Truth and Consequences: Credibility Determination in the Refugee Context

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INTRODUCTION

When I became a Member of the Refugee Division of the Immigration and Refugee Board in 1994, I brought with me academic knowledge of the Convention refugee definition and the principles governing the conduct of quasi-judicial hearings. I quickly realized that relatively few of the cases coming before me would raise the kind of legal questions that had preoccupied me as a scholar — the meaning of "particular social group", the application of cessation or change of circumstances, the conceptual limits of state protection, the interpretation of the exclusion provisions, and so on.

Instead, the vast majority of my time would be spent on credibility determination — did I believe the claimant's story or, more precisely, did I believe enough of the story to render a positive decision? Ultimately, I found this to be the most challenging aspect of the job, not because the legal issues (when they arose) were so simple, or because I'm so smart, but rather because credibility determination engaged me at both an intellectual and emotional level in a way that bare questions of law or procedure did not.

What I wish to do here, in a tentative way, is to begin the difficult and slippery process of theorizing credibility determination. My starting point is a description of what most of us think we are doing: A claimant/applicant comes before us, tells us a story, furnishes what particulars and corroborating evidence she can, and we ask some questions. Our goal? To "search for truth". If we just ask enough questions, get enough evidence, observe the claimant closely enough, we will be able to determine what really happened or, at least, what didn't really happen. Frequently, we find ourselves frustrated by the paucity of information: If only we could verify this; if only we could corroborate that; *then* we could know "what really happened".

But we never have all the information. In my experience, we rarely have even as much information as I would consider necessary to choose a new appliance, much less make a decision about a person's future. Nevertheless, we do formulate theories about what happened, or didn't happen, and these often take shape in accordance with inchoate ideas about the truth-telling quality of the claimant before us.

AVOIDANCE vs. HUBRIS

Credibility determination is hard. It is frequently difficult to articulate in rational terms why one does, or does not, believe another. Decision makers may put a lot of faith in their "gut feelings" about credibility, but recognize that gut feeling does not amount to a legally defensible basis for a decision. As a practical matter, this does not pose much of a problem when the decision is positive. The situation is more complicated when the decision maker is inclined toward the negative. Indeed, there is a temptation to avoid basing negative decisions on credibility, even though that is the real reason for the rejection. This avoidance usually manifests in a reliance on some other ground for turning down the application,

such as the availability of state protection, or an internal resettlement option, etc. Not only are these types of reasons easier to justify — one can typically point to country reports of one sort or another — but findings on these matters can often be made more expediently than is the case for credibility determinations. The rationale goes something like this: Even if X is telling the truth about being tortured, she can live safely in some other town, so there is no need for me to really explain why I don't, in fact, believe her. I submit that, in general, this avoidance tactic is wrong for two reasons. First, it underestimates the real impact that credibility has on our assessment of other factors. Thus it hides the actual basis of the decision. In other words, it is dishonest. Second, it leads to inconsistency and the appearance of arbitrariness in decision making.

I can illustrate my point with two Canadian cases. As you may know, refugee adjudicators in Canada sit in panels of two. The two cases in question had one Member in common. Both cases concerned Jamaican women who claimed to fear persecution in the form of domestic violence from their partners in circumstances where the state was unwilling or unable to provide effective protection. In the first case, the woman was married to a member of a civilian militia[1]. The other woman was married to a police officer.[2] Both claimed to have suffered extensive and serious abuse in the past, and further testified that the police and the judiciary were unresponsive to domestic violence. The cases were decided six months apart, and there was no evidence that anything significant had happened in Jamaica with respect to domestic violence in the interim. The first claimant was accepted, the second rejected. The distinguishing factor in the two cases was in the availability of state protection: the Panel in the first case[3] found that Jamaica *was not able* and willing to protect the claimant; the second ruled that Jamaica *was* able and willing to protect the claimant.[4] Although time does not permit a thorough review of the judgments, I propose that on a fair reading of the two cases, the disparate rulings on state protection are irreconcilable, especially considering that one of the decision makers participated in both hearings.

Reading a bit "between the lines", I suggest that what was really going on is that the first Panel genuinely believed that the claimant had been battered, while the second Panel did not. Instead of resting its decision on a finding of non-credibility, the second Panel took the expedient approach of finding that Jamaica was able and willing to provide adequate state protection. The result is inconsistent and potentially misleading jurisprudence on the meaning of state protection in domestic violence cases generally and, particularly, with reference to Jamaica.

Another technique for avoiding responsibility for credibility determinations is to rule that the claimant has simply failed to discharge her burden of proof. That way, the decision-maker does not have to articulate precisely what it was that was not credible about the evidence — she can just say there was not enough of it. While I do not wish to appear flippant, I suspect that this device is susceptible to misuse where it is used to reject a claimant where the decision maker cannot articulate any cogent reasons to justify that conclusion.

1 T95-01010/11/12, July 30, 1996 (Then, Kelley). Although Then presided, and the presiding member usually writes the decision, this decision was written by Kelley. Then concurred.
2 T95-04279, December 30, 1996 (Then, Wolman).
3 *Supra* note 1.
4 *Supra* note 2.

Of course, it would be fundamentally unfair to impose on claimants unreasonable burdens to produce evidence, given the conditions under which they flee their countries of origin and the difficulty of obtaining documents from home once they have arrived in the country of asylum. Nevertheless, in my experience, the following pattern of reasoning is not uncommon among decision makers: Claimants are rejected because they are unable to furnish sufficient identity documents or documents proving residence in a refugee camp, etc. Some claimants protest that they are unable to obtain documents and are met with the reply that other claimants manage to do so. (Of course, decision makers have no idea early on whether or how many of those earlier documents were not genuine and thus, how easy or difficult it is to obtain genuine documents from one's country of origin). Soon, all claimants show up with the requisite documents, having learned through the grapevine that failure to produce documents will lead to rejection.

Predictably, decision makers become suspicious of the authenticity of documents, and may even send them for forensic testing where (not surprisingly) a number will turn up as fake. This, in turn, is used to impugn the overall credibility of claimants, and can lead directly to rejection. Eventually, decision makers "discover" that it is possible to illicitly purchase genuine documents, a practice which cannot be detected by forensic testing. The result? Decision makers simply begin to discount the probative value of the documents altogether.

The result is that claimants are damned if they do not produce the documents (failing to discharge burden of proof) and damned if they do (the documents turn out to be false, or are discounted on the assumption that genuine documents containing false information can be obtained illicitly anyway). And decision makers are no further ahead in obtaining evidence that they are comfortable relying upon in making decisions.

There is a "flip side" to these avoidance strategies. It is what I would call the trap of false confidence. By this I mean a belief that one can determine with precision not just whether something occurred, but also why it occurred. In a recent U.S. case[5], the 9th Circuit upheld a decision in which the lower tribunals (the Immigration Judge and the Board of Immigration Appeals) rejected a claim by a Filipino man who had received death threats from a left-wing insurgency group that he had informed upon to the government. The Immigration Judge and the BIA agreed that there was no link between the risk to the claimant's life and his political opinion, since it was "likely that [the claimant's] status as informant, not his political opinion, inspired the [insurgents'] acrimony."[6] In other words, the claim failed the "but for" test of causation between persecution and Convention ground.

While I am not in a position to take issue with the ultimate decision in the case, I question the capacity of decision makers sitting in North America, operating on a bare description of events from a claimant, to postulate with such confidence what, from a range of possible options, was going through the minds of various third parties. I also query this "but for" approach to identifying motives, which seems to deny that human action is the product of multiple layers of overlapping and interacting ideas, emotions, and cognitions. To hypothesize that the claimant may well face a risk of persecution for being an informant, regardless of his political opinions, does not mean that *in fact* his real or imputed opinion

5 *Kaurr* v. *INS*, 152 F.3d 926 (9th Cir.) 1998.
6 *Id.*, at 1259.

did not also play a causal role, especially in a context where persecutors may well interpret acting as an informant as the expression of a political opinion. The point is, how categorical should a decision maker be in surmising the mindset of a Filipino insurgency group?

A similar critique applies to the deservedly notorious case of *Campos-Guardado* v. *INS*[7], wherein decision makers purported to determine that soldiers' motives for raping female kin of politically active men arose from "sexual desire" and not "political opinion".[8] Similarly, in *Singh* v. *Ilchert*[9], the BIA found that police mistreatment of a Sikh suspected of harbouring militants was motivated by the goal of acquiring information about the militants, rather than by the claimant's political opinion. (This decision was overturned on appeal.) In each of these cases, the assumption that a decision maker can identify not only the possible range of motivations of an unidentified (and necessarily abstract) third party, but can actually isolate one and eliminate all the other motives strikes me as problematic.[10] I suspect that it emerges out of a sense of frustration at how little one can genuinely extract from the limited sources and volume of evidence before us. So we compensate by purporting to draw firm inferences from flimsy evidence.

WHAT CAN WE KNOW?

As the foregoing suggests, in my opinion we should neither run away from credibility issues, nor pretend to be capable of knowing more than we can. We are all familiar with the barriers standing between us and "what really happened". We were not there. The only witness is usually the claimant with whatever fragments of her life she puts before us. Country documentation and assorted governmental and human rights reports that we receive usually paint a canvas with broad, crude brush strokes. They rarely provide the kind of detailed information that would be necessary to corroborate a particular story.

Beyond this, there are the various factors influencing what and how the claimant relates to the decision maker. She may have every reason not to trust anyone in authority. Experience may have taught her that the key to survival is telling the person in authority whatever he or she wants to hear. She may have been threatened by her smuggler not to disclose the actual means by which she arrived in her country. She may recite a story that did not happen to her because she was assured that it was a "winning script", and because she has no story of her own or doubts that her own story will be taken seriously.

The tools we use to attribute meaning to all of this are usually the following: consistency, plausibility and demeanour. I'll begin with the last, which is in some sense the easiest. Examining demeanour for clues to credibility presupposes that we know what truth telling looks like, and that it looks the same on everybody. The stereotype goes something like this: truth tellers look us in the eye, answer the questions put to them in a straightforward manner, do not hesitate, show an "appropriate" amount of emotion, and are neither too laconic, nor too verbose. Liars do not look us in the eye (out of embarrassment or shame),

7 809 R.2d 285 (5th Cir. 1987).
8 The obvious sexism of this decision has been thoroughly critiqued by others (and myself) elsewhere. I acknowledge it, but do not pursue it here.
9 63 F.3d 1501 (9th Cir.) 1995.
10 I recognize that *INS* v. *Elias Zacarias*, 502 US 478 (1992), imposes certain constraints on the ability of a claimant to establish a nexus between persecution and one of the five grounds, but my admittedly cursory survey of jurisprudence does not suggest that this case requires or accounts for the insistent view that motives of third parties can be determined with certainty by decision makers.

do not answer the questions put to them (are evasive), say too little (because there is nothing to say — the story is invented), say too much (because they are trying to distract you) and are either too demonstrative (melodramatic), or lacking in affect (betraying the fact that nothing happened). Yet, as we all know (or should know), culture, gender, class, education, trauma, nervousness and simple variation among humans can all affect how people express themselves. It is dangerous at best, and misleading at worst, to rely on a uniform set of cues as demonstrative of credibility, or a lack thereof.

That is not to say that demeanour conveys nothing. It is, rather, to suggest that the messages conveyed by demeanour are indeterminate and contingent. Speaking personally, I became very wary of relying on demeanour, and did so infrequently.

Plausibility usually refers to the relationship between what the claimant describes and what we think we "know" about how the external world works. Consistency examines the relationship between different statements made by the claimant and searches for contradiction. Plausibility and consistency are sometimes assumed to be equivalent to the truth. They are not. They are, rather, proxies or substitutes for truth. Claimants may tell stories that are perfectly plausible and entirely consistent, yet wholly fabricated. The converse is also true.

In my case, I recall one claimant whose story struck me and my colleague as consistent and plausible. His demeanour was confident, his testimony was straightforward, and he held up well under questioning. The only problem was that his written story happened to be plagiarized word for word from that of a claimant I had heard a few months earlier.

In another case related to me by a former colleague, the claimant insisted that she had arrived in Canada in late November by jumping ship in Halifax. Literally. From a height of about four stories, into the freezing and thoroughly unwholesome ocean waters of Halifax Harbour. I would have had no hesitation in agreeing with my colleague that the scenario was wholly implausible — if not for the fact that the event had been photographed by local newspapers.

One particular case haunts me to this day, because it exposes how culturally contingent the qualities of consistency can be. I once heard a refugee claimant testify about the reasons he fled his country. The claimant was an elite athlete and escaped his country against the orders of his trainers, who were connected to government. He feared that if returned, he would be subject to persecution by authorities. Over the course of the hearing, the claimant provided three different versions of his escape. The accounts were contradictory regarding certain significant details. The claimant's demeanour was earnest, polite, co-operative and unsophisticated. He just could not keep his story straight. When confronted with the inconsistencies, he would either stick with his most recent version, or change the story yet again. His manner was entirely guileless and, for that reason, disconcerting. Most claimants understand that it is bad to be caught in a contradiction and will, if confronted with an apparent inconsistency, attempt to deny it, explain it, or reconcile it. Yet this claimant simply did not "get it". It seemed rather that he was intent on pleasing us, and if his first version seemed to cause us consternation, he would change it in an effort to find a story that we liked better. In addition, the claimant was simply not able to explain why authorities would want to punish him so severely should he return, given that he was the top — and a world-class — athlete in his sport in the whole country.

The next day, the counsel for the claimant produced a Canadian witness, a coach who had significant experience with the system of elite sports in the claimant's country of origin. He was able to corroborate certain aspects of the claimant's story and, most importantly, confirm the fate of an athlete who leaves the country without permission. He also explained how a person in the claimant's position would be targeted for very harsh treatment in order to make an example of him to other athletes who might consider leaving their country for the more promising (and lucrative) future abroad. At that point, we had the requisite information and were able to accept the claimant.[11] Without the benefit of a Canadian witness — someone who provided the answers using a shared "cultural" language — I cannot say what our decision would have been. Why the claimant could not or did not provide us with a single, consistent account of his escape I do not know; yet I am as confident about the ultimate decision as I am about any others I have rendered. I know that this progressive mutation of a story under questioning is a phenomenon which I have noticed among other claimants from the same country of origin as this claimant. In many of those cases, it has led to negative decisions because of serious inconsistencies in the claimant's story. Is this a problem of cultural difference? If so, whose culture poses the problem?

We may take the view that it is the claimant's job to learn, understand and follow the rules of "our" game, where consistency, plausibility and "appropriate" demeanour are the markers of credibility. While I am not unsympathetic to that view, we should understand that we, in so doing, are merely allocating the risk of, and responsibility for, erroneous credibility determination to the claimants; we are not necessarily adopting methods that enhance the odds of accurately capturing "the truth".

WHAT CAN WE DO?

Thus far, I have tried to demonstrate why the "search for truth" is a quixotic task. It presumes not only that there is an objective reality out there, but that decision makers can uncover and apprehend it using tools such as demeanour, consistency and plausibility.

My tenure as a decision maker has taught me that if there is an objective reality out there, I'm unlikely to discern it except incidentally. More importantly, I have learned that it is a mistake to overestimate our own capacity to distinguish truth from falsehood, fact from fiction. I call this mistake the "gut feeling" fallacy — the unquestioned assumption that our gut is a uniquely trustworthy arbiter of truth.

This lesson was brought home to me by the experience of sitting with another decision maker whom I hold in high regard. It was not uncommon for two of us, sitting together, listening to the same testimony, observing the claimant simultaneously, reading the same documentation, to come to different conclusions about the credibility of the claimant. We might agree that the claimant had made certain inconsistent statements — what claimant doesn't? — but differ on the significance of the contradictions. One of us might contend that a certain scenario was utterly implausible, while the other found it merely unusual. We compared notes, observations and impressions. Sometimes our deliberations led us to consensus, other times not. There was no external vantage point from which to assess who was "correct" or, if you prefer, whose gut was better. I could hardly maintain that my judgment, and mine alone, was a transparent lens through which I perceived reality, unmediated by the subjective apparatus that others might bring to the task.

11 I omit here other aspects of the claimant's story which were important to establishing the elements of the claim.

Ultimately, I came to the conclusion that credibility determination is not about "discovering" truth. It is, rather, about making choices — what to accept, what to reject, how much to believe, where to draw the line — in the face of empirical uncertainty. Acknowledging that judging is about choosing, and not about discovering, shifts the focus of credibility determination in significant ways.

Foremost, it means that credibility determination is necessarily and inexorably subjective. As a consequence, when making evaluations about credibility, we indeed need to look outwards — at the claimant, his or her demeanour, the quality of testimony, the documentation, the country information. However, we also have to look inwards — at our own values, prejudices, orientation and perspective — and ask ourselves *why* we choose to find a particular contradiction crucial, *why* we think the claimant is evasive rather than confused or simply telling stories in a way that is typical in that person's culture, and *why* we find the failure to make eye contact indicative of lying instead of shyness or intimidation.

Each of us brings our own complicated baggage to every act of judgment that we perform. A mundane example: I used to sit with a colleague on cases from a particular country where many of the claimants would point to assorted scars on their bodies and attribute them to police brutality. Once, when my colleague and I would discuss various problematic aspects of the case, she commented that despite various other weaknesses in the claim, the scarring weighed quite significantly in her mind. How else would these people end up with so many marks on their bodies if not through torture? My colleague, a much more agile and nimble person than I, remarked that she had no scars on her body. I, on the other hand, am a veritable showcase of the effects of clumsiness, with scars and marks bearing testament to a mis-stepped youth. To me, there was nothing unusual about acquiring various random scars on one's body in the normal course of life. To her, it was rather more unlikely. Our life experience had left us with different perspectives that informed the weight we attributed to a particular form of evidence as proof of credibility.

Other aspects of our life experience exert a subtler, but more pervasive influence on our approach. Am I a suspicious person by nature? Do I mistrust those around me, always on guard for fear being taken advantage of? Do I feel like I have experienced and overcome oppression in my own life? Does that make me identify with the victim, or harden my attitude toward those who have not overcome adversity the way I have? Do I feel personally offended when I think a claimant is lying to me and set out to "teach the claimant a lesson"? Do I internalize other people's pain and take it on as my own? Am I being less rigorous in my questioning of this claimant because I am already inclined to go positive, whereas if I were to probe deeper, I might well find the same problems that led me to reject a similarly situated claimant? As a minority decision maker, am I more inclined to empathize with a claimant who is a member of the same minority, or do I feel pressure to be tougher, in order to "prove" my impartiality to colleagues? We rarely ask these questions of ourselves, but I submit to you that they play as much a role in determining outcomes as do the external factors we think we rely upon in making decisions.

Obviously, there are no easy answers to these questions. I do believe, however, that a critical first step is to acknowledge the subjective nature of drawing inferences from evidence. The next step is to take responsibility for this fact by bringing whatever critical self-awareness one can to the exercise of choosing what and whom to believe. We want our choices to be the best and most just that they can be. My proposal to you is that achievement of that objective requires that we do not confine ourselves to interrogating the claimant, but that we also interrogate ourselves.