

The rights of women seeking asylum

Book or Report Section

Accepted Version

Honkala, N. (2019) The rights of women seeking asylum. In:
Juss, S. S. (ed.) Research Handbook on International Refugee
Law. Edward Elgar, pp. 295-309. ISBN 9780857932808
Available at <http://centaur.reading.ac.uk/92004/>

It is advisable to refer to the publisher's version if you intend to cite from the work. See [Guidance on citing](#).

Publisher: Edward Elgar

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The Rights of Women Seeking Asylum: Procedural and Evidential Barriers to Protection

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It has long been recognised that women face specific challenges in having their claims recognised under the Refugee Convention. Although women can, of course, suffer from the same kinds of human rights abuses as men, women may experience them in different ways. Women may be persecuted for the same reasons, for instance because of their religion or ethnic background, but their persecution is more likely to include sexual violence or rape. Persecution of women is also more likely to occur in the so-called private sphere and at the hands of non-state actors.

In the absence of gender as a Convention ground, the Refugee Convention has been traditionally interpreted through the male perspective, leaving the specific gender-based concerns of women's claims unacknowledged.¹ Feminist scholarship has brought to bear the importance of understanding the experiences of refugee women within the gendered context in which persecution takes place.² This growing body of feminist critiques has challenged the ways in which the gendered interpretations of the Convention continue to marginalise women's experiences, as well as, how women asylum seekers face particular practical challenges within the refugee determination context.

In 1985, in an effort to try to address the gendered interpretations of the Refugee Convention, the UNHCR offered guidance to state parties suggesting that women's gender-based claims could be considered under the membership of a particular social

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¹ See UNHCR, *Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1 A (2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, U.N. Doc. HCR/GIP/02/01 (Herein after UNHCR Gender Guidelines), Alice Edwards, 'Age and Gender Dimensions in International Refugee Law' in Erika Feller, Volker Turk and Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP, 2003), 46-80, Efrat Arbel, Catherine Dauvergne and Jenni Millbank (eds.) *Gender in Refugee Law: From the Margins to the Centre* (Routledge 2014).

² See Audrey Macklin, 'Refugee Women and the Imperative of Categories' (1995) 17 *Human Rights Quarterly* 213, Heaven Crawley, *Gender and Refugees: Law and Process* (Jordans 2001), Thomas Spijkerboer, *Gender and Refugee Status* (Ashgate, 2000), Jane Freedman, *Gendering the International Asylum and Refugee Debate* (Palgrave Macmillan, 2007), Alice Edwards, 'Transitioning Gender: Feminist Engagement With International Refugee law and Policy 1950-2010' (2010) 29(2) *Refugee Survey Quarterly* 21.

group ground.³ Over the years, the UNHCR has developed a range of Guidelines and conclusions that have consistently referred to international human rights law instruments to assist recognition of the need for gender-sensitive approaches.⁴ These references underscore the advances made in the recognition of women's human rights under international human rights law, international criminal law as well as under domestic initiatives.⁵

Significant recent developments in international human rights law evidence the growing recognition of these specific concerns of refugee women and the challenges to the protection of their rights. For instance, on the anniversary of the Refugee Convention, in 2011, the CEDAW Committee adopted a statement that addressed the issue of gender equality for refugees. The CEDAW Committee called on states to recognise gender-related forms of persecution and stressed that 'gender-sensitive registration, reception, interview and adjudication processes also need to be in place to ensure women's equal access to asylum'.⁶ In a further call on gender equality and non-discrimination obligations of state parties in respect of asylum seeker women and refugees, in 2014, the CEDAW Committee in their General Recommendation No. 32, makes the link of violence against women and asylum, as well as providing a range of measures that state parties are obliged to provide to women claiming asylum.⁷ Lastly, The Istanbul Convention addresses directly the rights of asylum seeker women by requiring that gender-sensitive interpretation be given to each of the Refugee Convention grounds.⁸ The Istanbul Convention also addresses practical challenges to

³ UNHCR, Executive Committee Conclusion No.39 (XXXVI): *Refugee Women and International Protection* (1985), UN Doc. A/40/12/Add.1.

⁴ See UNHCR Gender Guidelines (2002), UNHCR: Guidelines on the Protection of Refugee Women (Geneva, July 1991), UN Doc. ES/SCP/67. For repeated calls to develop and implement guidelines that recognise gender-related claims, see UNHCR Executive Committee, 'General Conclusion on International Protection', Conclusions No. 77 (XLVI) (1995); No. 79 (XLVII) (1996), No. 81 (XLVIII) (1997), No. 87 (L) (1999), <http://www.unhcr.org/578371524.pdf> accessed 23 Sept 2016.

⁵ Audrey Macklin, 'Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian and Australian Approaches to Gender-Related Asylum Claims' (1998) 13 (1) *Georgetown Immigration Law Journal* 25, 29.

⁶ U.N. Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW Statement on the Anniversaries of the 1951 Convention Relating to the Status of Refugees and the 1961 Convention on the Reduction of Statelessness*, 19 October 2011, <http://www.refworld.org/docid/4ea13f012.html> accessed 9 September 2016.

⁷ CEDAW Committee, 'General Recommendation No. 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women', 14 November 2014, UN Doc. CEDAW/C/GC/32.

⁸ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, Article 60 (2). (Hereinafter The Istanbul Convention).

protection by requiring the provision of gender-sensitive reception procedures, support services and asylum procedures, including refugee status determinations.

These developments are undoubtedly significant in the recognition of the rights of asylum seeker women at the international level but to what extent are they reflected in practice? This chapter examines some of the procedural and evidential barriers to the protection of the rights of asylum seeker women within the refugee determination context in the UK. It begins by first outlining some of the practical barriers to gender-sensitive interview procedures and discusses some of the obstacles to being heard at the asylum screening and interview. Secondly, focusing on the nature of gender-based persecution, the specific issues relating to trauma, memory and disclosure are discussed. The third section focuses on the challenge of lack of country specific knowledge and information relating to gender issues before outlining the challenges of the problematic approaches to credibility in many women's cases.

1. Practical Barriers to Gender-sensitive Interview Processes

When an asylum seeker applies for refugee or humanitarian protection status, the decision is made by a 'case owner' at the UK Visas and Immigration (previously UKBA), an official of the Home Office.⁹ Initially, an asylum seeker attends an 'asylum screening' where she will be assigned a case owner and a substantive interview is arranged where a decision is made. If the case owner rejects her claim, as is often the case,¹⁰ an asylum seeker has the right to appeal to the Immigration and Asylum Chamber of the First-tier Tribunal, and thereafter an onward appeal to the Upper Tribunal. Criticisms about poor first-instance decision-making have been widely

⁹ After years of sustained criticism of the United Kingdom Border Agency's (UKBA), on 26th March 2013, the then Home Secretary Theresa May announced that the UKBA's performance was 'not good enough' and that it was to be scrapped, <https://www.gov.uk/government/speeches/home-secretary-uk-border-agency-oral-statement>. As the UKBA was abolished, its functions were divided into two sections, namely the 'Visas and Immigration' and 'Law Enforcement' sections. Though, in a leaked memo to staff, Permanent Secretary Mark Sedwill said that 'most staff would 'still be doing the same job in the same place with the same colleagues for the same boss', <http://www.bbc.co.uk/news/uk-politics-21941395> accessed 11 September 2016.

¹⁰ Rejection rate of 62%. Home Office, 'National Statistics: Asylum', 26 August 2016, <https://www.gov.uk/government/publications/immigration-statistics-april-to-june-2016/asylum>, accessed 11 September 2016.

reported by refugee organisations¹¹ and acknowledged by the UNHCR's Quality Initiative Reports reviewing the work of the Home Office decision-makers.¹² The combination of poor quality initial decision-making, arising in particular from negative credibility assessments, and the complex nature of women's gender-based persecution claims means that women's cases are more likely to be overturned on appeal.¹³

For many women asylum seekers, the process of the asylum screening and interviews is the first point at which difficulties arise. It is of crucial importance that the asylum interviews are conducted in an appropriate way. As this might be the first time for many of the asylum seekers to tell their story, special attention needs to be placed on the vulnerable situation in which most asylum seekers find themselves when being interviewed by an official.¹⁴ Any meaningful disclosure requires a non-judgmental environment and an establishment of trust between the interviewee and the case owner.¹⁵

CEDAW Committee's General Recommendation 32 includes the provision of information, trained interviewers and decision-makers, the right to a female interviewer on request, childcare and counselling. The right to a female interviewer on request is important for women in order to create an environment that is conducive to disclosure. Women may prefer to have a female case owner/ interviewer and or interpreter when speaking about experiences of gender-based persecution, such as rape, sexual violence

¹¹ Amnesty International UK: *Get it Right-How Home Office Decision Making Fails Refugees* (2004), available at https://www.amnesty.org.uk/sites/default/files/get_it_right_0.pdf, Independent Asylum Commission, *Fit For Purpose Yet?: The Independent Asylum Commission's Interim Findings* (2008), <http://www.independentasylumcommission.org.uk/>, Helen Muggeridge and Chen Maman, *Unsustainable: The Quality of Initial Decision-making in Women's Asylum Claims* (Asylum Aid, January 2011) accessed 11 September 2016.

¹² The Quality Initiative Project ran from 2005 till 2009 aiming to 'positively influence first instance decision-making', their findings highlighting a number of causes of concern, particularly relating to the application of the refugee definition, approaches to credibility and the conduct of interviews. See specifically, UNHCR, 'Quality Initiative Project: Second Report to the Minister, 2005' <http://www.unhcr.org/uk/quality-initiative-and-integration.html> accessed 23 September 2016.

¹³ Asylum Aid examined 45 women's asylum claims at the initial decisions-making stage, of the 87% of claims that were refused by the case owners, 50% were overturned on appeal. Muggeridge and Maman (2011), 31.

¹⁴ Nienke Doornbos, 'On Being Hear in Asylum Cases: Evidentiary Assessment Through Asylum Interviews' in Gregor Noll (ed.), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martinus Nijhoff, 2005), 103- 122, 104.

¹⁵ Helen Baillot, Sharon Cowan and Vanessa E. Munro, 'Seen but not Heard? Parallels and Dissonances in the Treatment of Rape Narratives Across the Asylum and Criminal Justice Contexts' (2009) 36 (2) *Journal of Law and Society* 195, 207.

or domestic violence. After consistent advocacy efforts by refugee NGOs, applicants are now being asked at the asylum screening if they would like a male or female interviewer.¹⁶ However, based on their research interviews with asylum seeker women, Asylum Aid concluded that one of the reasons for many women expressing no preference was the result of an environment in which women were not able to give an informed response to the question. Some women described feeling intimidated; having their interviews held via glass window and having felt hurried, confused and uninformed.¹⁷ Majority of women said that with hindsight they would have requested a female interviewer.¹⁸ However, as Baillot, Cowan and Munro have noted, there is a risk that female interviewers would be regarded as a panacea in this context, particularly if the assumption is made that women would necessarily make for more receptive listeners.¹⁹

Even if a woman requests a female interviewer, operational time constraints mean that this does not always happen.²⁰ This is also the case with regards to childcare. Although the Home Office Asylum Policy Instruction recognises that the presence of children would be stressful for them, as well as, potentially inhibiting disclosure, the provision of childcare remains piecemeal, which can result in some women being interviewed in front of their children.²¹

As noted above, international gender guidelines now exist outlining recommendations for gender-sensitive refugee determination procedures. National gender guidelines for Home Office caseworkers were introduced 2004 in the UK²² though research found

¹⁶ Asylum Aid (2011), 36. See also, Home Office, 'Asylum Policy Instruction: Asylum Interviews', 4 March 2015, para 3.7,

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/410098/Asylum_Interviews_AI.pdf accessed 23 September 2016.

¹⁷ Asylum Aid (2011), 36.

¹⁸ Ibid.

¹⁹ Helen Baillot, Sharon Cowan and Vanessa E. Munro, 'Second-hand Emotion? Exploring the Contagion and Impact of Trauma and Distress in the Asylum Law Context' (2013) 40 (4) *Journal of Law and Society* 509, 521.

²⁰ Helen Baillot, Sharon Cowan and Vanessa E. Munro, 'Reason to Disbelief: Evaluating the Rape Claims of Women Seeking Asylum in the UK' (2014) 10 (1) *International Journal of Law in Context* 105, 117.

²¹ Asylum Aid (2011), 40.

²² See Home Office, 'Asylum Policy Instruction: Gender Issues in the Asylum Claim' (2004, updated 2006) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257386/gender-issue-in-the-asylum.pdf accessed 23 September 2016.

very little evidence of them being used in practice²³, knowledge of their content or even their existence.²⁴ Furthermore, gender guidelines that were adopted at an appeal level in 2000, were removed during the restructuring of the Tribunals system with a denial that the guidelines were ever official policy.²⁵ Therefore, as Freedman has noted, the advancements that have been made in jurisprudence recognising gender-based persecution remain ‘undermined by the operation of random and discretionary exercises of power by bureaucrats and decision-makers’.²⁶

2. Obstacles to Being Heard in the Asylum Screening and Interviews

The narrative of the asylum seeker is central to her claim, yet there are several structural, procedural and ideological barriers that restrict the ability of the asylum seekers’ narrative to be told, to be heard, and to be understood. The UNHCR has published guidance on the process of refugee status determination under the Refugee Convention, titled *Handbook on Procedures and Criteria for Determining Refugee Status* (UNHCR Handbook).²⁷ Though it recognises that each country has to produce its own guidelines and procedures the UNHCR has always pleaded for a generous asylum policy in the spirit of the Universal Declaration of Human Rights. The UNHCR Handbook states that the examiner “must apply the criteria in a spirit of justice and understanding”.²⁸ Equally, adjudicators must have the required knowledge and experience of an applicant’s particular difficulties and needs.²⁹ The Handbook acknowledges that, according to the general legal principle, the burden of proof rests on the applicant, but it also stresses that “the duty to ascertain and evaluate all the relevant facts is *shared* between the applicant and the examiner”.³⁰ Repeatedly, the Handbook emphasises that the applicant should be given the “benefit of doubt” at all

²³ Sophia Ceneda and Claire Palmer, ‘“Lip Service” or Implementation? Home Office Gender Guidance and Women’s Asylum Claims in the UK’ (Refugee Women’s Resource Project, 2006).

²⁴ Baillot, Cowan and Munro (2013), 521.

²⁵ Baillot, Cowan and Munro (2009), 202.

²⁶ Jane Freedman, ‘Women’s Right to Asylum: Protecting the Rights of Female Asylum Seekers in Europe?’ (2008) 9 *Human Rights Review* 413, 414. For lack of consistency in the American context, see Sara L. Zeigler and Kendra B. Stewart, ‘Positioning Women’s Rights Within Asylum Policy: A Feminist Analysis of Political Persecution’ (2009) 30 (2) *Frontiers: A Journal of Women’s Studies* 115.

²⁷ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HRC/IP/4/Eng/REV.1, Reedited Geneva, 1992, UNHCR 1979, Reissued 2011. (Hereinafter UNHCR Handbook).

²⁸ *Ibid.*, para 202.

²⁹ *Ibid.*, para 190.

³⁰ *Ibid.*, para 196. (Emphasis added)

stages of the process.³¹ The impossibility of “proving” everything in the applicant’s story is recognised and it is stated that it might sometimes be necessary for the examiner to use “all the possible means at his disposal to produce the necessary evidence in support of the application”.³² Importantly, the UNHCR states that “untrue statements by themselves are not a reason for refusal of refugee status” and that it “is the *responsibility* of the examiner to evaluate those statements in light of all the circumstances”.³³

However, in practice, the structure of the process of refugee determination creates obstacles from the beginning. The conceptual framework for the interviews is premised on an “androcentric and eurocentric basis of ideology, theory and method”.³⁴ Emphasis is placed on “knowledge” and its gathering. This is done through decisions made by the official about what is important in the asylum seeker’s narrative, the questions asked, the language used and interpretations made to elicit this knowledge.³⁵ The method of extracting this knowledge is based on a traditional interviewing practice, which prioritises “value-free objectivity” and detachment, thus establishing a subject-object hierarchy between the interviewer and interviewee.³⁶ The focus is on finding out “attributes of the object in order to assign it to categories” and further to “use rules about the categories to explain and predict the object’s behavior”.³⁷ This is problematic because refugee experiences can often defy general preconceptions of “common sense” amongst decision-makers. How a person acts in a situation of extreme violence, conflict or persecution challenges any “normal” analysis of risk taking for instance.³⁸ The experiences can be so horrific that the tendency to think them unbelievable seems to be often present. Yet this form of doubt should not be used as a signifier of the “truthfulness” of the refugee story.

³¹ Ibid, paras 196, 203.

³² Ibid. para 196.

³³ Ibid, para 199. (Emphasis added)

³⁴ Deborah Cheney, ‘Valued Judgments?: A Reading of Immigration Cases’ (1993) 20 *Journal of Law and Society* 23, 25.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Richard Nisbett as cited in Ilene Durst, ‘Lost in Translation: Why Due Process Demands Deference to the Refugee’s Narrative’ (2000-2001) 53 *Rutgers Law Review* 127, 153.

³⁸ Jane Herlily, Kate Gleeson and Stuart Turner, ‘What Assumptions About Human Behaviour Underlie Asylum Judgments?’ (2010) 22 (3) *International Journal of Refugee Law* 351, 355-356.

This being the case, the opportunities for an asylum seeker to voice her personal narrative of her experiences remain limited. She must respond to the official's questions without scope for expansion on other factors that the official does not consider relevant or important.³⁹ This process risks reducing the asylum seekers' story to the portion of her life that can be written in the shape of a "travelogue" which is "documented by means of place descriptions and timeframes".⁴⁰ This portion is repeatedly re-moulded and re-narrated by various people, including interpreters, lawyers, experts and adjudicators during the refugee determination process.⁴¹ But it is this portion that might not be intelligible, even to the applicant herself, against which her credibility and any inconsistencies are measured as if it was her own free narrative of her experiences and she was the central author.⁴² At this point, the applicant has already lost control of her narrative.

Yet what is expected of her is to produce her statement in a coherent narrative form rather than in a fragmented manner.⁴³ A number of obstacles can be present: some claimants will experience discomfort and shame, which can be amplified by their cultural and personal background; difficulties in recording, recollecting and recounting traumatic events are common.⁴⁴ Within the criminal justice systems, it has been identified that rigid, interrogative, closed questions and a direct answer format of testimony, as well as the adversarial environment of the courtroom, are all obstacles to victims of rape.⁴⁵ Asylum seekers may face similar problems during the refugee determination process and the parallels to the criminal justice system are evident in many women's asylum cases. A significant proportion of women seeking asylum will have experienced rape in the country of origin, and for many this will form a part of their narrative. An understanding of trauma and its effect on asylum seekers is thus a necessary part of a gender-sensitive approach.

³⁹ Walter Kälin, 'Trouble Communication: Cross-Cultural Misunderstandings in the Asylum Hearing' (1986) 20 (2) *International Migration Review* 230, 232.

⁴⁰ Jan Blommaert, 'Investigating Narrative Inequality: African Asylum Seekers' Stories in Belgium' (2001) 12 (4) *Discourse and Society* 413, 442.

⁴¹ Baillot, Cowan and Munro (2009), 209.

⁴² Blommaert (2001), 438.

⁴³ Walter Kälin, above n 39, 232. For Australian context, see Trish Luker, 'Decision Making Conditioned by Radical Uncertainty: Credibility Assessment at the Australian Refugee Review Tribunal' (2013) 25 (3) *International Journal of Refugee Law* 502.

⁴⁴ Baillot, Cowan and Munro (2009), 209.

⁴⁵ Ibid.

3. Trauma, Memory and Barriers to Disclosure

The difficulties with the process of the interview are exacerbated by the psychological factors involved. Most asylum seekers have gone through traumatic experiences, with in many cases gender-based persecution, sexual violence or rape as part of their experience. A common assumption during this “knowledge” finding process is that an experience of severe violence is so important that it will be remembered very clearly over a period of time.⁴⁶ The expectation of a coherent narrative is but an extension of this assumption. This assumption is based on the belief that all memories are the same. How we think memory operates is commonly based on autobiographical memory. This memory is of a “normal” event and it presents itself by being verbal and sequenced (having a beginning, middle and an end).⁴⁷ It is recognised as being in the past and may be recalled voluntarily, for instance when asked.⁴⁸ Yet studies of autobiographical memory have confirmed their variability.⁴⁹ Furthermore, memories of traumatic events do not operate in the same way. They may include incomplete accounts and flashbacks that are experienced in the present and are often triggered by external or internal cues rather than being subject to conscious recall.⁵⁰ This means that there are serious obstacles to answering officials’ questions in a coherent or consistent manner.

Psychologists and psychiatrists have shown that both depression and post-traumatic stress disorder (PTSD) are associated with a pattern of overgeneral memory, in which individuals have difficulty retrieving memories of specific events.⁵¹ Both depression and PTSD are highly common in asylum seekers. Thus, trauma can alter the account of the asylum seeker in various ways. For a traumatised person, time and space

⁴⁶ Jane Herlily and Stuart W. Turner, ‘Asylum Claims and Memory of Trauma: Sharing our Knowledge’ (2007) 191 *British Journal of Psychiatry* 3, 3.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ See Stephen J. Anderson et al ‘Rewriting the Past: Some Factors Affecting the Variability of Personal Memories (2000) 14 *Applied Cognitive Psychology* 435, Juliet Cohen, ‘Errors of Recall and Credibility: Can Omission and Discrepancies in Successive Statements Reasonably Be Said to Undermine Credibility of Testimony?’ 69 (1) *Medico-Legal Journal* 25, 27.

⁵⁰ *Ibid.* See also, Hilary Evans Cameron, ‘Refugee Status Determinations and the Limits of Memory’ (2010) 22 (4) *International Journal of Refugee Law* 469.

⁵¹ Richard McNally, *Remembering Trauma* (Harvard University Press, 2005) 131.

perceptions are altered, memory blocks can occur and disassociation is common.⁵² Herlily notes that ‘people suffering from PTSD due to experiences of sexual violence will be more likely to be prioritizing *above all other considerations* the avoidance of thoughts, feelings, and conversations about their experiences’ as well as having potential gaps in their memory about the details of those experiences.⁵³ This is of course extremely difficult for an asylum seeker as the official is expecting a detailed account of times and dates to fit into the “travelogue”. Furthermore, difficulties in concentrating, common for traumatised people, can be responsible for numerous little mistakes, which in a legal setting are interpreted easily as lack of credibility.⁵⁴

At the time of the interview, two phenomena are operating: the influence of traumatic experiences on the claimant’s testimony and the impact of her stories on the officials.⁵⁵ This means that disclosure by the applicant is influenced by the traumatic experiences. But it also means that the impact of exposure to traumatic experiences on the listener, the official, can be serious. This in turn can mean that the officials may restrict disclosure by avoiding asking for more details of the most traumatic events.

A study by Bögner, Herlily and Brewin, on the impact of sexual violence on disclosure during Home Office interviews found that, in a sample of 27 participants, *all* those who disclosed a history of sexual violence, reported being prevented from talking about it further in the interview by the Home Office official.⁵⁶ The authors concluded that one explanation for this could be vicarious traumatisation suffered by the interviewers working with trauma survivors.⁵⁷ This supports previous research by Rousseau *et al.* that analysed the operation of the Canadian Immigration and Refugee Board. This multidisciplinary research team found that vicarious traumatisation and uncontrolled

⁵² Cecile Rousseau et al ‘The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board’ (2002) 15 (1) *Journal of Refugee Studies* 43, 49. For a study in the Australian context, see Zachary Steel, Naomi Frommer and Derrick Silove, ‘The Mental Health Impacts of Migration: The Law and its Effects-Failing to Understand: Refugee Determination and the Traumatised Applicant’ (2004) 27 *International Journal of Law and Psychiatry* 511.

⁵³ Jane Herlily, ‘Psychological Barriers to Fair Refugee Status Determination Relating to our Understanding and Expression of Gender’ in Arbel, Dauvergne and Millbank (2014), 116-135, 123. (emphasis in original text).

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, 48.

⁵⁶ Diana Bögner, Jane Herlily, and Chris R. Brewin, ‘Impact of Sexual Violence on Disclosure During Home Office Interviews’ (2007) 191 *British Journal of Psychiatry* 75, 79.

⁵⁷ *Ibid.*

emotional reactions were among the factors having a negative impact on the Board members' ability to evaluate credibility and on the overall conduct of the hearing.⁵⁸

Research from the psychological and psychiatric fields supports these conclusions. Psychodynamic analyses have demonstrated that traumatic histories can evoke “voyeuristic and sadistic impulses in the listener”.⁵⁹ Over exposure to traumatic accounts often produces defensive reactions in the listener, which can lead to trivialisation of horror, cynicism, and lack of empathy.⁶⁰ Likewise, these defensive reactions can result in dismissal or demonisation of the “other”.⁶¹ This may go some way in shedding light on the troubling allegation, made by a whistleblower named Louise Perrett, how one official “boasted to her that he tested the claims of boys from African countries who said they had been forcibly conscripted as child soldiers by making them lie down on the floor and demonstrate how they shot at people in the bush”.⁶²

As Rousseau *et al.* have pointed out, even though there is increasing evidence of the significance of vicarious traumatisation, this has not been studied in the immigration court setting; yet it can be hypothesised that they are likely to have a major influence on the decision-making process.⁶³ Indeed, UNHCR's report suggested that the Home Office's culture of disbelief could be a result of stress in the form of compassion fatigue and disillusionment.⁶⁴

Consequently, it is clear how significant impact trauma can have within the refugee determination process. Trauma plays a weighty role in limiting the possibility of narrating a coherent story, which can impact negatively on the asylum seekers' case because of the expectations that the quasi-legal and legal settings impose. This shows the restricted boundaries of narrow legal processes, which have limited space for taking into account the complexity of the human story. Crucially, there exists no national

⁵⁸ Rousseau et al (2002), 53.

⁵⁹ Ibid, 49 citing the work of Maren Vinar and Marcelo Vinar, *Exit et Torture* (Éditions Denoël, 1989).

⁶⁰ Rousseau et al (2002), 49.

⁶¹ Ibid.

⁶² Diane Taylor and Hugh Muir, ‘Border Staff Humiliate and Trick Asylum Seekers-Whistleblower’, *The Guardian*, 2 February 2010, <https://www.theguardian.com/uk/2010/feb/02/border-staff-asylum-seekers-whistleblower> accessed 11 September 2016.

⁶³ Rousseau et al (2002), 49.

⁶⁴ UNHCR, Quality Initiative Project Report (2005), 12.

referral mechanisms for the provision of psychological assistance, trauma support or counselling for asylum-seeker women fleeing gender-based persecution.

On the institutional side, assessments of gender-based persecution claims require a trained interviewer that understands that shame, fear of authorities, trauma and not understanding what may be relevant to an asylum claim are some of the reasons behind late disclosure.⁶⁵ Because of the prevalence of trauma within this context, it is necessary that the decision-makers are aware of its possible consequences not only on the applicant but also on themselves. In turn, this requires service provisions to be provided to ensure decision-makers' are well supported, particularly in order to limit the negative impact of vicarious traumatisation. It ought to be noted, however, that without substantial changes to organisational culture, the effectiveness of service provisions in this context remain unclear.⁶⁶

4. Lack of Country Specific Information and Knowledge of Gender Issues

Each year, the Independent Chief Inspector of Borders and Immigration monitors the work of the UKVI. The Chief Inspector is appointed to provide independent scrutiny of the UK's border and immigration functions reporting to the Home Secretary. The reports are placed before Parliament and are available publicly. Each of the Chief Inspector's reports deals with different areas of the work of the UKVI, and the criticisms have been robust.

One of the reports is particularly relevant to initial decision-making. In his 2011 thematic report, the Chief Inspector at the time John Vine, addressed the problems with regards to the use of country of origin information in deciding asylum applications. The Chief Inspector found that the primary sources of country of origin information were the reports produced by the Country of Origin Information Services (COIS) and that

⁶⁵ Hana Cheikh Ali, Christel Querton and Elodie Soulard, 'Gender Related Asylum Claims in Europe: A Comparative Analysis of Law, Policies and Practice Focusing on Women in Nine European Union Member States' (European Parliament, Directorate General for Internal Policies, Department of Citizens' Rights and Constitutional Affairs, 2012)

http://www.europarl.europa.eu/meetdocs/2009_2014/documents/femm/dv/asylum_claims/_asylum_claims_en.pdf accessed 23 September 2016.

⁶⁶ Baillot, Cowan and Munro (2013), 539.

case owners rarely conducted any further research.⁶⁷ At the time of writing there are COIS for 39 countries, those countries from which there are most asylum applications. This of course creates another problem: what do case owners do when there is no COIS? The Chief Inspector found that there exists great variability in case owners' approach in these circumstances. Some regions encouraged case owners to do their own research while others discouraged this based on grounds such as time limitations.⁶⁸ The Chief Inspector also noticed that in one region there was an unofficial list of "objective sources" while others simply referred to the United States State Department (USSD) Reports.⁶⁹

It is arguably impossible to compile wholly "objective" country of origin evidence on issues of culture, norms and conditions where the asylum seekers are fleeing from.⁷⁰ This is exacerbated by the staff compiling them lacking research training and skills. Country of Origin reports produced by the Home Office staff have been repeatedly criticised for containing basic inaccuracies, for being partisan, for being out of date and for being insufficiently sensitive to gender issues.⁷¹ Of particular note to asylum seeker women's cases is the problem of COI often being too generic. While COI about the general human rights situation may be available, information about the status and treatment of women is commonly limited. This particularly affects women because gender-based persecution often occurs in the so-called private sphere, which means violations of women's rights are less widely reported. Crawley's thematic review on the coverage of women in COI reports found that, contrary to the recommendation of the UNHCR Gender Guidelines⁷² little or no information was found in many of the

⁶⁷ UNHCR Quality Initiative Project Report (2005), 12.

⁶⁸ Ibid, 13.

⁶⁹ Ibid. Most commonly seen non- country specific sources included the USSD, the Refugee Documentation Centre (Ireland), Human Rights Watch, the Immigration and Refugee Board of Canada, Danish Immigration Service reports and the Red Cross, as cited in Independent Chief Inspector of the UK Border Agency, 'The Use of Country of Origin Information in Deciding Asylum Applications: A Thematic Inspection' (London, October 2010- May 2011), <http://icinspector.independent.gov.uk/inspections/inspection-reports/2011-inspection-reports-2/>, accessed 11 September 2016.

⁷⁰ Robert Thomas, 'Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined' (2006) 8 *European Journal of Migration and Law* 79, 85.

⁷¹ Ibid. See also Natasha Carver, *Home Office Country Assessments: An Analysis* (London: Immigration Advisory Service Research & Information Unit, 2003), Bethany Collier: *Country of Origin Information and Women: Researching Gender and Persecution in the Context of Asylum and Human Rights Claims* (London, Asylum Aid, 2007).

⁷² UNHCR Gender Guidelines (2002), para 36x.

reports on the risks women may face if returned to their country of origin.⁷³ Lack of this information therefore creates a significant challenge for the evaluation of the availability of internal relocation option. Similar challenges are faced by asylum seekers fleeing persecution on account of sexual orientation as information about the specific experiences and living situation in the country of origin is commonly limited if not non-existent.⁷⁴

A further subject of critique has been the lack of ability and/or willingness of many case owners to differentiate between information from an independent source and politically based policy information from their own State or that of other States, ie. between COIS and the country of origin information that is included in the Operational Guidance Notes. The Operational Guidance Notes include recent case law and set out the Agency's overall *policy* in respect of types of asylum claim from nationals of particular countries.⁷⁵ They also contain country information, and although the Operational Guidance Notes refer case owners to COI reports, this inclusion of country information in policy documents serves to hide policy as information. This type of COI information in the policy documents should not be seen as country of origin information or as objective evidence; it is merely policy from the governmental side of the adversarial system of refugee determination process.⁷⁶ The Chief Inspector found that the inclusion of country information in Operational Guidance Notes means that case owners "will use information selectively in individual decisions based on overall policy position and will use this information as the primary source of country information rather than referring to the Country of Origin Services report or other available sources". Similarly, the UNHCR Quality Initiative Project found that country of origin research was inadequately conducted or misapplied regularly, with relevant information overlooked and not tested.⁷⁷

⁷³ Heaven Crawley, 'Thematic Review on the Coverage of Women in Country of Origin Reports', prepared for the Independent Advisory Group on Country Information (IAGCI), Sept 2011, <http://icinspector.independent.gov.uk/wp-content/uploads/2011/02/Evaluation-of-the-Country-of-Origin-Report-on-Women3.pdf>, 136, accessed 11 September 2016.

⁷⁴ See eg. Sabine Jansen and Thomas Spijkerboer, 'Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe', September 2011, <http://www.refworld.org/docid/4ebba7852.html>, 71-76, accessed 22 Sept 2016.

⁷⁵ Chief Inspector Report (2010-2011), para 8.1.

⁷⁶ Jo Pettitt, Laurel Townhead and Stephanie Huber, 'The Use of COI in the Refugee Status Determination Process in the UK: Looking Back, Reaching Forward' (2008) 25 (2) *Refugee* 182, 184.

⁷⁷ UNHCR, Quality Initiative Project Report (2005), 11.

The problems involving country of origin information and policy information highlight broader concerns over institutional competencies. In 2011, Webber noted that the training for UKBA officials, to learn the relevant case law, interviewing, assessment of evidence and reasoning decisions was just twenty-five days.⁷⁸ Furthermore, the UNHCR's file assessment and feedback process suggested "some established caseworkers and a number of senior case workers may lack, or not be equipped with, the necessary skills and knowledge for refugee status determinations".⁷⁹ Through investigation of initial decision-making, the UNHCR found "widespread use of weak analysis, poor written English, and limited or non-existent research." In addition, the feedback sessions that UNHCR held with individual caseworkers "lead UNHCR to conclude that a number of caseworkers have a limited interest in, and understanding of, global affairs".⁸⁰

5. Problematic Credibility Approaches

"In determining refugee claims the question of credibility is both everything and nothing."⁸¹

It is under the rubric of credibility that issues relating to the Home Office's culture of disbelief, trauma and vicarious traumatising and the inadequacy of country of origin information as well as its interpretation, combines. This combination undermines the protection of asylum seeker women's rights. This is due to the nature of many asylum claims and the particular ways in which decision-makers approach credibility assessments. The nature of many asylum claims, ie. the circumstances surrounding fleeing persecution and the nature of the persecution itself, means that many asylum claimants cannot produce documentary evidence for their claim. This is particularly so for women who experience of gender-based persecution that is difficult to corroborate

⁷⁸ Frances Webber, *Borderline Justice: The Fight for Refugee and Migrant Rights* (Pluto Press, 2012) 54.

⁷⁹ UNHCR, Quality Initiative Project Report (2005), 11.

⁸⁰ *Ibid.*

⁸¹ Gina Clayton, *Immigration and Asylum Law* (OUP 2012), 423.

with documentary evidence.⁸² Therefore asylum decisions are heavily dependent upon assessments of credibility of the applicant's account as well the applicant herself.

Assessment of credibility has been described as “often the single most important step” in determining refugee status.⁸³ Credibility, however, can mean different things, as it remains “conceptually elusive and adjudicatively influential”.⁸⁴ With regard to administrative and criminal proceedings, credibility has long been criticised as a vehicle for gender and cultural bias in addition to producing unreliable results.⁸⁵

Although credibility is not an element found in the Refugee Convention or principles of *non-refoulement*, the UNHCR nevertheless uses the term. This is due to the issue mentioned above, that asylum claimants are rarely in a position to provide external corroborative evidence for their claim. The object and purpose of the Refugee Convention can nevertheless be used to guide credibility assessments. Considering that the Convention promotes the principle “that human beings shall enjoy fundamental rights and freedoms without discrimination” in theory its interpretation ought to be made in order to promote protection from human rights violations.⁸⁶

In practice, however, decision-makers doubt the credibility of at least part of almost every applicant's story and in the opinion of many lawyers, the Home Office's presumption is that all applications are “bogus”.⁸⁷ In Baillot, Cowan and Munro's study, some case owners suggested that “it was the role of the UKBA to seek out inconsistencies within the asylum narrative, which could then be used as a basis to refuse claimants, or “catch them out” while remaining “blinkerred” to the plausible”.⁸⁸

⁸² Deborah Singer, ‘Falling at Each Hurdle: Assessing the Credibility of Women's Asylum Claims in Europe’ in Arbel, Dauvergne and Millbank (2014), 98-115, 104.

⁸³ Michael Kagan, ‘Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination’ (2003) 17 *Georgetown Immigration Law Journal* 367, 367.

⁸⁴ Guy Coffey, ‘The Credibility of Credibility Evidence at the Refugee Review Tribunal’ (2003) 15 *International Journal of Refugee Law* 377, 377.

⁸⁵ See for eg. Deb Tyler and Patricia Easteal, ‘The Credibility Gap’ (1998) 23 *Alternative Law Review* 211 and Mary Childs, ‘The Character of the Accused’ in Mary Childs and Louise Ellison (eds.); *Feminist Perspectives on Evidence* (Cavendish 2000), 211- 235.

⁸⁶ Preamble Refugee Convention.

⁸⁷ Anthony Good, ‘Witness Statements and Credibility in the UK Asylum Courts’ in Livia Holden (ed.), *Cultural Expertise and Litigation: Patterns, Conflicts, Narratives* (Routledge, 2011), 94-122, 99.

⁸⁸ Helen Baillot, Sharon Cowan and Vanessa E. Munro, ‘Research Briefing: Rape Narratives and Credibility Assessment (of female applicants) at the AIT’, Edinburgh Law School, University of Edinburgh, 2012, <https://www.stmaryscentre.org/wp-content/uploads/2012/05/FINAL-BRIEFING-REPORT-PDF-April-2012.pdf> accessed 23 September 2016, 5.

This “catching out” echoes findings from the US, where the obsession for internal consistency was said to become more of a game rather than an attempt to understand the applicant’s narratives and experiences.⁸⁹ Given the issues discussed earlier in relation to trauma and narrative consistency, an approach that expects a coherent narrative each time and on every single detail is too stringent a test in the asylum context.

According to the UNHCR Handbook, the basic requirement is that the asylum seeker’s account should be “coherent and plausible” and “not run counter to generally known facts”.⁹⁰ In a Note on the Standard of the Burden of Proof, the UNHCR adds the phrase of “capable of being believed”.⁹¹ This move is important as it signifies that what is in question is “could a “reasonable person” believe this testimony” rather than the decision maker’s subjective question “do I believe the applicant”.⁹² Kagan has argued that this provides a more objective test.⁹³ Although this test on its own does not remove problems with “objective” criteria still being able to mask gender and cultural bias, it goes towards stressing that decision makers need to evaluate their credibility assessments in this context in a more justifiable way. This is because the UNHCR approach suggests using credibility “as an alternative to proof” in that a credible account should be given the benefit of doubt in circumstances where proof has not been possible.⁹⁴ This is shown in the UNHCR stating that “there is no necessity for the applicant to prove all facts to such a standard that the adjudicator is fully convinced that all assertions are true” and acknowledging that “there would normally be an element of doubt in the mind of the adjudicator”.⁹⁵ Where an adjudicator considers the applicant’s story on *the whole* as coherent and plausible, any element of doubt should not prejudice the applicant’s claim.⁹⁶ In these circumstances, benefit of doubt should be given to the

⁸⁹ Sarah Ignatius: *National Asylum Study Project: An Assessment of the Asylum Procedures of the Immigration and Naturalization Service* (1993) as cited in B.J. Chisholm: “Credible Definitions: A Critique of U.S. Asylum Law’s Treatment of Gender-Related Claims” (2000- 2001) 44 *Howard Law Journal* 427, 471.

⁹⁰ UNHCR Handbook (2011), para 204.

⁹¹ UNHCR, ‘Note on the Standard of Proof’, 16 December 1998, available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3ae6b3338> accessed 23 September 2016, para 11.

⁹² Kagan (2003), 381.

⁹³ *Ibid.*

⁹⁴ James Sweeney, ‘Credibility, Proof and Refugee Law’ (2009) 21 (4) *International Journal of Refugee Law* 700, 707.

⁹⁵ UNHCR (1998), para 12.

⁹⁶ *Ibid.*

applicant's narrative.⁹⁷ As Sweeney argues, in the UNHCR's recommendations "being credible" is different both to "being proven" and "to being true".⁹⁸ This means that the threshold of being credible, under these recommendations is "lower than the low standard of proof", which "should caution decision makers against too readily equating minor inconsistencies to lack of internal or external credibility".⁹⁹

Because of the nature of refugee claims and the gravity of a negative decision it is necessary that the issue of burden of proof needs to be taken seriously. Established law does not require asylum seekers to corroborate their claims, yet the practice of the Home Office shows that the decision-makers often behave as though it does.¹⁰⁰ There are several reasons why women are disproportionately affected by this practice. The lack of COI on the specific status and treatment of women and the different types of persecution they may face creates difficulties for many women to evidence their claim and may mean a negative decision on their credibility.¹⁰¹ Freedman also notes that in particular in claims involving rape or sexual violence, some decision-makers seem to assume that 'all women say they have been raped'.¹⁰² Despite evidence that late disclosure should not be taken as evidence of incredibility, including an acknowledgement of this in the Asylum Policy Instruction, stakeholder interviews conducted by Baillot, Cowan and Munro showed that a number of case owners still opined that disclosure was likely to occur at an early stage in the asylum process.¹⁰³ Consequently, the respondents felt that where rape was not disclosed early, both the claim of rape and the credibility of the claimant could be legitimately doubted.¹⁰⁴ It is the interaction of the lack of corroborative evidence, high standard of proof and the impact of trauma on disclosure that create significant challenges for positive credibility findings for many women that can lead to failure of protection from persecution.¹⁰⁵

⁹⁷ Ibid.

⁹⁸ Sweeney (2009), 707.

⁹⁹ Ibid.

¹⁰⁰ Anthony Good, above n 88, 99.

¹⁰¹ Bethany Collier, above n 71, 11. See also, Christel Querton, ' "I Feel Like As A Woman I'm Not Welcome": A Gender Analysis of UK Asylum Law, Policy and Practice' (London, Asylum Aid, 2012), 48-49.

¹⁰² Jane Freedman, above n 26, 423.

¹⁰³ Helen Baillot, Sharon Cowan and Vanessa E. Munro, ' "Hearing the Right Gaps": Enabling and Responding to Disclosures of Sexual Violence within the UK Asylum Process' (2012) 21 *Social & Legal Studies* 269, 276.

¹⁰⁴ Ibid.

¹⁰⁵ Singer (2014), 113. Singer also discusses the significance of demeanor in this context.

Conclusion

Despite several developments with regards to recognition of the importance of gender-sensitive procedures within refugee determination contexts, the practical reality of the rights protection on the ground remains bleak. Significant concerns have been voiced by refugee organisations, academics, the Independent Chief Inspector and the UNHCR over the competencies of the UKBA's first-instance decision-making. It remains to be seen whether the UKVI will take seriously these concerns. The asylum processes have remained largely the same, however, and there seems to be little evidence of any significant organisational shifts. Significant procedural and evidential barriers remain to the protection of the rights of women seeking asylum in the UK. Gender-sensitive procedures require interviewers who are adequately and appropriately trained and who recognise the specific challenges that asylum-seeker women face within the refugee determination context.

For asylum seeker women, the process provides little opportunity to have their voices heard. The complex nature of many gender-based persecution claims and the environment in which women are questioned poses obstacles to full disclosure and this can impact negatively on their cases. Barriers to the protection of the rights of women range from practical issues, such as the operational constraints on the provision of female interviewers and child care to the interaction of trauma, disclosure, lack of country of origin information and problematic credibility assessments. Given the gravity of a negative decision to individual lives, the processes are in need of significant improvement. Asylum seeker women continue to claim their rights within a complex political climate that has seen the tightening of both immigration and asylum policies, cuts to legal aid, and, the raising of appeals fees. The continued detention of women fleeing gender-based persecution, including pregnant women,¹⁰⁶ rather than evidencing

¹⁰⁶ The government did not follow the Ombudsman Stephen Shaw's recommendation of providing an absolute exclusion on detaining pregnant women, see Stephen Shaw, 'Review into the Welfare in Detention of Vulnerable Persons: A Report to the Home Office', January 2016, para 4.34, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/490782/52532_Shaw_Review_Accessible.pdf accessed 23 September 2016. See also, Commons Select Committee: Home Affairs Committee, 'The Work of the Immigration Directorates (Q4 2015): Government Response to the Committee's Second Report of Session 2016–17'

signs of improvement, demonstrate the continued erosion of asylum seeker women's rights in the UK.

http://www.publications.parliament.uk/pa/cm201617/cmselect/cmhaff/675/67504.htm#_idTextAnchor006 accessed 23 September 2016.