

## **Reason to Disbelieve: Evaluating the Rape Claims of Women Seeking Asylum in the UK<sup>1</sup>**

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### **Abstract**

Asylum applicants in the UK must show, to a 'reasonable degree of likelihood', a well-founded fear of persecution, on the basis of race, religion, political opinion or membership of a particular social group, in the event of return 'home'. This requirement presents myriad challenges both to claimants and decision-makers. Based on findings from a three-year national study, funded by the Nuffield Foundation, this article explores those challenges as they relate to women seeking asylum in the UK, whose applications include an allegation of rape. The study explored the extent to which difficulties relating to disclosure and credibility, which are well documented in the context of women's sexual assault allegations in the criminal justice system, might be replicated and compounded for female asylum-seekers whose applications include a claim of rape. Findings suggest that the structural and practical obstacles faced in establishing credibility, and the existence of scepticism about rape claims and asylum-seeking more generally, mean that

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decision-making can often be experienced as arbitrary, unjust, uninformed or contradictory, making it difficult for women asylum applicants who allege rape to find refuge in the UK.



# **Reason to Disbelieve: Evaluating the Rape Claims of Women Seeking Asylum in the UK**

**Helen Baillot, Sharon Cowan and Vanessa E. Munro**

## **1. Introduction**

The low threshold of proof in the context of asylum applications in the UK requires that an applicant establish, to a 'reasonable degree of likelihood', their well-founded fear of persecution, on the basis of race, religion, political opinion or membership of a particular social group, in the event of return 'home'.<sup>2</sup> Yet the requirement that a claim to refugeehood be credible - even to this extent - presents myriad challenges, both to claimants and decision-makers, including the availability and quality of supporting evidence, the impact of trauma on the way that narratives are presented and received, and the potential for linguistic and cultural misunderstandings (see, for example, Thomas, 2009; Good, 2008; Kagan, 2003; Bogner et al, 2007; Herlihy et al, 2002). Based on the authors' findings from a three-year national study, funded by the Nuffield Foundation, this article explores those challenges as they arise specifically in relation to women seeking asylum in the UK, whose applications include an allegation of rape.

While robust data on the prevalence of rape in women's asylum applications in the UK does not exist, various estimates have been made which suggest that sexual violence is not uncommon, but rather a frequent aspect of women's narratives of

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<sup>2</sup> *Karanakaran v Secretary of State for the Home Department* [2000] EWCA Civ 11; *R v SSHD ex p Sivakumaran* 1988 AC 958.



persecution (London School of Hygiene and Tropical Medicine (LSHTM), 2009; Refugee Council, 2012). The particular sensitivities and challenges that may be posed in receiving and responding to such disclosures have been formally recognised in the Home Office's own Gender Guidelines (2010: 17-18). Despite this, within the context of broader research on asylum claims made by women (for example, Human Rights Watch, 2010; Asylum Aid, 2011), NGOs have repeatedly raised concerns about the (mis)handling of narratives of sexual violence. Against this backdrop, the present study was the first of its kind to devote dedicated attention to the handling of rape allegations by asylum decision-makers in the UK. Its specific aim was to assess the extent to which difficulties relating to disclosure and credibility, that are well documented in the context of women's sexual assault allegations in the criminal justice system (CJS) (Gregory and Lees, 1999; Temkin, 2002; Kelly et al, 2005; Finch and Munro, 2005; Rumney, 2006; Ellison and Munro, 2009a), might be replicated - and possibly compounded - for female asylum-seekers whose narratives of past and/or future persecution include a claim of rape.

Although the asylum system and the CJS operate in very different contexts and are governed by distinctive probative and procedural rules, our findings suggest that there may nonetheless be important parallels in relation to the handling and evaluation of women's rape narratives. More specifically, while there may be progressive examples within criminal justice policy and practice that might usefully be transposed to the asylum context, some of the problematic myths and assumptions that beleaguer the CJS in relation to rape investigation and prosecution



are also manifest in the asylum process. As will be discussed in detail below, asylum decision-makers' evaluations of the credibility of women's rape claims are at risk of being similarly influenced by gender stereotypes, and these can interact in uniquely problematic ways with dubious cultural preconceptions, as well as with the broader evidential, procedural and political constraints of the asylum context.

Of course, a lack of credibility is not the only ground for refusing an asylum claim; and conversely, refugee status is not guaranteed where the applicant's allegations of abuse are found to be credible. Decision-makers may, for example, accept that an incident, such as sexual assault, occurred, but conclude that this was 'private' conduct rather than persecution (Edwards, 2012: 10); or they may discount the risk of future persecution, either because they consider that the abuse is not likely to reoccur or that the applicant can relocate internally, or seek protection from domestic authorities after being returned 'home'. At the same time, however, since no claim for asylum can succeed without being found to be credible, credibility is the crux of every application; it is the first hurdle that must be overcome and the point at which a large proportion of applications are refused (International Association of Refugee Law Judges (IARLJ) 2013: 82). Since credibility is also at the heart of the vast majority of contested rape claims, the question of credibility in asylum applications that involve rape may, therefore, be doubly significant.

The aim of our study was not to test the credibility or veracity of individual women's asylum claims, nor to offer a set of tools by which others would be better enabled to



make such assessments ‘accurately’. Instead, the aim was to probe the parameters of the discursive spaces in which women’s asylum claims, which often include allegations of sexual violence, are invited, narrated, evaluated and adjudicated upon; and to highlight some of the ways in which decision-makers’ discomfort, preconceptions or assumptions, as well as the structural and institutional context of asylum decision-making, might militate against thorough engagement with applicants’ accounts on their own terms. Of course, the role that a claim of rape will play within any woman’s application for asylum is highly variable, which in turn legitimately impacts on the extent to which it is necessary or appropriate to dwell upon it in determining a claim. While in some cases, it may be of central importance, in other cases it will simply constitute one element of a catalogue of abuses allegedly suffered by an applicant; its credibility may not be pivotal, or at least it need not be. Nonetheless, as we will discuss below, our findings suggest that, even in these latter cases, the credibility of a rape allegation and the credibility of the asylum claim overall are often linked in intricate and sometimes contradictory ways.

In the following sections, we first set out the current framework for asylum decision-making in the UK, in order to provide some political and institutional context for our research. Having done so, we will briefly explain the methods used in this study, before moving on to outline our findings. The discussion will then focus on four main themes: (i) the ways in which the standard and burden of proof for a credible asylum claim impact upon women’s rape allegations; (ii) the specific



markers of (in)credibility within rape claims; (iii) general scepticism towards asylum applications; and (iv) scepticism about women's claims of sexual violence.

## **2. Safeguarding Bodies or Borders?: Asylum Decision-Making in the UK**

The primary legal text relating to claims for international protection is the 1951 Geneva Convention Relating to the Status of Refugees.<sup>3</sup> Although its original purpose may have been as much to limit inward migration as to protect those in need, the principal of *non-refoulement* that it enshrines prevents signatory states from turning back from their borders any person who would thereby face persecution.<sup>4</sup> Thus it significantly curtails the power of national governments to control inward migration to their sovereign territories.

Perhaps for this reason, national governments in Europe, in common with other 'destination' countries, have - from the 1980s onwards - tended to enact legislation and policies with the aim of restricting the number of asylum claims made on their territories. This has involved measures such as stricter border controls, increasing use of detention, and limits on refugees' access to social and economic means of support (the so-called "pull factors" for migration). Justification for such measures

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<sup>3</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html> last accessed 8 October 2013. Since the passage of the Human Rights Act 1998 and as per the terms of the EU Qualification Directive, UK decision-makers will simultaneously consider all asylum claims on refugee convention and ECHR grounds.

<sup>4</sup> Article 33, *ibid*.



has been provided in part by the creation and perpetuation of a policy image of risk, threat and danger (Maurer and Parkes, 2007), and through the merging by politicians and the media of diverse policy spheres including national security, illegal migration, terrorism, asylum and border control (Kaunert and Léonard, 2011). Although recently disbanded, at the time that the present study was undertaken, the task of receiving and assessing asylum claims in the UK, as well as the removal of 'failed' applicants, was undertaken by the UK Border Agency (UKBA), an executive agency of the Home Office. The agency's motto, 'Securing Our Borders, Controlling Migration', in itself arguably amply illustrated that the UK has not been immune from the tendency to problematize migratory and refugee flows in this defensive way.

Since April 2013, the various functions of initial asylum screening and decision-making have been re-integrated under the more general auspices of the Home Office.<sup>5</sup> In discussing our findings below, we retain references to the UKBA since this was the governing organisation at the time that the research was conducted, but in the following outline of the UK asylum process we have generally adopted the currently more accurate terminology of 'Home Office' personnel. Importantly, despite this organisational restructuring, there is little evidence to date of a

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<sup>5</sup> On 1st April 2013, the UKBA, itself an incarnation of the previous Borders and Immigration Agency, was split into two units within the Home Office - a visa and immigration service which has taken on the responsibility for asylum decision-making, and an immigration law enforcement division.

<http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2013/may/11-transition>, last accessed 15th October 2013.



significant change in the policies, processes and procedures for UK asylum decision-making.

Asylum applicants in the UK are dealt with initially by way of a brief screening interview, conducted either by an Immigration Officer at the port of entry or, in the majority of cases, at a central Asylum Screening Unit in Croydon, London.<sup>6</sup> First instance decisions are then made by Home Office 'Case Owners' (CO), who are essentially public servants, trained on asylum policy, procedures and legal authorities, but without – necessarily – any further legal training. These initial decisions are based largely on a substantive asylum interview, which the Home Office aims to conduct within ten working days of a person's claim having been registered, unless the applicant is placed into the Detained Fast Track, in which case the interview will normally take place within two days.<sup>7</sup> At the substantive interview, the applicant is afforded the opportunity to recount her reasons for leaving her country and claiming asylum in the UK, the basis for her fear of future persecution and her past life experiences in her country of origin. Although the applicant may have secured some level of legal advice or assistance in advance of the substantive interview, legal aid will rarely, if ever, cover a representative's

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<sup>6</sup> 'In-Country' claimants who have particular vulnerabilities – most often separated children, those with physical health needs and families with dependent minor children – may be 'screened' at regional offices in the area where they first come into contact with services.

<sup>7</sup> For a summary of these, and the other, key stages of the current UK asylum process, see: <http://www.ukba.homeoffice.gov.uk/asylum/process/>, last accessed 8 October 2013.



attendance at interview, and so (women) asylum claimants are unlikely to have the benefit of legal representation during the interview itself.

If, as often occurs,<sup>8</sup> the applicant is refused leave to remain in the UK, she will usually benefit from an in-country right of appeal to the First Tier Tribunal (Asylum and Immigration Chamber),<sup>9</sup> where a 'Presenting Officer' (PO), or occasionally the CO who made the initial refusal, will represent the Home Office and defend the decision before a specialist Immigration Judge. Here most applicants are legally represented, although there is evidence of significant regional variation in the availability and quality of legal advice at this stage.<sup>10</sup> Where a woman has benefited from timely legal advice, a written statement drafted by her representative will normally have been submitted to the tribunal in advance of a full hearing. It is this written statement that is usually proposed by legal representatives as the evidence-in-chief during the hearing itself, in accordance with the tribunal's Practice Directions. Our hearing observations in this study, and indeed published guidance to legal representatives, make it clear that lengthy oral testimony is thus rare, if not actively discouraged by both representatives and tribunal personnel (Henderson,

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<sup>8</sup> In 2010, the last year for which full data is currently available, 73% of women were refused any sort of leave to remain at initial decision-making (Home Office, 2011).

<sup>9</sup> Unless her decision is 'certified' under Section 94 of the Nationality, Immigration & Asylum Act 2002, meaning that UKBA believes she can return to her country of origin whilst awaiting the result of any appeal.

<sup>10</sup> Thomas noted that 18% of the 182 tribunal cases he observed were unrepresented (Thomas, 2011). Asylum Aid note that in Cardiff at the time of their research fieldwork 50% of the women in their sample were unrepresented by the time of their appeal (Asylum Aid, 2011). Specific issues have also been identified with women making appeals from the Detained Fast Track (Human Rights Watch, 2010). For critical discussion of the problem of lack of representation see Adler (2007; Aspden 2008).



2003/2009). From here, if the First Tier Tribunal rejects the appeal, it may be possible to request that the Upper Tribunal reconsider that decision, with final recourse to judicial review by the Court of Appeal (or, in Scotland, the Court of Session) if required. However, obtaining legal aid and representation to pursue often lengthy and legally complex further appeals is by no means certain. Moreover, at this stage, applications can be made only on material errors of law, meaning that a substantive reconsideration of the facts of the case is not usually available after the initial First Tier Tribunal hearing stage.

There is evidence of good practice in decision-making – both at initial stages, by Home Office personnel, and at appeal stages, by judges – and there is currently an emphasis upon the continued improvement of the quality and efficiency of the process for all parties.<sup>11</sup> Nonetheless, asylum decision-making in the UK has been the target for considerable criticism, particularly by those who have worried that structural constraints or institutional / personal scepticism may be militating against full, thorough and just engagement with applications in all cases (Asylum Aid, 2011). The fact that a significant proportion of the cases refused at first instance are subsequently overturned on judicial appeal<sup>12</sup> has been highlighted in order to

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<sup>11</sup> The Quality Initiative Project, which since 2004 has been a joint endeavor of the UNHCR and the then UKBA's Quality Audit Team, aims to improve the quality of asylum first instance decision-making in the UK, and produces an annual report and recommendations to the Home Office. See also the report of the National Audit Office (2004); and the Report of the Independent Chief Inspector of UKBA (2009).

<sup>12</sup> Of the 8,943 asylum appeals lodged in 2010, 2,251 (25%) were overturned by the Tribunal. (UKBA Briefings Immigration Statistics October – December 2011 Data table asylum vol. 1. Accessible at:



raise concerns about the quality of initial decision-making, with some commentators suggesting that it evidences the existence of a ‘culture of disbelief’ within the UKBA / Home Office. Similarly, a recent report from the House of Commons Home Affairs Committee (2013) has also highlighted, amongst other things, the problems of delays and backlogs in the asylum system, the quality of decision-making, and the pervasive perception that there is a culture of disbelief within the Home Office.<sup>13</sup> Of course, the fact that applications are initially refused and then subsequently allowed on appeal does not *necessarily* indicate bad practice; the circumstances in the country of origin may, for example, have changed in a way that merits the reversal, new information about the applicant’s case may have emerged, or new legal authorities may have intervened. Nonetheless, the scale of such reversals in the UK context does give cause for some concern about the accuracy and reliability of initial decisions; indeed, this concern was recognised by the UKBA when identifying the decrease in the rate of overturned decisions in one geographical area (where an ‘early legal advice project’ (ELAP) was piloted), as a “key success indicator” reflecting “higher quality, and more sustainable asylum decisions” (Aspden, 2008: 7).<sup>14</sup>

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<http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/immigration-asylum-research/immigration-brief-q4-2011/asylum>

<sup>13</sup> Available at:

[www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/71/71.pdf](http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/71/71.pdf), last accessed 21 October 2013.

<sup>14</sup> However the final report on ELAP is more equivocal, particularly as to the increased costs of implementing the process. See Lane et al (2013).



In the specific context of women's asylum claims, it seems that there may be additional cause for apprehension in this regard. Indeed, in a recent study by Freedom from Torture, it was suggested that women's claims may be "particularly poorly considered at the initial decision level" (2011: p21).<sup>15</sup> In line with this, Asylum Aid has also highlighted the existence of a disproportionately high overturn rate, in women's cases, of 50% (2011). Indeed, UKBA figures released to Asylum Aid under the Freedom of Information Act 2000, but not officially or publically available as national statistics, suggested that for women whose claim took more than 6 months to decide, 41% were allowed on appeal, whereas the comparable rate for men was 26% (2011: 32). As discussed by Asylum Aid in its *Unsustainable* report, of the 45 women's applications examined by them, 18 involved an allegation of rape. It is not possible to tell from their figures how many of the successful appeals in women's cases involved a claim of rape, or whether such a claim was deemed credible at first instance. What these figures do suggest, though, is the existence of a potentially problematic gendered difference in relation to why and how asylum claims are accepted or refuted by decision-makers, both at first instance and on appeal.

While credibility is clearly an issue for all applicants, the way in which assessments of credibility interact with, and contribute to, the gender gap in the rate of successful appeals, and the questionable quality of initial decision-making more generally, thus

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<sup>15</sup> Note that Freedom from Torture (formerly named The Medical Foundation) only agrees to prepare a medico-legal report for those who are believed, on the basis of in-house medical assessment, to have been tortured: <http://www.freedomfromtorture.org/>, last accessed 8 October 2013.



require further research. The present study seeks to contribute to this enterprise by exploring the ways in which allegations of sexual violence, which are often present in the context of women's asylum applications, are dealt with by decision-makers. In so doing, it considers whether establishing credibility is more complex and ultimately more difficult for those women for whom rape is a part of their claim.

Before exploring those questions in more detail, however, in the following section, we will briefly set out the methods used to collect and analyse our data in this study.

### **3. Evaluating the Evaluators: Methods of Data Generation**

Having completed a small-scale pilot study in 2007, the researchers undertook a three-year study (2009-12) over four geographical regions in the UK, using a combination of semi-structured stakeholder interviews and ethnographic observations. Three of these regions included a large urban centre inhabited by a sizeable community of asylum-claimants; they also contained very active asylum appeal tribunals and UKBA offices in which a large number of COs and POs were based. The remaining, fourth, region represented a somewhat smaller, though still significant, asylum community, within which the local appeal tribunal tended to hear a rather smaller number of asylum applications. NGO workers, interpreters and legal representatives based in this region did, however, have extensive experience dealing with asylum appeals at other tribunals. In reflection of this geographical division of expertise, while interviews with UKBA personnel and Immigration



Judges were limited to the first three regions, interviews with legal representatives, NGO workers and interpreters also extended to participants in the fourth region.

In total, 104 semi-structured interviews were conducted and 48 asylum appeal tribunal hearings of women's asylum claims were observed, with the research team having access to the surrounding case files in 12 of those cases. Interviews and contemporaneous notes from hearing observations, as well as case file data, were anonymised and transcribed. They were then coded and analysed jointly by the researchers, working first on the basis of open, grounded coding to generate key themes, and then on the basis of more selective, thematic coding, and using NVIVO, a computer-assisted qualitative data analysis programme to assist in the process.

Gaining access to relevant stakeholders and documents was, as might be imagined in this high-pressured and politicised environment, often challenging. Potential interviewees were identified by various means depending on their role. For example, we gained permission from the UKBA to interview Case Owners and Presenting Officers (n=24) in each of the 4 geographical regions, where a designated team leader facilitated our access to interviewees. Similarly, the Senior President of the Immigration and Asylum Chamber gave permission for us to interview Immigration Judges (n=20), who were then identified with the help of a judicial contact in each regional tribunal centre. Other participants were recruited more directly. Interpreters (n=14) participated having answered an advertisement in the Institute of Linguists newsletter, having been recruited with the assistance of the



Tribunals Service Interpreter division, or through personal contacts and snowball sampling. NGOs providing asylum support and advice (n=21) in each of the four areas were approached by letter or recruited through personal contacts. Meanwhile, legal representative respondents (n=25) were recruited on the basis of a letter that was sent to all legal practitioners engaging in asylum work in each geographical area. Interviews typically lasted between 60-90 minutes and, in most cases, were tape-recorded (with the permission of the participant). They were semi-structured in format to reflect the range of different stakeholders involved and to ensure an appropriate balance between flexibility and comparability across the data. Interviewees were asked to reflect – amongst other things - on their perceptions of the scale of rape allegations within women’s asylum claims, the contexts in which such allegations arise, the ways in which they are disclosed and responded to, as well as factors that might tend to support or undermine their perceived credibility.

Legal representatives were also asked, via a consent form (available in a range of languages) to be given to their clients, to identify any cases where female clients had alleged rape as part of their application, and were in the process of appealing against an initial refusal of leave to remain. Where representatives provided such referrals, and clients consented, the researchers then observed the client’s tribunal hearing, and accessed the applicant’s surrounding case documentation, including the UKBA’s initial refusal letter, the applicant’s written statement in support of her appeal, and the written determination provided subsequently by the tribunal judge.



Although this was the preferred route by which to observe tribunal hearings of relevance, large caseloads and the considerable time constraints under which legal representatives in the UK asylum system operate meant that the stream of referrals was insufficient to support the demands of the study. As a result, the researchers also sought out alternative mechanisms for identifying and observing relevant cases. More specifically, referral protocols operating on a similar basis were secured with NGO and asylum support advice providers as well as with the Tribunal Service. Together, this ensured referral and observation of 31 tribunal hearings of appeals where a previous disclosure of rape had been made by the appellant. In addition, since asylum hearings are open to the public unless a request has been made to hold proceedings *in camera*, the team were able to randomly observe a further 17 hearings across the four regions involved in the study, ensuring a number (n=10) of observations of cases within the detained fast track system. Lending support to anecdotal evidence of the high prevalence of sexual violence within women's asylum claims, of the 17 random hearings, in 7 cases the existence of a claim of rape was alluded to during the appeal and in a further 2 cases there was mention of an allegation of a threat of rape on return. Moreover, in some of the remaining randomly observed hearings, references were made, for example, to 'women's problems' necessitating an all-female court, or to 'sensitive aspects' of a claim, which suggested a possible experience of sexual violence not discussed during the appeal. A representative from the UKBA was present in all but 4 of the 48 observed cases; in a further 4 cases, although the UKBA was represented, the appellant was not.



There are, inevitably, some limits to the methods used in this study and to the resultant data, which must be borne in mind. For one thing, all interviewees were self-selecting or recruited via selection by an intermediary. This, coupled with the relatively small number of interviewees within some stakeholder groups, means that we cannot claim to have a representative sample. Nonetheless, the diversity of stakeholders and perspectives evidenced across the study has ensured a rich dataset that is of ample scale for the purposes of qualitative analysis, particularly when triangulated with findings arising from our tribunal observations (referred and random), the documentary evidence included in the selection of case files made available to us, and pre-existing research or campaign materials addressing issues of relevance. Further, although the primary focus of observations was on the appeal tribunal, at which initial refusals of leave to remain are challenged, it is important to point out that this does not limit our findings exclusively to negative rather than positive decision-making, nor to this appellate stage of the process. Indeed, interview participants reflected more broadly on all stages of the asylum application process, from the initial screening interview undertaken at the point of entry into the UK, through the substantive interview conducted by the UKBA Case Owner and the process of initial determination, to the tribunal appeal stage and beyond. Finally, it should be noted both that no asylum-seeking women themselves were interviewed (albeit that their experiences and perspectives were often relayed to us through the mediated lens of stakeholder respondents, and their participation in tribunal hearings was observed directly by the researchers) and that the study focusses almost exclusively on women's, rather than men's, claims of sexual



violence. The former restriction was justified on ethical grounds, based on a concern to avoid unnecessary re-traumatisation of potentially vulnerable asylum applicants; the latter on the basis that, while asylum-seeking men do experience rape, this tends to arise in distinct contexts and merits, we believe, its own independent study.

#### **4. Reason to (Dis)Believe: Assessing the Credibility of Rape Claims in Asylum**

##### **a. Credibility - The Standard of Proof and The Perception of Arbitrariness**

Problems of proof are well known in the asylum context, and assessing credibility is never an exact science. Social science research has shown that assessors are not particularly skilled at distinguishing truth from lies, even where the assessor is a professional, such as a police officer; nor does confidence in one's ability to detect lies correlate with the ability to do so (Vrij et al, 2008; for discussion, see also Smith, 2012).<sup>16</sup> Indeed, Norman (2007: 291) suggests that assessing credibility is not an exercise in establishing the truth, but about "making findings of fact that are reasonable and open on the evidence".

The UNHCR Handbook (1979, paragraph 203) states that in the absence of available proof, it is "frequently necessary to give the applicant the benefit of the doubt". In

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<sup>16</sup> This refers to single incidents of 'truth' telling. Smith (2012) notes that studies show that the reliability rate increases when the assessor observes a cluster of behaviours rather than an isolated incident, though these kinds of studies present all sorts of methodological problems.



the UK context, a plethora of official policies and guidelines have been developed, which are designed to assist asylum decision-makers in assessing the credibility of the claim more accurately, including 'Asylum Policy Instructions', 'Asylum Process Guidance' and 'Asylum Support Policy Bulletins', as well as 'Country Specific Asylum Policy' and 'Country of Origin Information'. It is not clear, however, how - if at all - these different kinds of policies and guidelines relate to each other, and whether they are hierarchical. Moreover, from the comments of some of our respondents, it appears that some of the guidelines are thought to be of poor quality, and that policies are not always followed in practice. Indeed, this was often demonstrated, as we will discuss further below, by participants' lack of knowledge of Gender Guidelines.

Perhaps the key piece of guidance, when it comes to assessing the credibility of applications, is the 'Considering Asylum Claims and Assessing Credibility' Asylum Policy Instruction (last revised in 2012). In line with UNHCR guidance, the UKBA Instruction divides credibility into two aspects – internal (involving a 'coherent' account) and external (being capable of proof by objective means) (UNHCR, 1992: paragraph 204). More specifically, internal credibility is defined as requiring an account that is "consistent with past written and verbal statements, as well as being consistent with claims made by witnesses and/or dependents and with documentary evidence submitted in support of the claim" (UKBA, 2012: paragraph 4.3.1). In assessing credibility, specific factors that must be taken into account include: the level of detail supplied by the applicant; any inconsistencies in the



account; and any ‘mitigating circumstances’ that may affect her ability to present a detailed, coherent or consistent narrative, such as age, gender, mental health issues, or trauma.

The UKBA Instruction also provides guidance on how to assess credibility externally, that is, as measured against, for example, ‘objective’ Country of Origin Information Reports (COIRs). Whilst country information that chimes with an applicant’s consistent and coherent account will likely lead to acceptance of that part of the story, country information that contradicts the account is “likely to result in a negative credibility finding” (UKBA, 2012: paragraph 4.3.2). Where it is not possible to externally substantiate a claim in this way, it is stated that the decision-maker must make a finding, giving the benefit of doubt to the applicant (UKBA, 2012: paragraph 4.3.3). An applicant’s general credibility can, however, be damaged simply by virtue of the fact that she has engaged in behavior covered by section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, and cannot provide a reasonable explanation for that behavior. The range of behavior that can indicate adverse credibility under section 8 is extensive, including concealing information, delaying the resolution of a claim, failing to produce official documents such as a passport or travel documents, failing to make an asylum claim as soon as practicable, or making a claim subsequent to arrest or an immigration decision. Whilst UKBA guidance states that section 8 is not the “starting point” for the consideration of credibility, it also instructs decision-makers that “section 8 behaviours **must** be taken into account as potentially damaging” (UKBA, 2012: 17,



paragraph 4.3.4). The relevance or centrality of such factors to assessing the veracity of an applicant's claim has, however, been challenged by a number of commentators and practitioners (see for example IARLJ 2013: 95; Thomas, 2006). After all, as Sweeney (2009: 9) has observed: "Examination of the applicant's travel itinerary or behavior 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."

With respect to decisions regarding the credibility of individual material facts, the UKBA Instruction further points to the need for decision-makers to consider whether these are 'plausible' when deciding whether or not to apply the 'benefit of the doubt'. Plausibility has been taken to mean the "inherent likelihood or apparent reasonableness of a claim".<sup>17</sup> Importantly, the Instruction acknowledges that a plausible event need not chime with expectations of life events in the UK, and maintains that the pertinent consideration is the "apparent likelihood or truthfulness in the context of the general country information relevant to the applicant's country of origin and/or their own evidence" (UKBA, 2012: paragraph 4.3.6).

Of course, in practice, there is much room for discretion when assessing what counts as a plausible claim, because often there is, as one UKBA Presenting Officer told us, *"no way of proving it one way or the other"*. In the current study, some decision-

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<sup>17</sup> *MM (DRC – plausibility) Democratic Republic of Congo* [2005] UKIAT 00019, paragraph 16.



makers demonstrated awareness that what seems plausible in relation to *“illiterate women in a village somewhere”* will differ from what we might deem plausible for western women. But essentially, plausibility remains a subjective assessment. A lack of empathy or cultural awareness, or even just limited life experience, may preclude a decision-maker from being able to see an applicant’s behaviour as plausible in its own context, for instance in terms of to whom, if anyone, the woman discloses sexual violence, and when. One NGO worker in this study gave an example of this inability to comprehend the behaviour of asylum applicants, where a judge questioned a woman, who had given birth as a result of a rape, as to why she had nonetheless given the baby her husband’s name: *“And [the appellant] was like, ‘Well, whose name would I give it?’, you know, it’s her baby”*. Likewise, in one tribunal hearing that the research team observed, the UKBA Presenting Officer argued that the appellant’s claim that she was a traumatised victim of sexual trafficking was undermined by the fact that, having escaped her trafficker, she quickly formed a relationship, and had a baby, with another man. As one NGO worker put it: *“I’d like to see less disbelief based on a civil servant’s ability to imagine or not.”*

In some asylum cases, then, it may be the most implausible account that turns out to be true; and thus *“the ring of plausibility”* can be as problematic a touchstone as *‘the ring of truth’*” (Smith, 2012: 36; see also Kagan 2003). The UKBA are, at least officially, cognisant that subjectivity in assessments, while inevitable, might lead to *“unfounded assumptions based not on objective information but on the individual decision makers’ own experiences and beliefs, undermining the balance and fairness*



of an assessment” (UKBA, 2012: paragraph 4.3.5). They advise decision-makers never to dismiss a material ‘fact’ on speculative grounds, and to set out the reasons for the (negative) decision. However, at the level of practice, many of our respondents pointed to what they saw as individualised, arbitrary decision-making, where not just the outcome but the integrity of the decision-making process was conditional upon the characteristics of particular decision-makers: the application and appeal process was frequently described as a “*lottery*”, with success and sensitivity being dependent on the personal characteristics and dispositions of those involved.

Further, certain characteristics of the applicant seem also to play an inconsistent role in the evaluation of credibility. For instance, some of our participants acknowledged that applicants who were educated and articulate might be better placed to disclose sexual violence, and thereby give a coherent statement that would form the basis of a credible account. For example, as one legal representative suggested:

*“I think if you are educated, sadly you are better able to express yourself... I think your ability to do so and remain focussed on the questions and answering the questions... is probably greater than it is if you are not... I think the manner in which you give evidence would be better if you are educated. So I think it does play a role even if it shouldn’t.”*

Likewise, an Immigration Judge said:



*“[a] woman, who has never been allowed out of the house, has never been allowed any education, has never been given any sense of them having any value out of the home, then expecting them in a formal setting to then be full of confidence, able to assert themselves in cross examination, able to express clearly exactly what’s happened is unrealistic.”*

As such – other things being equal in the asylum equation – educated and articulate applicants may be more likely to be successful in their applications. At the same time, however, education was also seen to be a factor that could reduce the prospects of success where it pointed to a reduced level of risk on return, since educated applicants could be expected to more feasibly relocate and recreate a secure and tolerable life in their country of origin. This was evidenced in one hearing that we observed, for example, in which the appellant’s education and knowledge of English, as well as her familiarity with mobile phones and social media, was used in the UKBA’s submissions to undermine her claim that she had been trafficked, and was at risk of re-trafficking on return. Thus, it seems that a level of education, and the articulacy and self-confidence that this can bring, may be a duplicitous ally in the context of (women’s) asylum applications, with its impact on decision-making being difficult to predict. As we will discuss below, moreover, a similar conclusion can be reached in relation to the demeanor of the applicant more broadly, which our findings suggest can also play a contradictory role in the assessment of the credibility of an account.



The concern about arbitrariness and inconsistency in asylum decision-making is well-supported by empirical evidence in other jurisdictions which has uncovered high levels of variability in the treatment afforded to asylum claims across individual decision-makers, as well as across different departments or hearing centres (in the US context, for example, see Ramji-Nogales et al, 2009). The problem of inconsistency in decision-making within and across EU jurisdictions - particularly around credibility issues - is one that the IARLJ has also recently turned its attention to, leading to their publication of “Judicial Guidance” on basic criteria and standards of good practice in credibility assessment (2013). There is an inevitable lack of certainty in asylum decision-making, since it involves assessing the credibility of allegations of past abuses in a context in which the coherency and consistency of an applicant’s persecution narrative may be impeded by trauma or language difficulties, and corroborating evidence may be lacking; and then, evaluating the prospects of future risk in a context in which conditions in countries of origin are often volatile, fluctuating and difficult for foreign ‘others’ to comprehend properly. To some extent this means that asylum decision-makers must be permitted to exercise a sizable amount of discretion. But with discretion comes the threat of arbitrariness and inconsistency. Where the treatment and outcome of the applicants’ claim can be, or at least can be seen to be, dependent to this degree upon the personality and disposition of individual actors, it is not surprising that stakeholders feel that decision-making is often unjust or contradictory, and more or less a game of chance.



**b. Credibility – Meeting the Burden of Proof or Dispelling the Burden of Doubt?**

The threshold for establishing a credible account in the asylum context is that of ‘reasonable likelihood’ - a lower standard than is applied in many other forums. However, the burden of adducing evidence that meets this standard remains on the applicant. The UKBA Asylum Policy Instruction on ‘Considering Asylum Claims and Assessing Credibility’ suggests that an applicant does not have to *prove* that her claim is true, simply that it is credible:

“Applicants do not have to convince the decision maker that they are telling the truth. It is possible to establish a credible claim even where the applicant is unable to provide any independent, corroborative evidence to support claims about past and present events and experiences as long as the account is coherent, consistent and plausible when considered in light of the applicants’ profile and any mitigating circumstances.” (UKBA, 2012: 11, paragraph 4.1)

Nonetheless, as one Presenting Officer suggested to us, *“the burden is on them (the applicant) to prove they have been raped”*. To the extent that this seems to imply a more demanding standard than that formally required in UKBA guidance, it raises concerns in relation to the feasibility of being able to discharge this burden - rape is often a notoriously difficult allegation to prove under any circumstances, and factors of displacement, delay and shame that cause difficulties in the domestic arena may



be compounded in the asylum context to rule out the possibility of any corroborating evidence. Reflecting these concerns about how a female applicant could, in practice, *prove* that she had been raped, an interpreter that we interviewed in the course of our study observed: *“And how can you prove rape? It is just the woman’s word, what she says, her evidence. What more can she do? She can’t.”*

Perhaps the key consequence of placing the burden of proof upon the applicant in the asylum arena is that it ensures that, in assessing claims and in taking the decision to refuse them, the UKBA do not have to prove an applicant’s claim to be false. Instead, it is sufficient to conclude that the applicant has not convinced the decision-maker of the credibility of her claim. This may have significant ramifications in cases involving an allegation of rape. Official UKBA policy acknowledges that there may be aspects of a claim that are not considered credible, or even established to be false, and yet not fatally undermine the prospects for a successful asylum application (2012: 12-13, paragraph 4.2). In line with this, in the present study, there was *some* recognition amongst our participants that, in the words of one respondent, even if a rape claim was made *“to try and add a bit of colour to an otherwise genuine claim”*, that would not in itself be a reason to reject the application wholesale. Thus, there were some decision-makers who accepted that an ‘incredible’ rape claim need not undermine the overall credibility of the applicant’s account nor her overall prospects for asylum. Despite this, the vast majority of our respondents exhibited or recounted a more inflexible approach, indicating that a claim will only be seen to be as compelling as each of its constituent



parts. Indeed, as one Presenting Officer told us, *“if we disbelieve one part of the claim, we quite often disbelieve the rest.”*

Several respondents lamented a tendency on the part of asylum decision-makers (particularly at the UKBA initial decision stage) to draw upon specific (often tangential) aspects of an account about which doubt is present in order to find the whole claim incredible and refuse the application – this was referred to as akin to the unravelling of threads in order to destroy the cloth in its entirety. Similarly, one Immigration Judge described a mentality of searching for *“knock-out blows”* – UKBA personnel, he suggested, would sometimes use discrepancies in factual details in order to try to persuade him that the appellant’s entire account had been fabricated.

This practice is in itself potentially problematic, particularly in a context in which, as will be discussed below, there may be compelling explanations for inaccuracies or inconsistencies in the account provided by a traumatised applicant. Also troubling, though, are the concerns raised by many of our respondents, which suggest that the grounds upon which the UKBA raise doubts about elements of an asylum claim can seem flimsy, trivial or pedantic. A number of examples of this were provided in our interviews, but perhaps one of the most striking came in a tribunal appeal observation during which the following exchange took place between a UKBA PO and an appellant, in relation to UKBA doubts regarding her claim to be a lesbian:



*PO In relation to your being lesbian, in your asylum interview there were a series of questions posed about gay literature – and one of the gay magazines you said you read was ‘Hello’, is that correct?*

*App I said I read all magazines*

*PO The question that would have been asked was what magazines do you buy as a lesbian person and you said ‘OK’ and ‘Hello’. And some of the TV channels which you mentioned were for men not women. So you have been unable to substantiate your claim to be a lesbian.”*

There are a number of questionable assumptions at play in this exchange – about what the interview question *would* have been, about the fact that all lesbians read only lesbian magazines and watch lesbian (but not gay male) TV channels, and so on. And yet, despite this, it is the appellant’s failure to meet these expectations that is relied upon to support the UKBA’s insistence that her claim to be a lesbian is unsubstantiated. To this extent, this exchange lends support to the concerns recently raised by Bennett following her exploration of the handling and evaluation of women’s sexuality-based claims within the UK asylum system.<sup>18</sup>

Of course, in this particular case, the lesbian status of the applicant was crucial to the success of her asylum application, and to that extent the UKBA’s challenge to the credibility of her claim to be lesbian in order to justify refusing her application is not

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<sup>18</sup> <http://www.independent.co.uk/news/uk/home-news/gay-prove-it-then--have-you-read-any-oscar-wilde-judges-accused-of-asking-lesbian-asylum-seekers-inappropriate-questions-8558599.html>, last accessed 1 May 2013.



in itself unreasonable, even if the basis for the challenge is dubious. But in some of the other cases observed or recounted to us in this study, there was evidence of UKBA reliance on the perceived incredibility of often apparently marginal or minor elements as a strategy to undermine the more substantive components of an asylum claim. One legal representative recounted to us, for example, a case in which a young women's claims of having been raped and trafficked were undermined by a PO at the tribunal on the basis, amongst other things, of the applicant's 'inappropriate' behaviour. As the legal representative put it,

*"there was no focus on the rape or anything like that, it was more peripheral things... and there was reliance on the fact that she had been found at a party where there had been alcohol, and there was just this building up of a picture of someone with maybe not the best of characters".*

This tactic of undermining the overall credibility of the applicant and her claim by casting doubt on the calibre of her character echoes, of course, the kind of long-invoked but much-challenged strategy utilised by defence counsel in criminal rape trials (see, for example, Lees, 2002; Temkin, 2002; Temkin and Krahé, 2008). Against this backdrop, it is perhaps not surprising that several interviewees in the present study directly referred to examples of improvements and good practice within the criminal justice system, in terms of its handling of rape allegations, which it was suggested might usefully be transposed into the asylum system to aid in the substantiation of claims and the respectful treatment of complainants. The practice of gender-matching, designed to ensure that women alleging rape have the



opportunity to speak with a female interviewer, is already incorporated as standard practice in both the asylum and criminal justice systems. Nonetheless, our study, together with previous research (Ceneda & Palmer, 2006), revealed that, at least in the asylum arena, operational and time constraints entail that this does not in fact happen in all cases. Respondents in our study also pointed to the possibility of the use within asylum cases of: specially trained interviewers and judges; special measures for victims who are traumatised to enable them to provide 'best evidence'; and the use of victims' advocates to provide additional support to applicants during hearings.

Clearly there are distinctions to be made between the criminal justice system and the asylum process, such as: the differences in rules of proof and procedure; the absence of a defendant in the asylum context; and, in determining a claim to asylum, the obligation upon the state to assess the likelihood of future persecution rather than prosecute past wrong-doing. For these reasons, uncritical transplants from the criminal justice system would be inappropriate. However, what our respondents highlight here is the scope for productive engagement across judicial arenas to ensure improved approaches to evidence gathering and credibility assessment. Although the asylum tribunal, like all tribunals in the UK, is ostensibly an inquisitorial forum (Bano, 2012) – or at least to some degree “active, enabling and investigative” (Thomas, 2012: 1) - our respondents routinely described it as an adversarial and confrontational arena. Likewise, applicants' experiences of the overall application environment, including UKBA interviews, was variously



described as “hostile”, “frightening”, “ruthless”, “degrading”, “stressful”, “traumatising”, “cold”, “distancing” and “intimidating”. The ways in which measures to support vulnerable applicants, akin to those used for vulnerable witnesses in criminal trials, might assist in ensuring a fuller and more coherent narration of a claim (which in turn might support its credibility) merit reflection (see also Eyster, 2012: 31-34, who calls for rules, similar to ‘rape shield laws’ to protect unwarranted attacks against asylum claimants’ credibility). In addition, in a context in which – as we will discuss in more detail below– there is evidence of potentially problematic assumptions (about the appropriate behaviour of women generally, and sexual violence victims in particular) informing the way in which some asylum decision-makers assess the credibility of a claim of rape, there may also be valuable lessons to be learned from recent efforts within the criminal justice system to dispel myths and stereotypes amongst jurors through education (Ellison and Munro, 2009b).

In the next section, we will explore more directly some of the key factors that our research suggests decision-makers often take into account when assessing the credibility of a claim of rape within the context of an asylum application. We will reflect on the assumptions that inform this process as well as the ways in which such assumptions have the potential to unjustly reduce applicants’ prospects for being heard and believed. More specifically, we focus on four factors – delay, inconsistency, demeanour and expert evidence – which, not coincidentally, have also been shown to impact (albeit sometimes in subtly or significantly different ways) on decision-making on rape within the CJS (see, for example, Ellison & Munro 2009a).



## **5. Specific Markers of (In)Credibility: Delay, Inconsistency, Demeanour, and Expert Evidence**

As outlined above, assessing the credibility of a claim in the asylum context requires consideration of two aspects: internal credibility, which focusses upon the coherence of the account provided by the applicant; and external credibility, which focuses upon its feasibility in light of objective, external evidence. With respect to internal credibility, recognition within the criminal justice system that factors such as the timing, consistency and manner of relaying a rape claim are unreliable as indices of credibility has led to the recent development of specific judicial directions designed to reduce the significance placed upon such factors by jurors.<sup>19</sup> However, our data suggests that many asylum decision-makers saw these same factors as key to assessing the internal credibility of an asylum application. Meanwhile, regarding external credibility, there is marked concern about the reliability of the types of expert evidence upon which the UKBA have most often relied (for example, COIRs) and the considerable difficulties that applicants increasingly face – particularly due to funding constraints - in accessing medical or psychological specialists (such as Freedom from Torture). Nonetheless, as we will discuss below, it was clear in the present study that, in examining the credibility of a rape claim, the availability of such evidence was often considered by decision-makers to be paramount.

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<sup>19</sup> Judicial Studies Board, 'Crown Court Benchbook: Directing the Jury' (2010: Chapter 17) – available at [http://www.judiciary.gov.uk/NR/rdonlyres/BE25EBB6-AAD2-4ACD-8115-28D3BF613164/0/benchbook\\_criminal\\_2010.pdf](http://www.judiciary.gov.uk/NR/rdonlyres/BE25EBB6-AAD2-4ACD-8115-28D3BF613164/0/benchbook_criminal_2010.pdf), last accessed 7 October 2013.



### **a. Internal Credibility**

#### **i. Delay – A Late Attempt to Bolster the Claim?**

Delay in disclosure was often described by our respondents as presenting an enormous problem with respect to credibility. Research and experience indicates that there are a wealth of good reasons for delaying a disclosure, particularly where the individual is vulnerable or the incident in question was traumatic or shameful (Bogner et al, 2007; Herlihy et al, 2002). Nonetheless, a number of our respondents – whether legal representatives, UKBA personnel, NGO workers or even some Immigration Judges – were adamant that delay in disclosing a key aspect of the asylum claim, or even delay in making the claim itself, would (and for many, should) reflect negatively on a claimant’s credibility. As one legal representative put it, for example, *“Obviously you’re going to have huge credibility problems because there is absolutely no sympathy or acceptance that people won’t tell their stories straight off”*.

Although many respondents in this study, including some UKBA personnel, acknowledged that the substantive asylum interview was not always an environment particularly well-suited to the disclosure of rape allegations, there was nonetheless a strong presumption amongst a significant proportion of our respondents that, to be credible, such disclosures needed to be made at this stage (see further, Baillot, Cowan and Munro 2012). Indeed, some UKBA personnel and



Immigration Judges went so far as to insist that allegations of rape made at any stage after this were most likely to be false, deployed as a tactic to try to strengthen a flimsy asylum claim. As one UKBA Presenting Officer put it, for example:

*“And of course, if they bring up the rape after the [initial] refusal our view is you’re just trying to bolster your claim... You know, you’ve been refused so now you’re trying to make something else up to make your claim look better, and that’s quite often the stance that we will take”.*

Meanwhile, another observed uncritically that they had never had a case where rape was disclosed for the first time at the appeal tribunal, except where it was obviously fabricated: *“I can’t ever recall being surprised by an allegation of rape actually at a hearing that we didn’t know about beforehand...If there are it’s probably a Jamaican case or something where they go off on one and make allegations on anything.”*

The strength and tenacity of this view is particularly striking in a context in which the UKBA’s own Gender Guidelines, the most recent version of which was published in 2010, specifically included a direction to decision-makers advising them not to place too much weight on the fact of delayed disclosure of a rape allegation:

*“The disclosure of gender-based violence at a later stage in the determination process [than the substantive interview] should not automatically count against her or his credibility”* (‘Gender in the Asylum Claim’, 2010: paragraph 7.2).

However, when asked what guidance was available to support decision-making in these cases, it was clear from our interview data that very few UKBA personnel were



aware of any guidance relating to gender, or if they did know about it, they were not sure of its content or status. Some, even when asked specifically about the UKBA's internal guidance on gender issues in the asylum claim, confused them with Country Information Reports. Others seemed to feel that there was no need to refer to them. As one UKBA Case Owner admitted, for example, when asked about the organisation's gender guidelines, *"[it's] not something I really use personally, I don't think I've looked at it since I started"*. This failure to turn to relevant, but often lengthy, official guidance may be due to limited time-scales for decision-making. However, it may also, as Jubany (2011: 88-9) found with respect to the UNHCR handbook on determining refugee status, be grounded in a lack of interest, a sense of the irrelevance or redundancy of policies introduced by 'management', or a disconnect between the government-led policies of deterrence and border control and the practical difficulties and complexities of 'frontline' asylum decision-making.

A number of respondents in the present study did express a more nuanced approach to the issue of late disclosure, appreciative of the fact that there may be legitimate reasons for the delay. Thus, one UKBA Presenting Office observed, *"it's not the case that everybody who raises it later on is lying"*, whilst an Immigration Judge insisted that delay was not *"the be all and end all in the assessment of the case"*. Many such participants acknowledged that there was a tendency amongst UKBA initial decision-makers to expect disclosure but maintained that – as one Immigration Judge put it – there was no sense in being *"unrealistically pedantic"* or *"old fashioned"* about this in a context in which it was increasingly understood that



disclosure may be very difficult. Indeed, as one NGO support worker pointed out, “*if [early disclosure] is not the norm in the criminal justice system in the UK and we don’t expect it to be, then why on earth would we expect it to be in the asylum process?*”

At the same time, however, even amongst these respondents, there was typically a sense that delayed disclosure was problematic in that an applicant who had delayed disclosure of rape would have to articulate a recognised ‘legitimate reason’ (such as shame or trauma) for this if her credibility was not to be undermined. As we have discussed in previous work, such expectations, which might require those women who do not disclose rape at an early stage of their claims to embody roles of vulnerability and passive victimhood in order for their credibility to remain untarnished, can themselves be highly problematic, masking the influence of a number of gendered and cultural stereotypes (Baillot, Cowan and Munro 2012; Baillot, Cowan and Munro 2011). For example, there was a general tendency amongst respondents to relate problems in disclosing rape to women from certain nations or religious groups - what one Immigration Judge described as “*less sophisticated or enlightened cultures*”. Yet there was little evidence of reflection as to professionals’ own culture, or the barriers faced by women in the UK regarding disclosure of sexual abuse and violence. Similarly, many NGO interviewees insisted that late disclosure was primarily due to the after-effects of trauma and women’s difficulties engaging with or understanding the asylum process. While, of course, these may be valid concerns that apply to many women, they also risk re-casting



even the most articulate of applicants as a silent victim, and ignoring the resistant potential of silence or non-disclosure (Johnson, 2011).

## **ii. Inconsistencies – A “Stick to Beat you With”?**

Another key obstacle to establishing internal credibility, which was repeatedly raised by our respondents and was evidenced clearly in the first instance refusals that we learned about through our appeal tribunal observations, was inconsistency. Reasons for inconsistencies can vary and include, of course, the impact of trauma on memory. Even without the effect of trauma, memory has been demonstrated to be unreliable in that recall is often incomplete, inaccurate, lacking in detail and constructed over time (The British Psychological Research Board, 2008; see also UNHCR 2013: 57-60). Trauma can further exacerbate this inherent unreliability, and a number of psychological studies have been conducted on the effects of trauma and fear, particularly experiences of torture and rape, on the way in which asylum applicants tell their stories (Cohen, 2001; Herlihy et al, 2002; Jones and Smith, 2004; Bögner et al, 2007 & 2010; Herlihy et al 2012; UNHCR 2013: 61-66). These studies suggest that trauma can not only generate temporary or permanent difficulties in memory recall, but can also distort recollections, and inhibit the ability to clearly remember what might seem to observers to be important details. When compounded by broader difficulties in terms of language and inter-cultural communication, trauma can also impede the ability to provide a coherent, logically sequential account. This can be further exacerbated by the short time scales for



decision-making and limited legal aid funding available in the UK asylum process (Gibbs 2010).<sup>20</sup> As one legal representative explained: *“the funding tends to push you to get on with things a bit quicker than might you want because I think any rape victim would not want to sort of talk at such a speed.”*

In recognition of this, the UKBA Asylum Policy Instruction on ‘Considering Asylum Claims and Assessing Credibility’ specifically directs decision-makers to exercise caution in automatically interpreting an inability to recall or recount certain facts as evidence of fabrication. It states that:

“Decision Makers must be aware of and take into account, the profile of the applicant. This is relevant both in assessing the level of knowledge they can reasonably be expected to have and the effect other factors such as age, gender, social background and underlying medical or psychological factors will have on the applicant’s ability to recall certain facts” (2012: paragraph 4.3.1).

Over the course of the study, the researchers did encounter examples of good practice by decision-makers in relation to this issue. Some respondents explicitly maintained that trauma could, and often would, have an effect on an applicant’s

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<sup>20</sup> The Legal Aid, Sentencing and Punishment of Offenders Act 2012 recently made drastic cuts to legal aid provision in the UK. Legal aid is still available for asylum, but not for immigration; since many solicitors in the sector subsidise their asylum work partly through income from immigration advice and representation, there is a fear amongst the legal and NGO sector that law firms will be forced to withdraw from asylum work altogether. See <http://legalvoice.org.uk/topstories/a-culture-of-disbelief/>, last accessed 7 October 2013.



ability to disclose a consistent story, and that, while this would present challenges in terms of credibility assessment, it needed to be accepted and treated sympathetically. Thus, as one Case Owner explained:

*“Some just become so upset in the interview about it that they can’t discuss it to start with and they have to take breaks and things like that just to calm them down... it is going to be difficult for them, because I expect it is a very horrifying experience that they’ve been through and it’s difficult to relive it isn’t it so.... and we have to be as gentle as we can with that.”*

Another observed that:

*“If there’s parts of their account that don’t match up but then clearly something has happened to them and it has... I don’t know, that they are traumatised by it then you can make a finding that, and...just give them the benefit of the doubt.”*

Likewise, one Immigration Judge stated:

*“People are emotionally traumatised by leaving their country and so on without anything having happened to them and the prospect that they’ll never see their families again is obviously going to be a trauma... and compounded obviously by sexual offence or sexual violence, you know, it’s difficult to make these assessments but we are expected to do them.”*

At the same time, however, the majority of our respondents indicated that decision-makers were often likely to take a less nuanced approach, and several of the decision-makers we interviewed took the view that inconsistencies in the applicant’s account ought rightly to give rise to suspicion, and that discrepancies often justified a finding of lack of credibility, notwithstanding possible alternative



explanations, such as trauma (see also Jubany, 2011: 82). Indeed, one legal representative described inconsistencies as a “*stick*” used by UKBA decision-makers to “*beat*” asylum applicants. Meanwhile, several others suggested that UKBA personnel often approached asylum interviews with the *aim* of trying to find inconsistencies as a basis to refuse the claim, or that the UKBA were “*blinkered*” and “*close their eyes to the plausible*”. Though, from their perspective on the side of clients, these comments from legal representatives might be read as merely reflecting frustration, the suggestion that exploiting inconsistencies in an account is a core aspect of the decision-makers’ role was supported by the comments of several UKBA staff; and was reflected most poignantly in the following comment from a Presenting Officer: “*Obviously discrepancies in their evidence, which is what we are paid to do. Go to court and sort of catch them out so to speak, to put it bluntly*”.

At the same time, it is also important to note that asylum applicants were apparently expected to tread a delicate balance in this context, since some respondents were keen to maintain that an account that was too consistent would be just as suspicious as one that contained several inconsistencies. As one Immigration Judge put it,

*“small discrepancies can be not only forgiven but expected. You would expect someone who has gone through this to make a few errors. They wouldn’t get it all perfect and if the whole story is perfect every single time that is slightly suspicious as well”.*



Of course, what at first may appear as an inconsistency in an account can often be reconciled with further probing, either to redress an initial misunderstanding in the narration or translation, or to trigger fresh recollection. Indeed, procedural fairness requires that asylum decision-makers should allow applicants a chance to respond to doubts as to their credibility. In recognition of this, the UKBA's 'Considering Asylum Claims and Assessing Credibility' Instruction specifically advises that decision-makers should give the applicant the opportunity to clarify or address any apparent inconsistencies that arise during her substantive interview. Our research suggests that some Case Owners do put inconsistencies to the applicant at this time and give them the opportunity to respond. Equally, it was clear that this practice was not uniformly followed, with several of our participants bemoaning what they regarded as a tendency amongst other UKBA personnel to allow the inconsistency to stand before citing it in the reasons for refusal letter; a practice which we confirmed having taken place from our analysis of case files and observed tribunal appeals.

Even in those cases where the opportunity is formally afforded for inconsistencies to be addressed, moreover, there are reasons to be circumspect. The closed question and answer format utilised for the majority of the asylum interview, as well as the practice of the interviewer transcribing contemporaneously by hand (notwithstanding the availability of a tape recorder in every room), the possibility that many asylum applicants do not understand what is being asked of them or the importance of giving their account in full at this stage, and the potentially complicating factor of an interpreter intermediary provide an environment ripe for



misunderstanding and confusion. Moreover, the opportunity to clarify inconsistencies or add further information is typically afforded to applicants only at the end of the UKBA interview. Taken together, these structural constraints may present an applicant with minimal prospects of constructing a complete, consistent narrative. As one Immigration Judge in our study acknowledged, for example, *“especially with the Home Office introduction saying ‘only answer these questions’. They really may feel inhibited about bringing up something that they wish to add which they haven’t said before.”* We found evidence in support of this in the present study – in one observed hearing, for example, an appellant advised the tribunal that although she had had difficulty understanding some of the questions posed by her UKBA interviewer, she had not reported and tried to resolve this at the end when given the opportunity to do so because she was *“fed up, just wanted to get out of the interview at all costs, because I did not know what was going on around me”*. Even where an applicant is afforded, and takes advantage of, this opportunity to provide clarification, moreover, there was also evidence which suggested that the UKBA may continue to see the account forever as *“tainted with suspicion”* since it required further probing from the interviewer to produce a complete and consistent account.

The anxiety that a focus on inconsistencies generates in asylum applicants can in itself augment these difficulties. Thus, for example, one NGO support worker recounted an experience in which a client claimed to have ‘forgotten’ the details of an event in an effort to avoid giving ‘wrong answers’ or creating inconsistencies, only to have her application adjudged by the UKBA as incredible on the basis that it



was vague and too lacking in detail. Legal representatives use various strategies in order to combat these problems. For example, representatives routinely commented on the fact that they will “*look for the holes that the Home Office will pick*” in a client’s story and do what they can to ensure that these are accurately explained. Some also told us that they would emphasise the most credible parts of an applicant’s account in the hope that this would reflect positively on the overall claim. But where an applicant genuinely cannot recall, or is unsure about, the details of a particular aspect of her account, this can fuel anxiety about being disbelieved in ways that may actually render the narrative less credible, and further undermine her case.

### **iii. Demeanour - A Misfortune Difficult to Bear?**

Demeanour includes a wide range of behaviours, including body movements, facial expressions, disposition and attitude, tone, volume and pace of speech, externally observable emotional state, and level of articulacy. In the context of the criminal trial, Morrison et al have defined it as: “every visible or audible form of self-expression manifested by a witness whether fixed or variable, voluntary or involuntary, simple or complex” (2007: 179).

The role and relevance of an applicant’s or witness’s demeanour in decision-making is controversial, with a wealth of research emphasising that it can be a highly unreliable marker of credibility (see, for example, Morrison et al, 2007; Ekman and O’Sullivan, 1991). In the asylum context, moreover, cultural variances in applicants’ styles of narration and emotional presentation, as well as the traumatic nature of



the events alleged, and the mediating presence and role of an interpreter, can render demeanour ever more ambiguous. Recent UNHCR guidance (2013: 190) states that:

“While an applicant’s demeanour may prompt or guide questioning, it is UNHCR’s view that it should not be relied upon as an indicator of credibility or non-credibility. Where it is used, UNHCR urges decision-makers to exercise extreme caution, to fully take into account the individual and contextual circumstances of the applicant, and to ensure that demeanour is not determinative of non-credibility.”

To some extent this has been recognised in the UK both by the tribunal and by the UKBA in its official policy. Thus, in the case of *MM*, the tribunal insisted that “the way in which the evidence is given, so far as significant at all in this type of case, would normally be reflected in the quality of the content of the evidence”. In other words, the demeanour of the applicant should never be considered in isolation from the totality of the evidence.<sup>21</sup> Similarly, the UKBA’s Asylum Policy Instruction on ‘Considering Asylum Claims and Assessing Credibility’ specifically insists that:

“In making a credibility assessment, decision makers should not be influenced by subjective factors, for example if the applicant appears nervous or fearful at the interview, or entirely calm and rational. However, they

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<sup>21</sup> *MM (DRC – Plausibility) Democratic Republic of Congo* [2005], paragraph 19.



should be sensitive to the gender and cultural norms which may affect an applicant's demeanour.” (2012: p. 14, paragraph 4.3.1)

Despite the existence of this precedent and guidance urging caution in the asylum context, the present study highlighted a reluctance amongst many decision-makers to minimise the relevance of demeanour as a measure of credibility; a reluctance that parallels in important ways the suspicion apparently aroused in the criminal justice context by rape complainants who are either too calm or too hysterical in delivering their testimony (Ellison & Munro, 2009a). Some asylum decision-makers evidently continue to rely on demeanour, or more accurately their subjective assessments and interpretations of demeanour, as a significant factor in framing substantive outcomes for applicants. Several respondents indicated that they were more likely to believe accounts provided by applicants who were visibly upset, reflecting their own preconceptions about what constitutes an ‘appropriate’ or ‘normal’ emotional reaction in the circumstances. Thus, for example, of the judges in our study who had dealt with initial disclosures of rape allegations during their tribunal hearings, three specifically commented on the demeanour of the appellant, implying that a *“dramatic breakdown”* or a *“flooding out”* of the claim would be viewed as more credible than a calmly laid out account. This is reflected in the words of one judge, who reported in relation to a particular case: *“...she smiled very sweetly and said ‘and I was raped’...clearly in the way she said it, it was clearly a lie...”*.



This suggestion that an applicant who gives a calm and controlled account, especially if relaying a story about rape, would be likely to encounter scepticism from decision-makers was confirmed, moreover, by other participants. One NGO worker reported, for example, that: *"We've had cases where women have had their appeal go against them because they worked so hard to maintain their composure and dignity in court that they weren't believed"*. Meanwhile, another observed that: *"it's the idea about the deserving and undeserving and how you present and how that's seen"*.

Reflecting the delicate balance that applicants need to strike in this context to avoid generating suspicions about their veracity, one UKBA Presenting Officer maintained:

*"Occasionally you'll have somebody in court who'll be crying the whole time and you have to then question that they may be genuine. But you can also have people who remain completely calm and will talk about it in a very matter of fact way, which, if you've been through an experience like that, I find it very hard to understand how you could be that calm."*

Some participants in the present study demonstrated a more pragmatic attitude to the role of demeanour, for example recognising that while a display of emotions might not be spontaneous, it may well still be genuine if fuelled by, as one interpreter suggested, a desire to *"reinforce credibility and to, if you like, underscore and emphasise, 'This is a misfortune that I find difficult to bear'"*. Others acknowledged that although some decision-makers may rely upon it, demeanour is



a duplicitous measure of truthfulness and can only be, at the very most, one aspect of what Morrison et al have called a “panorama of communication” (2007: 190); such respondents maintained that they would never “*make a credibility finding on whether somebody cried or didn’t cry or looked upset or appeared upset*” (UKBA Case Owner) and acknowledged that applicants’ emotional reactions will be “*time-specific and country specific and culture specific*” (Immigration Judge) (see also Jubany 2011: 85-6). Likewise, recognising that distress could equally be a sign of veracity or mendacity and that – as Morrison et al have suggested (2007: 175) “the fear of being disbelieved looks the same as the fear of being caught” – one CO observed:

*“All of a sudden you see their eyes filling up, or, you know, and you’re thinking okay so one of two things is happening, either they’re preparing to put on a show or they’re recounting something truly traumatic so you have to be prepared for either of those being, you know, the eventuality.”*

For many legal representatives seeking to present clients’ cases in their best light, the ambiguity over how demeanour will be interpreted by decision-makers was a particular concern. Nonetheless, this did not preclude legal representatives from attempting to bolster the credibility of their clients by relying on such stereotypes – in one hearing, we observed the legal representative stating that the appellant would have to have been an “*Oscar winning actress to put on a show like that*”. This may be a risky strategy. Although several representatives reported to us that they tended to ask clients provocative questions where possible, including in the tribunal hearing, in order to evoke an emotional reaction in the presence of decision-makers,



they also reported that the impact of this could not be taken for granted, and that the use of such strategies never diminished the importance of presenting the rest of the case effectively. As one legal representative put it, *“you can’t prepare a case knowing how people are going to react to that sort of reaction from a client, you just don’t know. You don’t know how an officer or a Judge is going to read it.”*

To summarise the discussion in this section so far, then, we have highlighted the existence of on-going reliance, amongst some asylum decision-makers, on delayed disclosure, inconsistency or (too) calm demeanour as markers that point compellingly in the direction of incredibility. There is a wealth of research questioning the relevance that can be attributed to each of these factors, and there are official dictates that warn decision-makers against too heavy and uncritical reliance upon them; that these factors persist so tenaciously nonetheless is a source of concern where their use obviates the possibility of a full and fair hearing, but is perhaps not entirely surprising. Delay, inconsistency and an ‘inappropriate’ or ‘unusual’ demeanour (however that may manifest itself) *may* indeed be markers of a fabricated account; and in a context in which, as discussed above, asylum decision-makers are faced with the daunting combination of a wide margin of discretion and a very limited prospect for receiving convincingly corroborated accounts, the attraction that these markers hold in providing a shorthand for credibility is understandable. However, they *may* equally tell us nothing, or at least nothing reliable, about the veracity of an account. To that extent, they must be treated with



more caution than was apparent amongst many of the respondents in our study who continued to see these factors as almost automatically undermining a claim.

## **b. External Credibility and Objective Evidence**

The UNHCR states that, since asylum decision-makers are evaluating a subjective fear of persecution, “(d)etermination of refugee status will therefore primarily require an evaluation of the applicant’s statements rather than a judgement on the situation prevailing in his country of origin” (UNHCR 1979: paragraph 37). This, however, is not the end of the matter since the successful asylum applicant’s fear must be well-founded, that is, it “must be supported by an objective situation” (paragraph 38). It is in this latter regard that the external aspect of credibility, outlined above, comes into play, with the pursuit of corroboration being a key objective. In this section, we focus on the two main kinds of supporting evidence that are invoked in asylum cases – medical or other expert reports, and Country of Origin Reports.

### **i. Expert Reports**

Although it can be difficult to secure access to them given funding constraints and the tight timescales for case preparation within the UK asylum system (Refugee Council, 2006), expert medical or psychological reports may be included in an asylum application, either to help document past persecution, support concerns about the likely negative impact of a return to the country of origin, or explain why



an applicant has difficulty with giving coherent or consistent testimony. Several of our respondents intimated that in cases that involve an allegation of rape, which by their nature are often based only on the testimony of the applicant, securing this type of expert corroboration can be particularly important (see also Wilson-Shaw et al 2012).<sup>22</sup> As one legal representative said, for example,

*“as soon as you have got a victim or a client who says to you “I have been raped” and the core, central core issue is around that, it is very, very important that you start looking for independent evidence and supporting evidence and one of them is a psychological report and you know, and medical reports”.*

Medical reports can be used to verify reports of physical injuries in the (rare) cases where the rape is both recent and particularly violent, and psychological reports can be used to confirm that the applicant is suffering from symptoms of PTSD, but many of our interviewees acknowledged that, in most cases, the distance in time between the alleged incident and the asylum application severely limit what such reports can meaningfully corroborate. As one Immigration Judge explained:

*“I mean, bruising round the vagina and so on, that could be useful, or scratches, deep scratches, wounds, which, in a way, point to a sexual assault, that would be very useful. You’re lucky if you get that. You don’t ... you tend not to get that.”*

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<sup>22</sup> Wilson-Shaw et al raise the concern that non-clinical decision-makers and legal representatives are not necessarily best placed to recognise symptoms or signs of mental ill health, or to know when a claimant should be referred for psychiatric assessment.



Similarly, another observed that *“we will occasionally get a psychological report, we will, occasionally we get a medical report, but obviously both are fairly useless because they’re so long after the event.”* A further judge lamented:

*“How I am supposed to make a finding of whether someone’s raped when it happened thousands of miles away, it happened a while ago, all they’re saying in the oral evidence is yes, my account is true, the cross examination is non-existent or feeble, and I’m supposed to make a factual finding as to whether someone’s raped, I mean it, it’s virtually an impossible task sometimes”.*

In the words of a fourth judge, these difficulties often mean that *“support has to be found in more ephemeral ways”.*

Moreover, the process of securing such evidence from applicants is not straightforward. It may be re-traumatising for an applicant to experience an intrusive physical examination. Psychological interventions can also cause trauma and may reflect a culturally inappropriate expectation. As one legal representative explained,

*“talking cures are a very western thing. So if people don’t come from that culture then they’re, they’re not really ... and it’s hard to explain how it might help them feel better because they just think, no it won’t. I’m not talking about it... So that can be difficult.”*

While there may thus be valid reasons for an applicant’s refusal or reluctance to submit to examinations, it seems that a failure to do so can be particularly



problematic in terms of the prospects for her case, and can be seen by decision-makers as in itself a cause for suspicion about the veracity of the allegation of sexual abuse. Indeed, as one Case Owner in this study stated, *“if there are no psychiatric reports, no counselling whatsoever and the solicitors haven’t said that it’s not necessary, then I would argue that it’s very unlikely that the applicant has undergone such [an assault]”*. In a somewhat less critical tone, this sentiment was also supported by a number of other respondents – and was reflected, for example, in the comment from an Immigration Judge that *“if you don’t have a report from a clinician to support that, and the country of origin information to support ... in a general background way..., it’s going to be really disadvantageous.”*

Even where such medical or psychological evidence is presented, moreover, previous research has raised concerns about the ways in which it is handled and evaluated by asylum decision-makers. Indeed, notwithstanding a UKBA Asylum Policy Instruction (2007) on how to treat expert evidence from Freedom from Torture, research by that organisation found that its reports were treated inconsistently, both by UKBA and at the First Tier Tribunal. More specifically, decision-makers sometimes substituted their own alternative assessments for expert medical opinion, even though such alternatives were unsupported by any qualified or expert witness (see also Hunter et al, 2013: 3; Jones and Smith, 2004: 396-7); or conversely, displayed a marked suspicion towards evidence provided by GPs since they were not deemed to be appropriately specialist in psychological or psychiatric diagnoses and treatment (Freedom from Torture, 2011: 17). Though the



handling of medical expert evidence was not our primary focus, we did find some support in this study for these concerns. Indeed, several legal representatives and NGO workers lamented a tendency amongst UKBA decision-makers to fail to give what they considered appropriate weight to evidence provided either by GPs or by non-medically trained counsellors or support workers, even where they may be the people with most direct experience of engaging with asylum-seekers, or with vulnerable individuals.

In addition, it was clear that, even where an expert was considered of appropriate standing, the use of medical evidence often continued to be problematic by virtue of the fact that it can be ambiguous and inconclusive. In accordance with the requirements of the UN Istanbul Protocol (1999), an expert cannot testify that an applicant's claim is true, or even that it has merit, but instead can only speak to the degree of correlation between the injuries and the applicant's testimony as to their cause. In other words, the expert can only advise on whether a particular injury or psychological response is consistent with, rather than caused by and corroborative of, the rape that is being claimed.<sup>23</sup> The difficulty with this, of course, is that "it is almost always true to say that a scar could have been caused in another way" (Jones & Smith, 2004: 391). While the standard of proof in asylum cases is designed to give

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<sup>23</sup> For the purposes of visible physical injuries, an injury should be categorised as either not consistent with, consistent with, highly consistent with, typical of, or diagnostic of, the applicant's explanation for them. For psychological harm, the criteria are somewhat different. See *The United Nations' Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1999). The current edition was updated in 2004. For discussion see Jones and Smith (2004).



applicants the benefit of the doubt, many respondents in our study echoed the sentiment already attributed to UKBA personnel and judges in the research conducted by Freedom from Torture, which held that such evidence does little more than reflect the “self-reporting” of the applicant (2011: 29) and cannot, therefore, assist meaningfully in ascertaining the veracity of an asylum claim.

## ii. Country of Origin Reports

In addition, or in the alternative, to these medical or psychological / psychiatric reports, the other genre of expert evidence that is most frequently utilised in asylum applications comes in the form of Country of Origin Information Reports (COIRs). These reports, which can be produced by the UNHCR, the IARLJ, the European Asylum Support Office (EASO) or by the government of the receiving state, are designed to provide objective descriptions of the on-the-ground situation in the applicant’s country of origin, and are intended to assist in checking the plausibility of the applicant’s account of persecution, and evaluating the risk of its recurrence in the event of her return. As the IARLJ states, “Judges should see the obtaining and use of COI as part of “shared burden” approach to credibility assessment” (2013: 39; on the shared burden see UNHCR 1979, paragraph 196; UKBA 2012: 12, paragraph 3.2; and, most recently, UNHCR 2013, chapter 4).

While many of the respondents in the present study saw the value in using such information for these purposes, several interviewees expressed concerns about the quality and accuracy of the in-house reports commissioned on behalf of, and often



preferred by, the UKBA. It was suggested that these can often be out of date (or sometimes even incorrect), overly-reliant on desk-based research rather than observations from in-the-field, or inclined to represent contentious conclusions as unambiguous fact. Such concerns also reflect the findings of previous research, which has identified a risk of COIRs reifying cultural norms and expectations as monolithic and static, rather than multiple and shifting (Good, 2008). Against this backdrop, several NGO and legal representative interviewees urged caution against automatically discrediting an applicant's account where it appears to contradict the COI evidence relied upon by the UKBA, and emphasised that a more circumspect approach was particularly vital in the context of women's claims where generic country of origin information often neglects or sidelines issues of gender, especially where information on the situation of vulnerable women in the country is difficult to access (see also Collier, 2007).

Even where these reports were seen to be accurate or helpful, moreover, it was not always the case in the present study that the UKBA used them with integrity or care. In one observed hearing - for which we also had access to the case file - for example, the UKBA had misrepresented their own COIR by selectively quoting from it in order to exclude a particular passage that supported the applicant's narrative; meanwhile, in another case, the reason given in the UKBA Reasons for Refusal Letter for finding the applicant's account incredible was directly contradicted by the applicable COIR.



Counter-balancing the concerns expressed by several respondents regarding the quality and reliability of UKBA commissioned COIRs, there were also a number of interviewees in the present study who were keen to emphasise instead the limitations and risks associated with country of origin information obtained from other sources, such as NGOs, particularly where this was made freely available on the internet. Several UKBA personnel maintained that applicants will construct stories to match internet reports of what is happening in a particular country, in an effort to increase their chances of a successful application. UKBA personnel were not alone in taking this view. Indeed, in one of the tribunal hearings that we observed, the Immigration Judge went so far as to interrupt the legal representative, and - apologising to the Presenting Officer for “*usurping his position*” – put it to the client that, since he, the judge, had been able to find a list of war criminals from the appellant’s country of origin online, it was “*not beyond human ingenuity*” for the appellant also to have done so and then lied to the court. Interestingly, however, it seemed that this distrust by UKBA personnel of freely available information did not typically extend to its use in support of their own conclusions. Indeed, in another hearing that we observed, the PO relied on a Gambian tourist website, which stated that prospective spouses were consulted prior to a marriage, in order to counter the credibility of the applicant’s allegation that she had been subject to FGM, forced into an abusive marriage, and risked rape and domestic violence if returned home.

Key to the concerns outlined above is the degree to which, in the context of rape, they imply that a woman’s narrative may require a relatively high degree of



corroboration for it to be deemed truly credible. Despite an explicit instruction to decision-makers that, in line with UNHCR guidelines (1979: paragraph 203), benefit of the doubt can and should be applied, the requirements for women's claims to be substantiated by expert and other 'evidence' implies that a higher standard of proof may be being applied in practice. Moreover, as we will discuss below, this may be truer of women's rape claims than other aspects, or kinds, of asylum narratives. While, as one NGO worker explained, asylum claimants may feel that their role is to *"tell their story as they know it"*, the use of expert evidence to bolster or to undermine the account implies that applicants do not, in fact, 'know' their own story; rather, the integrity of their intimate, personal experiences are often left at the mercy of civil servants or other professionals who construct and present alternative, 'impartial' constructions of the 'truth'. This goes to the heart of Tuitt's depiction of an asylum process which moves ever more distant from the very beneficiaries whom it was designed to serve (Tuitt, 1996: 80).

## **6. General Scepticism - The 'Culture of Disbelief'**

Of course, an assessment of credibility in any asylum case does not take place in a vacuum. Inevitably, the way in which decisions are made is framed not only by prevailing legal norms and obligations, procedural practices, and – in a realm where discretion often looms large – personal dispositions and assumptions, but also by institutional cultures, resource constraints, and the surrounding socio-political forces that coalesce around migration and asylum (see also Jubany, 2011). In the



present study, the highly politicised nature of asylum decision-making, as well as the difficulties that the UKBA have faced in reconciling their dual function of deciding asylum applications on a case-by-case, merits basis whilst also being the primary organ of the state responsible for ‘protecting’ (read containing) borders, did not go unacknowledged by many participants. Immigration Judges, for example, variously referred to the whole area of asylum as a “*political football*” which ensured that there was “*enormous political pressure on this jurisdiction*” for “*containment*” of the “*problem*” of migration. Meanwhile, several UKBA personnel reflected on their experiences of political pressure from both sides of the asylum debate. As one Presenting Officer put it, for example,

*“if I let people stay in the country I get all the right wing, like my friends, saying like send them all home, comments like, why are they here and all that stuff; and then when you send people home, you get people protesting outside the gates saying what you are doing is wrong and how can you sleep in your bed... so it can sometimes feel like a thankless job.”*

We have previously suggested that conducting inherently emotionally challenging labour, particularly in this sort of contested, constrained and politicised context, can increase the risk of ‘burn-out’ or ‘case-hardening’ amongst professionals and may encourage the development of coping strategies that distance decision-makers from applicants and support the adoption of an automatically sceptical perspective in relation to their claims (Baillot, Cowan and Munro 2013). Such concerns are also raised in recent work by Jubany, indicating that feelings of discontent and “apathy



towards the fairness of the system” (2011: 80) amongst UK and Spanish asylum decision-makers encouraged them to form their own values and norms, which in turn informed the operational culture of the immigration service. Many commentators (both academics and practitioners) have expressed concern that this institutional culture is best represented as a ‘culture of disbelief’ (Souter, 2011; Weston 1998); and unsurprisingly this was a theme that was also raised in the present study. Several respondents, most notably legal representatives and NGO workers, identified what they considered to be an institutionalised culture of disbelief within the UKBA. One legal representative observed: *“the culture of disbelief of the Home Office is at times very trying... when you work in this area you just expect it. You expect them to refuse everything, it is a surprise when they don’t,”* whilst another described the process of dealing with the UKBA as: *“it’s like a brick wall and you can’t knock them down”*. This level of scepticism was also seen as inhibiting women from disclosing traumatic and sensitive information such as a sexual assault.

As might be expected, UKBA personnel in the present study were far less inclined to accept the existence of such a culture within their institution, but some of the comments from Presenting Officers did nonetheless intimate that they saw it as their function to rigorously uphold refusal decisions even where they considered them to be unfair or unfounded. Indeed, one Immigration Judge, who commented to us that POs *“never, ever”* concede, suggested that they were instructed not to do so by their UKBA superiors. In line with this suggestion, at one hearing we observed, the PO admitted that, although the first instance adverse credibility finding was in



part based on a direct contradiction of the guidance given in the COIR, she was there to “defend” the reasons for refusal letter, and could not concede the credibility point. This finding is in line, moreover, with recent UNHCR research suggesting that some decision- makers “tend to view their task as keeping the gates closed, rather than providing protection” (2013: 78).

Such a defensive attitude can insulate from challenge the negativity that commentators, and some of our respondents, suggest might infiltrate and inform initial UKBA decision-making. There was certainly evidence in the present study of some (although certainly not all) UKBA personnel reflecting a markedly sceptical attitude: one Case Owner, for example, maintained that “*for every one asylum seeker who is genuine and telling the truth, there will be twenty who are lying*”; whilst a Presenting Officer insisted (perhaps reflective of their only becoming involved in cases once a refusal is appealed) that the vast majority of claims are “*fabricated*”.

In addition, some Case Owners expressed frustration at what were referred to as “*repetitive claims*” – and, while recognising that the same thing can happen to different people in the same part of the world, reported that hearing the same story over and over intimated to them that applicants have “*chatted to each other, and they’re abusing the system by doing that*”. In several cases, the existence of this scepticism could be traced back to more general disquiet either about the ‘asylum problem’ or the fact that the asylum system in the UK was amenable to abuse. Indeed, some UKBA personnel were very open in interviews about their concerns



over the “*sheer number*” of people claiming asylum in the UK and their view that the system “*can be extremely, incredibly easily abused*”. As one Presenting Officer put it, for example,

*“you’ve seen them in their jungles<sup>24</sup> in France, etc. all waiting to get through and you know it’s... Britain basically, it’s you know, the sheer number of people wishing to claim asylum or be in this country, a lot of it is to do with the success that the country has had in the last so many years of our economy, etc. and stuff”.*

Though such views were not shared by all UKBA personnel in the present study, several respondents expressed concerns about the ways in which this more general scepticism about, and concern over, the ‘asylum problem’ could infect decision-makers’ handling of particular applications, generating a hostile approach to individual claimants. Many legal representatives, NGO workers and interpreters reported clients’ experiences of repeated aggressive questioning or “*interrogation*” in asylum interviews, resulting in a situation where “*the woman feels accused*”. Indeed, one legal representative recounted to us a particularly extreme example:

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<sup>24</sup> The “jungle” was the colloquial (and clearly racist) term given to the “temporary” camp near Calais, France, where thousands of migrants lived in tents and other shelters, many of whom hoped or tried to cross the English Channel across to the UK and beyond. The camp was bulldozed in September 2009 and riot police arrested hundreds of asylum seekers and other migrants. See: <http://www.guardian.co.uk/uk/2009/sep/22/calais-immigration-camp-france-uk> last accessed 12 October 2013.



*“Halfway through the interview she simply used a pen of the Home Office Case worker, they went for a break and she came back, and she had a 20 minute session where she [case worker] accused her [applicant] of stealing a pen, and she said she would be writing to her representative and her representative would have to refund her for the pen, she accused her of being a thief, told her to stand up, made her empty her pockets and made her empty the bag and the pen fell out from under her paper, she was simply making a note... and it had got mixed up in her papers.... How can you then ask her to, expect her to disclose everything else when you’ve actually approached her in such a way?”*

Although this may be the story of just one individual Case Owner, this kind of hostile atmosphere where the applicant is accused of being a liar and a thief is obviously not conducive to disclosure, or an open-minded assessment of credibility generally.

In seeming contrast to the IALJ’s recent caution that “[J]udicial independence and impartiality can be put under pressure from anti-migrant, anti-refugee public perceptions” (2013: 17), the excesses of this more generally sceptical attitude at initial decision-making stage were seen by some respondents to be tempered, at least to some degree, through judicial involvement at the appeal tribunal. However, this was recognised as being highly dependent on the style and approach of the particular judge, who was seen to have a prominent role in setting the tone within the hearing. As a result, while there were some respondents who considered the tribunal to be “*not confrontational*” or “*very pleasant*” (UKBA Presenting Officers),



there were others who described the environment as deeply adversarial and who reported cases in which appellants underwent aggressive questioning of a sort that would have been proscribed by the judge in the more formal setting of a criminal courtroom. Certainly, across our observation of tribunal hearings, we witnessed a very wide range of approaches and ambiances. Thus, while there were some hearings in which the judge took a proactive role in intervening in questioning that was overly-hostile, or a more enabling and inquiring role in asking questions on his or her own behalf, there were others where the judge acted much more passively as a detached arbiter of the competing adversaries. Likewise, while there were some hearings in which the judge took steps to put the appellant at ease and offered breaks from testimony where she was distressed, there were others (most starkly illustrated in cases within the detained fast track system) where the judge almost ignored the appellant, failed to allow her time to compose herself when upset, or made fleeting and potentially highly insensitive comments to her (for example about how the weather in her home country was much better than the weather in the UK).

Again, although an attitude of disbelief was not expressed by all respondents, our finding of a relatively wide-spread suspicion of mendacity, which all too often can lead to insensitive, interrogative questioning and decisions tainted by inherent mistrust of asylum-seekers, raises concerns about the opportunities for applicants to receive a fair and open hearing. Alongside this general problem of disbelief, moreover, as we will discuss further below, also sits the spectre of a more targeted scepticism surrounding women's claims of rape and sexual violence in particular.



## **7. “How Credible Can a Rape Story Be?”: Scepticism About Women’s Claims of Sexual Violence**

In the criminal justice context, feminists (for example Estrich, 1987; Gregory and Lees, 1999; Temkin 2002; Kelly et al 2005) have long critiqued a general tendency to disbelieve sexual violence claims, most starkly represented in the oft-quoted example of Sir Matthew Hale’s warning that “rape is an accusation easily to be made, hard to be proved, and harder to be defended by the party accused, tho’ never so innocent” (1778: 635). Some respondents in the present study insisted that a similar cynicism also informs the way in which decision-makers approach and evaluate allegations of sexual violence within the asylum context. It was suggested by one legal representative, for example, that “*the kind of disbelief that surrounds rape in the criminal context, that kind of infects the asylum process.*” Indeed, in our study, two Immigration Judges (one male, one female) told us of women’s rape claims that “*it’s an easy allegation to make*”; and this despite one of the judges having personal experience of supporting a friend, who had been raped, through the various stages of a criminal trial. For some respondents, this scepticism towards rape claims was simply an extension of the general disbelief that allegedly permeates the asylum system, as discussed in the preceding section: “*I think there is this general disbelief in the Home Office anyway and I think it is even stronger when it comes to rape allegations*” (legal representative). But, for others, this scepticism had a particular



relevance for the expectations and assumptions specific to rape, for example about how a genuine victim of sexual assault will react in the aftermath of an attack.

Where a rape allegation became a central focus in evaluating credibility, it was evident in the present study that determinations on its veracity could influence the broader outcomes for an asylum applicant in unpredictable ways. Thus, whilst some Immigration Judges acknowledged, in line with current case law,<sup>25</sup> that even if it was decided that a rape claim amounted to *“gilding the lily”*, this didn’t necessarily preclude the rest of the claim being genuine, others proposed that it was legitimate to give adverse weight to a claim (and claimant) in relation to an incredible rape allegation; one Immigration Judge described the approach of one of her colleagues as: *“you have now blemished the good name of the man you say raped you and you’re lying about it”*. This latter view expressed itself amongst some respondents (notably female respondents) as moral outrage that women could dare to fabricate such a serious allegation. One Case Owner expressed indignation when faced with what she perceived as false claims: *“...how could you use that [a claim of rape] to try and get your claim going forward...So it is awful hearing it at the time but then it can be awful as well, knowing that it’s not true”*. Similarly, one Immigration Judge spoke of her sense that asylum-seeking women who invented a claim of rape were betraying the *“sisterhood”*, whilst another suggested that such mendacity *“destroys your belief in womanhood”*.<sup>26</sup>

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<sup>25</sup> *Karanakaran v SSHD* [2000].

<sup>26</sup> There was no evidence in our study that female judges were more likely to refuse women’s asylum applicants whose claim included an allegation of rape, or indeed



Importantly, a number of respondents contrasted the treatment of women's claims of sexual violence with those of men. While there is no reliable evidence as to whether male asylum applicants are more or less likely than women to disclose sexual assault, participants reported that male rape claims were much less common; and some echoed the view of one legal representative, who suggested that decision-makers are more likely to believe a man's rape claim: "[it's viewed with] *much more shock, it's seen as a much worse crime... you don't get people suggesting that men who say they have been raped have lied about it... whereas [for women] it's not the same*".

The different treatment of male claimants was observed in the comments of some decision-makers who perceived men's claims of sexual violence to be more credible because sexual violence was seen to be more shameful and stigmatising for men, and therefore more difficult to disclose. As one UKBA Case Owner put it, for example,

*"you tend to place a lot more weight on man's claim that he's been raped, because it's so difficult for him to disclose, whereas with women you hear it a lot, you know and the chances are it might have happened to them but with men it takes a lot more you know."*

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treat those applicants more harshly, than male judges. A recent large-scale study in Canada has concluded that, in women's asylum cases, particularly those that involve gender-based prosecution, male adjudicators had slightly higher grant rates than female adjudicators, but that female adjudicators with experience in women's rights had higher grant rates overall – see Rehaag (2011).



Similarly, an Immigration Judge noted that *“if a man is telling you that he has been raped, it has taken him a lot,”* whilst a UKBA Presenting Officer maintained that, *“I am not saying men don’t lie but... their claim comes with such stigma attached to it you kind of think well maybe it’s more likely to be true”*.

While one Presenting Officer suggested that a late disclosure of sexual violence was less problematic for male than for female applicants, a less sceptical appraisal of men’s rape claims was often still conditional upon claimants exhibiting ‘expected’ behaviours, and late disclosure by men was perceived by some decision-makers to be problematic for credibility. There was also evidence of conflicting assumptions about which gender of UKBA interviewer would be the preferred target for such disclosures – whilst some respondents felt the more *“sensitive”* approach of female interviewers, experienced in handling female allegations of assault, would be more conducive, others suggested that disclosure to a female would be a *“demasculation”* (PO) and that gender-matching should extend, therefore, to male applicants.

Of course, there is more going on in the suggestion that male rape claims are less likely to be fabricated than just scepticism as to women’s more frequent allegations. Some respondents commented on the nature of the context of many male rape claims as being more easily substantiated, often due to an expectation that internal injury or scarring would be more likely in men than in “normal” heterosexual intercourse. It was also commonly observed that sexual violence against men occurs in different contexts than for women; it is therefore less easily explained away as an



example of “lust”, “opportunism” or “private” motivation (or “casual rape” as one judge put it), than is the more pervasive experience of sexual violence against women. This in turn means that sexual violence can more convincingly support a man’s well-founded fear of persecution based on, for example, his political activity; a type of claim that is often said to be easier to document for men than for women (Spijkerboer, 2000; Crawley, 2001). To the extent that this is so, this differential approach also, therefore, goes to the heart of concerns raised about a lack of appropriate sensitivity towards, and the need for a more expansive approach in relation to, the particular complexities and nuances that mark women’s experiences of gender-based persecution (Spijkerboer, 2000; Collier 2007; Freedman 2007; Asylum Aid 2011; Oosterveld, 2012).

And yet, despite these other issues at play, there was a feeling amongst several of our respondents that, at least to some extent, the apparent discrepancy ultimately could be traced back to a problem of disbelief of women’s rape claims in general. This was reflected, for example, in the following comments of an Immigration Judge:

*“Ij: I don’t think that I have seen a case where a man’s claim to have been raped has been disbelieved. I think that’s right. It doesn’t necessarily mean they’ve succeeded in their appeal. I’m just searching my memory. I mean, I suppose that there must have been somewhere they have been disbelieved, it would be surprising if there were none, but obviously they aren’t of any significance, because they would come into my mind. And they don’t, so that’s interesting.”*



*INT: Do you have any thoughts on that, on what might account for that difference?*

*IJ: Well, it's tempting to say that it's to do with the judicial minds that are assessing the claims, and how those judicial minds view allegations of rape, by men and by women, because the women are very, very frequently disbelieved."*

This particularly gendered form of disbelief problematically conflates assessments of empirical likelihood with substantive veracity; it is generally accepted across the asylum field that women face rape much more frequently than men, but the fact that rape narratives are heard more often in the context of women's claims means that the mundane reality of heterosexual gender violence seems in itself to provide a reason to disbelieve the women. It also highlights the extent to which hearing repeated stories of sexual violence recounted by women can render some decision-makers case-hardened in ways that limit their capacity not only for empathy towards the applicant, but also for belief in her account (see further, Baillot, Cowan and Munro 2013). Indeed, in her study, Jubany (2011) found that since women applicants who indicated a history of sexual assault were more likely to be interviewed by women, the limited number of women officers were liable to hear such accounts more regularly, which may effect increased desensitisation and scepticism on the part of female decision-makers.

Scepticism about women's claims of rape in particular was also further complicated by other sets of assumptions that cut across and intersect with those related to



gender. For example, we found evidence that the cultural and national background of the applicant may also influence the ways in which decision-makers evaluate the credibility of rape claims. More specifically, if an applicant behaves in a way that does not chime with decision-makers' understandings of her culture, this can exacerbate problems of credibility. Indeed, disclosure of sexual violence can work against the credibility of women if in their 'home' country or culture it would be shameful to talk of such things. This finding has support from research in other jurisdictions. In her study of immigration in the UK and Spain, Jubany (2011) also found that assumptions about the applicants' credibility were often tied to the applicants' country of origin, with applicants from certain areas tending to be lumped together, usually as a way of inferring a lack of credibility. In her study, assumptions were also tied to what she refers to as "gender labels". Thus, Polish women were said to cry "because they think it will soften officers' hardened hearts" (2011: 84), whilst Kenyan "girls" were depicted as having gone through a "phase" of lying about having been raped, with the fabrication of these accounts being evidenced in the minds of decision-makers by their lack of emotional trauma when disclosing the sexual violence (2011: 85). Jubany claims that this demonstrates an inherent exercise of discretion, which is supported by reference to group practices and experiences that are shared amongst immigration officers: "This is arguably a codification of personal stereotyping as 'experience' and expertise', applied and legitimised by the subculture of disbelief" (2011: 87; in other jurisdictions see also the findings of Pratt, 2010 (Canada), and Hornquist, 2006 (Sweden)). In line with this, our findings suggest that moments of "gender labelling", as well as cultural



ignorance, stereotyping or blindness, can intersect with the operational and institutional culture of asylum decision-making to produce complex and contradictory hurdles for women in having their claims of rape believed.

## **5. Concluding Remarks**

“In short, the lasso of truth remains elusive” (Smith, 2012: 29).

Assessing credibility is extremely challenging for decision-makers; more often than not there is little supporting evidence, there is commonly a gap in language and sometimes in educational level and understanding of the process between decision-maker and applicant, and the full and free narration of an account can be inhibited by experiences of trauma, shame and stress. In many - if not most - cases, it will be impossible to say with any certainty whether or not an applicant's account is 'true'. Nonetheless, several decision-makers in this study asserted that they were easily able to tell genuine claims from false ones, with one UKBA Presenting Officer explaining that “*with experience you get to know over time who is being genuinely honest*”; and an Immigration Judge suggesting that “*it's just a feeling you know really... So the truth shines through*” (see also Jubany, 2011: 86). There were also indications from some of the interpreters that they too might assimilate and replicate credibility judgments. As one put it, for example, “*so I could tell you for sure who was lying and who was not...I could feel at a personal level that this is not true*”. However, it is evident from our data that the foundation for discerning 'truth' is



often built on sand; in an effort to reach a conclusion, decision-makers can turn to unpredictable and unreliable markers of credibility such as delay or demeanour, and their decisions may all too often be informed by gender and/or cultural stereotypes as well as a lingering scepticism towards women's claims of sexual violence.

Research in the criminal justice context has highlighted and challenged the influence of gendered stereotypes on the evaluation of women's rape allegations; our study demonstrates that these same stereotypes may beset the process of determining refugee status. The individual exercise of discretion, although inevitable, becomes arbitrary when grounded in these problematic practices, and thus potentially contravenes the principle of justice that we should treat like cases alike, and achieve, as far as possible, certainty in the law. When combined with inflexible work practices, administrative structures, and time scales, as well as the current political context of asylum more generally, in practice this can present significant hurdles for many women, claiming asylum in the UK, who have disclosed an experience of rape. This has repercussions both for the immediate context of their asylum decision and their prospects for physical safety that attend upon it, as well as their on-going mental and emotional well-being. Indeed, as Freedom from Torture have emphasised, there are "very serious consequences of subjecting already vulnerable individuals to a legal process in which their integrity and credibility are repeatedly subject to question and doubt" (2011: 5). Ultimately, however, it seems that the structural and practical obstacles faced in establishing credibility, and the existence



of scepticism about rape claims and asylum-seeking more generally, continue to mean that decision-making can often be experienced as arbitrary, unjust, uninformed or contradictory, making it difficult for women asylum applicants who allege rape to find refuge in the UK.<sup>27</sup>

The UK Home Secretary's recent full-scale reorganisation of the UKBA, following consistently negative accounts of the agency's efficiency and working practices, may provide a platform for engaging with good practice from other jurisdictions – in particular, in this context, the criminal justice system – to achieve the procedural and policy changes that could assist in addressing at least some of the criticisms and concerns raised in this article. However, it remains to be seen whether or not this will be a priority within a system of immigration control which, as the Home Secretary was keen to underline, will have “law enforcement” rather than human rights protection at its heart.<sup>28</sup>

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<sup>27</sup> Note here the work of the EU funded Credo Project, which is a partnership, begun in 2011, between the Hungarian Helsinki Committee, the UNHCR Bureau for Europe, and the International Association of Refugee Law Judges and Asylum Aid (UK): “The overall goal of the CREDO project is to contribute to better structured, objective, high-quality and protection-oriented credibility assessment practices in asylum procedures conducted by EU Member States, as well as to promote a harmonized approach, reflecting relevant provisions in EU law and international standards” - <http://helsinki.hu/en/credo-%E2%80%93-improving-credibility-assessment-in-eu-asylum-procedures>, last accessed 7 October 2013.

<sup>28</sup> Speech by Home Secretary, Theresa May, on 26<sup>th</sup> March 2013 – available at <https://www.gov.uk/government/speeches/home-secretary-uk-border-agency-oral-statement>, last accessed 21 October 2013.



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