 'reasonable' way (or, more accurately, *never* act in the way described). For the same reasons, this argument is weak; methodologically speaking the judges do not have the data that could prove such a conclusion.

Finally, the 'reasonable persecutor' approach does not convincingly justify to the appellant the conclusion that has been reached in their case. It attacks their personal credibility without convincing reason and so the finality of the decision is not accepted and further appeals ensue. Thus, it is unsatisfactory from the perspectives of both the appellant and the efficiency of the RSD process.

The 'reasonable persecutor' technique thus fails in its apparent aim of revealing an obvious conclusion that speaks for itself. It may appeal to a shared sense of what is reasonable, but it is actively constructed by the immigration judge according to their impression of how the persecution in the case at hand could have been 'improved'.

The notion of the 'reasonable persecutor' (albeit not in these terms) has been identified in the initial decisions on asylum made by the Home Office (Henderson, 2003, 2; Amnesty International, 2004, 22; Smith, 2004, 25). The IAT has cautioned against 'speculating' on how persecutors behave (*Toro*, para. 15) and the Henderson guide has emphasised this case to lawyers engaged in asylum appeals (Henderson, 2003, 386), but its impact on the reasoning of initial decision-makers and immigration judges seems minimal.

## **Unpicking the Lure of Facts**

This section unpicks the lure of facts upon which the preoccupation with credibility is based and shows that by focusing upon them immigration judges are far from avoiding complex theoretical questions; they have merely recast them in a way that makes them more difficult to recognise. However the recognition that we can think theoretically about facts is shown to provide some 'consolations' to immigration judges.

### *Understanding Lawyers' Approach to Facts*

The determination of credibility is clearly about the establishment of 'facts'. This process of establishment, through the courts, is in an important sense 'rational'.



The rational judicial process has replaced other methods of determining 'facts', for example trial by battle, where the 'facts' are determined by divine guidance or some other arbitrary method (Montrose, 1954, 527). Although the court system is certainly rational in this sense rationality does not, and cannot, result in the knowledge of absolute 'truths' (Thomas, 2005, 476). However the power games employed by lawyers and judges when they are able to label some views as 'not credible' and others as legal 'findings of fact' feed this false impression of privileged access to 'truth' (Muller-Hoff, 2001).

In their credibility findings it seems that immigration judges have taken the products of rational procedures too far and lost sight of the idea that legal 'facts' can never be proved absolutely true or false in court, just more or less likely to be true or false. Instead they search for simple ways to show conclusively that events did or did not transpire. This has a great deal to do with legal education.

William Twining observed that legal theorists have tended to concentrate upon the activities of the higher courts (Twining, 1980, 13). Since the higher courts tend to deal with 'hard' questions of law, questions of fact, which are typically determined at first instance, are systematically excluded from legal education and theory. Fact-handling skills, argues Twining, are therefore taught less intensively to lawyers (where they are taught at all) than rule-handling skills (Twining, 1980, 21). This feeds through to tribunals such as the AIT, which are no less populated by lawyers.

Why are fact-handling skills so rarely taught? Twining suggests that the determination of facts is seen as a matter of ordinary inductive logic which is external (or prior) to legal education (Twining, 1980, 22). This would explain why immigration judges are prepared to explain their credibility findings as matters of common sense; thinking about facts is something that lawyers (wrongly) tend to think is far easier than the rest of their practice. If one has acquired the difficult and prestigious skills required of a lawyer, then one must be more than equipped to make decisions about facts.

Twining has argued that issues of fact and evidence are, however, an important aspect of understanding law (Twining, 1980). They raise important theoretical questions not normally on the agenda of legal theorists. The exclusion of 'facts' from the idea of (legal) 'theory' is precisely why immigration judges do not recognise the theoretical milieu in which concentrating upon the 'credibility' of the appellant's account places them. This, in turn, explains why judges would seek to obscure their role in 'constructing' rather than 'knowing' the truth.

### *Constructivism, Subjectivity and the 'Consolations' of Theory*

It has been described as 'an astonishing accomplishment' that courts operate perennially as if factual judgments were 'clear and solid' (Scheppelle, 1994, 92). The approach of immigration judges is based on this (unknowingly) positivistic conception of facts.

Anthony Good has observed this tendency in immigration judges' approach to expert evidence (Good, 2004). Disagreement about the role of experts in asylum cases, he argues, derives from differing perceptions about the nature of facts. For lawyers, they are 'philosophically unproblematic' (Good, 2004, 375). For the



experts themselves “‘facts’ are always products of a particular theoretical approach, and ‘truth’ is at best provisional and contested” (Good, 2004, 377).

The problem is that the positivistic way in which facts are viewed in law generally and in asylum appeals in particular is at odds with the way that ‘facts’ really operate in law. Legal facts, properly understood, are a study in *constructivism in practice*. Social scientists have long argued that the phenomena of daily life are socially constructed (Sarbin and Kitsuse, 1994, 3). The establishment of legal ‘facts’ exemplifies the process of constructing meaning and significance. The ‘facts’ established by immigration judges are actively constructed *by* them from the competing narratives presented *to* them.

Given the law’s inherent dependence on a practically constructivist theory of facts, problems ensue when judges attempt to deny or obscure the importance of their construction of events. As I suggested above the centrality of the appellant’s account is clearly recognised, but I would add that the role of the judge in constructing (rather ‘finding’) knowledge is consequently underestimated.

Each of the three types of credibility finding discussed above can be understood as having at its heart a defensive attempt to obscure the judges’ active construction of knowledge subsequently to be presented as a legal fact. In the ‘internal inconsistency’ decisions the judges’ findings are based upon inconsistencies that are objectively verifiable by reading the material presented to the judge. The ‘external inconsistency’ decisions make perhaps the clearest use of ‘objective material’. Even the ‘inherent implausibility’ findings are cloaked in references to what it is (apparently objectively) reasonable to believe. The decision is thus rationalised in terms of the objectively verifiable; matters that are at least normally more accessible and understandable than complex legal reasoning. The conclusion is reached on consideration of evidence that is presented as being so clear that anyone would have to agree with the immigration judge. Given the grave consequences of refusing refugee status to an asylum seeker who makes their application whilst in the UK, it is unsurprising that judges seek to be unequivocal in their commitment to the certainty of their decision.

The ‘objective’ point of reference seems required in order to defend against accusations of ‘subjectivity’, and where ‘subjectivity’ is linked to uncertainty. But if we recognise that facts are inherently contestable and that judges will inevitably have a role in constructing them, they can afford to be a little less defensive. This is the ‘consolation’ of my approach; it is important that judges are aware of their own enculturation and attempt to understand its impact upon their decision making (Clayton, 2004, 399), but they should not feel the need to deny their role in constructing knowledge. A less defensive approach that acknowledged the full complexity of determining, or constructing, facts in asylum appeals would have less use for the ‘reasonable persecutor’ arguments criticised above. If it is understood that the judge constructs knowledge, then more care can be taken in choosing the tools to effect that construction.



## **Conclusion**

At face value concentrating upon facts in asylum appeals seems like a good idea. It seems like an expedient, practical approach to dealing with the case-load without further reference to asylum and refugee law. I have argued that, by contrast, engagement with the facts is an infinitely theoretical exercise – albeit one that lawyers are not trained to recognise. However, as well as criticising the apparent over-simplification of the RSD process I have argued that there are ‘consolations’ to recognising its theoretical complexity.

The approach taken by immigration judges *seems* to avoid having to make the philosophical move from the generally accepted definition of a refugee to the case at hand by introducing a pre-requisite common sense examination of the facts. In legal terms this pre-requisite step is awkward because although expressed in terms of the ‘credibility’ of the account, findings of fact are meant to be formally considered alongside the legal question of proving a well-founded fear of persecution. Moreover, there are several additional general normative propositions that are implied by the judges’ approach to credibility findings, and which still have to be applied to the case at hand; principally, that asylum seekers are identifiably truthful and consistent, and that persecutors go about their business with a reasonable degree of efficiency.

On the view presented here, thinking about facts is never a practical alternative to the philosophical exercise of reasoning from the general to the particular but an alternative *form* of such reasoning. Thus, thinking about facts is theoretically resonant from the outset and, as such, should be undertaken alongside other forms of moving from the normatively general to the specific. Identifying one’s own engagement in making the move from the normatively general to the particular is perhaps as difficult as making it. However, most decisions involve some element of this process so it is better to recognise it than to seek apparently ‘practical’ ways of avoiding it. Attempts to avoid theory by, for example, dealing in facts, are doomed to failure because theory will resurface elsewhere. Taking the ‘consolations’ of theory, such as given above, is preferable to an irrational and ultimately unsuccessful attempt to avoid it altogether.

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The law is stated as at June 2006.



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1950 European Convention on Human Rights

1951 Convention relating to the Status of Refugees

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N.B. The asylum seekers who allowed me to use their unreported determinations in this research agreed to do so only if they remained anonymous. I cannot therefore supply appeal references for these cases. However I have, for the purposes of validating the academic integrity of the Chapter, and on condition that they are not made available to anyone else, supplied copies of the determinations to the editor of this volume.

*Other*

Electronic Immigration Network (2006), personal e-mail correspondence with John Dean, editor.