

DRAFT

## Subjectivity and Refugee Fact-finding

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Deciding refugee claims involves the bringing together of the law, basically the Convention definition, with the facts of the case.<sup>1</sup> At times the meaning of the law may be unclear. More often the difficulties lie with the other moment of this process – the finding of facts. This is my topic and I ask how do fact-finders come to have some confidence in their decisions? And how can others share or dispute this confidence?<sup>2</sup>

Decision-making is based on factual findings. But of course facts are not just found as one locates stones on the ground. And they cannot be found through the application of impersonal procedures. For despite the name - fact-finding - this is an evaluative task. Finding the facts means selecting the relevant facts from the irrelevant and the more plausible facts from the less plausible. As these judgments are made by a particular person - the decision-maker - there is an immediate and inevitable subjective component to this activity. Different people may well disagree as to which facts are salient or which parts of the testimony are more likely to be true. But how can we have confidence in a practice of fact-finding explained in subjective terms? The inconstancy and variability of personal opinion has somehow to be turned into persuasive fact-finding.<sup>3</sup>

This problem familiar to all legal fact-finding is compounded in refugee decision-making. For a number of reasons fact-finding here is more difficult. First, a fact-finder will be interested in the personal history of the applicant and the circumstances in the country of origin. With both of these matters there will be “evidentiary voids”<sup>4</sup>. Applicants will give an account of what happened to them but there is likely to be little corroborating evidence such as documents or eye witness testimony. And the general information, “country information”, is usually just that, general. Inferences must be drawn to link this material to the applicant’s personal account.

Second, the inquiry will be concerned not just with what happened to the applicant but ultimately with what might happen. What are the potential risks of persecution? This makes the process more speculative. It is not only focused backwards with a view to determining which facts probably or possibly occurred. The ultimate question is orientated towards the future. What are the risks to the applicant if he or she returns to the country of origin?

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I thank Giles Short a Senior Member of the RRT for discussing these matters with me. The errors are of course mine.

<sup>1</sup> See UNHRC handbook 29.

<sup>2</sup> As the paper is about fact-finding in general I ignore the ways in which law finding and law finding are connected. For example, the categories generated by the law via its interpretation will become important categories for fact finding (see for example the role “discrete behaviour” has played in claims based on religion or homosexuality). And, going in the other direction, the law obtains its meaning through its application in particular cases.

<sup>3</sup> G Goodwin-Gill *The Refugee in International Law* Clarendon 1996, 356

<sup>4</sup> J Hathaway *Rebuilding Trust – Report of the Review of Fundamental Justice in Information Gathering and Dissemination at the IRB of Canada* 1993, 6

Third, where there is so little to go on, the evidence provided by the applicant is central. Issues of credibility are thus crucial to the inquiry. Decision-makers will ask - are the applicant's claims about X credible? Or possibly, is the applicant credible?

Fourth, the applicant and the decision-maker will more than likely have quite different cultural backgrounds. This compounds the chance of misunderstanding. If decision-maker and applicant are to communicate with each other interpreters usually will be needed. Moreover, as we will see, notions such as "plausibility" play a key role in fact finding. And what is plausible from one perspective may be implausible from another.

Fifth, obtaining evidence from the applicant may prove difficult because of the applicant's experiences and present health; or possibly because of the unfamiliar or intimidating nature of the fact-finding proceedings.

Fact-finding is always *subjective* in the sense that someone, a particular person, is doing it. However if we read a statement of reasons for a refugee decision and we have a different view of the facts of the case from the decision-maker we don't see this simply as a difference of taste, for which there can be no accounting.<sup>5</sup> The claim that the fact-finding is defective carries the implication that it is defective for specific reasons. Wrong here is not just an expression of the critic's personal dislike. To make this point from the side of the decision-maker, the finding of facts in this context is not just a claim that the decision-maker sincerely believes these to be the facts. It is a claim that the findings are reasonable and that others would decide the facts in the same way faced with the same material. In other words, fact-finding is an appeal to *inter-subjective* criteria. The variability of personal opinion is turned into *reasonable* fact-finding through the application of these criteria. My aim is to give an account of some of these criteria.

However to make these kinds of points I need a specific example of refugee decision-making for with regard to these matters not all refugee decision-making is the same. That is the point; this regulatory framework is made up of understandings and expectations that arise out of the particular legal and bureaucratic setting. True refugee fact-finding has certain characteristics; I have just noted five of these. But these commonalities are not in themselves sufficient to determine how fact-finding should be carried out.

For reasons of convenience I turn to the Australian RRT. This body provides merits review for onshore protection visa refusals.<sup>6</sup> Its decision-making procedures usually involve a hearing with the applicant<sup>7</sup> as well as a consideration of the documentary material, from the applicant and "country information" from various sources<sup>8</sup>. As the

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<sup>5</sup> About matters of taste there is no disputing; Seneca.

<sup>6</sup> And in some circumstances protection visa cancellations.

<sup>7</sup> The right to a hearing can be lost if the applicant fails to respond to Tribunal requests for information or comment

<sup>8</sup> The Tribunal itself has a country information section that provides material and answers specific questions. I am told that a member has access to the Department of Immigration's Country Information Service (CIS) that draws on reports of human rights organizations, journals, newspapers, Australian Department of Foreign Affairs, UN High Commission for Refugees. Available also electronically are most of the reports from national and international bodies - US State Department, UK Home Office, Danish Immigration Service, International Helsinki Federation for Human Rights, Amnesty

Tribunal is not bound by the rules of evidence it is open to individual members to take account of whatever material they consider relevant. The process is non-adversarial and this places even more responsibility upon the decision-maker. For members sit alone. Often hearings involve only the member, the applicant and an interpreter.

More people fail before the Tribunal than succeed. The RRT set aside only 13% of the Department's decisions in the year 2003-2004 and 33% of the Department's decisions in the year 2004-2005. There are many reasons why a review may fail - the applicant is believed but the fears are not Convention related, the applicant fails to attend a hearing, etc. - but with every claim there is the possibility that it is supported by material that is not true. Awareness of this possibility is a starting assumption.<sup>9</sup>

The principles that set the framework for fact-finding are those dealing with the onus of proof and standard of proof. Material before decision-makers is often equivocal. Yet in this state of uncertainty cases can be decided with some degree of confidence only because the party with the burden of proof either has (or has not) established the facts in issue to the requisite degree. Without these default rules there often could be no decision one way or the other.<sup>10</sup>

We are familiar in other contexts with the onus of proof being on the plaintiff or the Crown and the standard of proof being expressed as "on the balance of probabilities" or "beyond reasonable doubt". But there is nothing inevitable about these rules. They reflect the particular values and interests considered to be at stake in say, negligence cases or criminal cases. Refugee law generates different values and interests. In refugee determinations the costs of error are high (possibly death) and the applicant labours under evidentiary disadvantages. Demanding too much evidence would undermine the point of the Refugee Convention – that States should protect persons in specified dire circumstances.

In this context any reference to onus of proof in refugee determinations is said to be misplaced. For it would be wrong to treat refugees as we treat other legal applicants and place on them the burden of making out a case.<sup>11</sup> We will see below that this difficulty is acknowledged in the rules concerning the standard of proof and in the limited duty of inquiry imposed upon the Tribunal. However an onus of some sort remains with the applicant. For the member must be satisfied that the facts as established bring the applicant within the legal definition. If the member is not satisfied the applicant loses; that is the default rule.

However the standard of proof is lower than on the balance of probabilities. To establish a "well-founded" fear applicants have only to show that there is a "real chance" of persecution; where a "real chance" is understood as a degree of likelihood somewhere between not far fetched and a reasonable possibility.<sup>12</sup> But how is this

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International, Human Rights Watch, etc.; and advices sought from Australian Department of Foreign Affairs and Trade and the UNHCR.

<sup>9</sup> The RRT review follows on from a negative decision from the Department. The Department decision may have turned on this very point.

<sup>10</sup> For an account of these procedures as a response to the "burden of ignorance" see Richard Gaskins *Burdens of Proof in Modern Discourses*, Yale UP, 1992.

<sup>11</sup> UNHCR 196

<sup>12</sup> In other words below 50%; *Chan v Minister for Immigration* (1989) 169 CLR 379

relaxed standard of proof passed down to the activity of finding the facts upon which this test operates? Do these facts have to be established on the balance of possibilities, or the balance of probabilities? The Australian authority *Minister for Immigration v Guo* (1997) 191 CLR 559 accepts that the Tribunal must often come to a view about whether past events occurred and as to the likelihood of future events. In doing this it must weigh the evidence and on balance choose one set of events over another. Possibly this can be explained as doing something different from balancing the probabilities, perhaps balancing the possibilities. But however it is described it is still an evaluative process through which the more likely is chosen over the less likely.

*Guo* connects the “real chance” test and the weighing of the factual evidence as follows. The degree of confidence the decision-maker has in these findings will be a factor when considering whether there is a “real chance” of persecution. For example, the more confident the finding that persecution has not occurred to date, the less there is a “real chance” of persecution in the future.<sup>13</sup>

This degree of confidence or lack of confidence in the findings is expressed in another established approach that proceeds as follows. If the decision-maker cannot be satisfied that the applicant’s claims did not occur then the application should be assessed on the basis that it is *possible* that the events occurred as claimed.<sup>14</sup> In other words, a proper application of the real chance test calls upon the decision-maker to take account of possibilities, even if these are considered unlikely.<sup>15</sup>

At times it has been suggested that the assessment of the facts should better reflect the difficult position of refugees. The applicant’s account should be accepted, presumed to be true, it is said, unless there is good reason not to do so.<sup>16</sup> The risks of uncertainty would then fall on the State rather the applicant. The UNHCR Handbook suggests at paragraph 196:

If the applicant’s account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.

It is quite appropriate to have as a starting assumption that the applicant is telling the truth. But this cannot be conclusive of the issue. For the mere fact that the applicant claims a fear of persecution does not establish that the fear is well-founded or, for that matter, that the fear is genuinely held.<sup>17</sup> Some of what is claimed may be false. Even a presumption of truth approach concedes this for it only applies “if the applicant’s account appears credible” and “unless there are good reasons to the contrary”. In other words the Tribunal cannot avoid testing the evidence placed before it, including the applicant’s account.<sup>18</sup>

The above discussion establishes that the Tribunal finds facts through such notions as – “is the member satisfied”, “real chance”, “weighing material on balance”, “not

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<sup>13</sup> But of course a claim of possible future persecution can be made out without the claim of past persecution; obviously the case with many “sur place” claims.

<sup>14</sup> *Rajasundaram v Minister* [1998] 565 FCA (29 May 1998, Wilcox J); *Minister v Rajalingam* [1999] FCA 719 (3 June 1999, Sackville, North, Kenny JJ).

<sup>15</sup> This still leaves the question – assuming these facts is the Convention definition satisfied?

<sup>16</sup> I Durst “Lost in Translation: Why Due Process Demands Deference to the Refugee’s Narrative” 53 Rutgers L Review (2000) 127

<sup>17</sup> *Minister v Guo* (1997) 191 CLR 559, Kirby J 596

<sup>18</sup> D Martin “Reforming Asylum Adjudication: On Navigating The Coast of Bohemia” 138 U Pa L Rev (1990) 1247, 1287.

satisfied that the claims did not occur”. While different decision-makers may have different views as to how these ideas apply to particular facts, this is the vocabulary that orientates all of their thinking. Without these basic concepts reasonable fact-finding would have no stable meaning.

As information relevant to the review is scarce much turns upon the applicant’s evidence. This makes assessments of credibility crucial in refugee determinations. Is the applicant credible?<sup>19</sup> Or more likely, is a part of the applicant’s evidence credible?

One way of assessing an applicant’s credibility is through a consideration of his or her demeanour when giving evidence. Demeanour provides a context in everyday life for determining a speaker’s meaning. But this is more likely to be a way of determining the speaker’s attitude to what is said. Are they joking, are they being ironic? Rather than are they telling the truth? In any event, testing the applicant’s evidence in this way is dangerous; particularly in a jurisdiction where the decision-maker and the applicant have different cultural backgrounds and where the evidence is received via an interpreter.<sup>20</sup> There could be many reasons for an applicant’s confidence or hesitancy, clarity of thought or confusion, calmness or nervousness. Clearly no findings should be based on this point alone.<sup>21</sup> And decision-makers should be discouraged from believing that experience on the job can give them a sixth sense about these things.<sup>22</sup> I cannot say that these sorts of considerations play no role in RRT decision-making but they should play no role in it or in the statement of reasons for the decision.<sup>23</sup>

More familiar ideas that figure in assessments of credibility are assessments of the *plausibility* of the applicant’s account and the *consistency* of the applicant’s evidence. The basis for these regulatory ideas is straightforward. Conventional wisdom has it that the reasonable is more likely to be true than the unreasonable; or a detailed account more likely to be true than one less detailed. And consistency is important, for truth is consistent and coherent with itself while falsity is not. But while these ideas are commonplace the risks of applying them in this setting are also obvious – sometimes the unreasonable or the general is true, sometimes inconsistencies are irrelevant.<sup>24</sup> And what is considered unreasonable, or not sufficiently specific, or inconsistent may be a reflection not of the evidence itself but of the inadequacies of the decision-maker.<sup>25</sup>

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<sup>19</sup> As Michael Kagan points out it is more objective to put the question as - is the material credible rather than do I believe this material? M Kagan “Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination” *Georgetown Immigration Law J* 17 (2003) 367, 381

<sup>20</sup> For a nice statement of this point see Gray J *Kathiresan v Minister* [1998] 159 FCA (4/3/98) p 6.

<sup>21</sup> G Coffey “The Credibility of Credibility Evidence at the RRT” *Int J of Ref Law* 15/3 (2003) 377, 386ff, 414f.

<sup>22</sup> M Kagan above 378ff

<sup>23</sup> Section 91V of the *Migration Act* is presumably a response to this kind of criticism; an ill-conceived response in my view and little used as far as I can gather.

<sup>24</sup> As they do not relate to the central issues of the review; or, possibly, because they can be attributed to the applicant’s ill-health or the stress of the proceedings.

<sup>25</sup> J Cohen “Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers” *13 Int J of Refugee Law* (2002) 293; C Rousseau and ors “The Complexity of Determining Refugeehood” *15 J of Refugee Studies* (2002) 43; Report of Amnesty International UK “Get It Right” Feb 2004

By the plausibility of the evidence I have in mind two things. Is the evidence sufficiently specific? And does the evidence make sense? As a regulatory assumption, specificity strengthens the account and lack of detail can weaken it. There may be good reasons for the lack of detail; and the lack of sense may be due to the decision-maker's failure of imagination, rather than any failings of the applicant. At the least these matters must be put to the applicant to learn what these reasons might be. The response will at times explain the misunderstanding away; at other times puzzles will remain. The issue then becomes - what weight to give to these puzzles?

Inconsistencies are generated when the applicant has provided information at a number of points of time and this information cannot all stand together. Perhaps there are direct inconsistencies between these accounts. Possibly the problem is a lack of coherence in that it does not all hang together. A typical example of potential lack of coherence is where the claims raised at the hearing are late claims; they were not made, say, in the initial interview with the Department. Again there may be good reasons for this and due process demands that these matters be explored with the applicant. But if inconsistencies or incoherence remain this will weaken the account.

A common form of potential inconsistency is where the applicant's claims conflict with country information. There may be occasions when the inconsistency is false, as the Tribunal has relied on inadequate information.<sup>26</sup> No doubt some material is better than other material – more reliable, more detailed, more up-to-date, etc. You would expect the Tribunal to assist the member to find the better material; material that accurately reflects the conditions in the country of origin. But the approach of the country information unit is to *provide* information, not to *evaluate* information.<sup>27</sup> Investigations will often disclose conflicting accounts. Here the member has to reconcile these differences by ranking the material - on the basis of age or source - or possibly finding the mean between rival accounts. If accepted country information produces facts inconsistent with the applicant's account and these remain after obtaining the applicant's response then there is a problem. A choice has to be made as to which to accept. Members of the RRT will often choose the country information over the applicant's account. But the issue still remains as to what weight to give to these findings.

As noted above, proper fact-finding will provide an opportunity for the applicant to respond to potentially adverse information. Hearing the other side assists in the disclosure of the relevant facts and it helps avoid misunderstandings.<sup>28</sup> Examples of adverse material are information from "concerned members of the community" (i.e. dob-in letters), apparent inconsistencies between statements given by the applicant at different points of time, and inconsistencies between the country information and the applicant's account. Judicial review has established that adverse material does not encompass the reasoning process of the decision-maker. The reasons why the account

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<sup>26</sup> Examples of this can be found in J Millbank "Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia" 26 Melbourne U Law Review (2002) and C Dauvergne and J Millbank "Burdened by Proof" 31 Federal Law Review (2003) 299.

<sup>27</sup> Although I am told that the country information unit will provide advice as to possible bias in particular sources and this will assist the member when attributing weight to the material.

<sup>28</sup> It is also the appropriate way for decision-makers to treat the people before them.

is found implausible or inconsistent do not have to be disclosed for comment prior to the decision.<sup>29</sup>

The RRT has a double obligation to disclose adverse material and this can lead to confusion on the part of the applicant and the member. Section 424A of the *Migration Act 1958* imposes a specific obligation to provide to the applicant “particulars of information that the Tribunal considers would be the reason, or part of the reason, for affirming the decision under review”. This provision is testament to the accidentality of law reform. It was proposed in 1997 in a Bill that took away the right of the review applicant to a hearing.<sup>30</sup> Section 424A protected an aspect of due process in the anticipated circumstances of a paper review. As it turned out the Senate blocked the changes to the right to a hearing but s 424A was implemented nonetheless.

Section 424A has exceptions. There is no need to provide adverse information which is in the form of general information, or information that was given by the applicant for the purpose of the review. In other words, inconsistencies between the applicant’s account and country information or between different accounts given by the applicant to the Tribunal do not have to be disclosed under s 424A. But these matters must be disclosed as part of the due process associated with a fair hearing. When matters fall within s 424A its obligations operate independently from the requirements for holding a fair hearing. Due process with regard to these matters must be given twice.<sup>31</sup> While this is a little odd s 424A has proved a simple way in which courts can supervise aspects of due process. For failure to comply with s 424A is a common source of jurisdictional error, even if due process was given at the hearing.

As refugee applicants face difficulties in providing evidence for their claims the decision-maker has some responsibilities. The UNHCR Guidelines state that “the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner”.<sup>32</sup> Judicial review has clarified the extent of this obligation in the Australian context. The Tribunal has a limited duty to inquire – where the Tribunal is in a better position to obtain information and it can do so without much difficulty.<sup>33</sup> Material considerations are also relevant. The Tribunal will have a view as to when investigations become too costly.<sup>34</sup>

I have described if only briefly a number of basic assumptions and regulatory principles that guide RRT fact-finding – the expectation that the evidence will be

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<sup>29</sup> McHugh...

<sup>30</sup> Whether a hearing was held or not was left to the discretion of the presiding Member. See MLA Bill No 4 1997.

<sup>31</sup> This doesn’t mean that the applicant always has notice of potential problems *before* the hearing. For both s 424A and the common law obligations of due process can be satisfied via correspondence after the hearing. And of course there is a difference between receiving notice of difficulties and being in the position to respond to these difficulties.

<sup>32</sup> Paragraph 196

<sup>33</sup> *Sun Zhan Qui v Minister* (1997) 81 FCR 71 *Minister v Singh* (1997) 74 FCR 553

<sup>34</sup> S Taylor “Informational Deficiencies Affecting Refugee Status Determinations” 3 U Tasmania Law Review (1994) 43 at 79 makes a point about provisions like s 424A. They only require the provision of *adverse* information. There is no obligation to provide material that might strengthen the applicant’s case. The Tribunals’ responsibility to share relevant information does not extend in Australia, as it does in Canada, to making the country information held by the Tribunal available to the public; C Dauvergne and J Millbank “Burdened by Proof”, above, 339.

tested, the onus and standard of proof rules, standards of plausibility and consistency for assessing credibility, the obligation to allow for a response to adverse material and the obligation for the Tribunal to itself inquire into the facts.

These guiding norms are more than personal criteria for they exist independently from and stand over individual members. Members are not free to disregard these ideas. And what is a reasoned finding of facts will take its meaning from these regulatory principles. A reasoned finding of the facts will *appropriately* test the evidence, *sensibly* weigh the evidence against the *relevant* standard of proof, *reasonably* assess credibility through the ideas of plausibility and consistency, give the *appropriate* due process and fulfil the *obligation* to independently inquire into the facts.

A descriptive account of these regulatory norms can answer the question posed at the beginning of the paper of how fact-finders can come to have some confidence in their decisions. And it discloses criteria through which others can share or dispute this confidence.

Ezra Pound said somewhere that you should always finish with a question. A *descriptive* account of fact-finding practices immediately gives rise to the following questions. Are the fact-finding practices in place good enough? How successfully do the members apply these standards? How can members be encouraged to apply these standards appropriately?

There is an available body of material, often critical, responding to the first and second question.<sup>35</sup> Here I can only comment on the third question - how can members be encouraged to apply these standards appropriately? Appoint suitable people in the first place. Adequately train new members. Train old members, for experience can bring certain pathologies.<sup>36</sup> Have some cases decided by more than one person. For personal idiosyncrasies have less influence on a two or three member panel and seeing how others do their work should encourage self-reflection. All obvious suggestions but no less worthy for that reason.

I conclude with the following observation. Ultimately what guides the application of the fact-finding principles I have discussed is the member's understanding of the purpose of the review. It makes a large difference to how the fact-finding is approached if the point of the review is seen as correctly identifying *valid* claims, or

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<sup>35</sup> S. Taylor above (over reliance on DFAT material, failure to understand legitimate reasons for inconsistent testimony); S Kneebone "The Refugee Review Tribunal and the Assessment of Credibility" 5 A J of Administrative Law (1998) 78 (overemphasis on country information); C Colborne "The RRT: a personal view" 75 Reform (1999) 27 (lack of disclosure of relevant material); J Millbank "Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia" 26 Melb U Law Review (2002) 144 (lack of understanding of claims based on sexuality, the use of 'discrete', improperly policing sexual mores, unfavourable comparison with Canada); C Dauvergne and J Millbank "Burdened by Proof" 31 Federal Law Review (2003) 299 (inconsistent approach to evaluating evidence, improper use of biased or inadequate country information, unfavourable comparison with Canada, specific changes proposed); G Coffey "The Credibility of Credibility Evidence at the RRT" 15 International J of Refugee Law (2003) 377 (examples of poor decision-making, wrong use of demeanor, guidelines for evaluating credibility recommended). Less critical is the report of the Senate Legal and Constitutional References Committee "A Sanctuary under Review" June 2000, ch 5.

<sup>36</sup> compassion fatigue, over-confidence, a processing of claims.

whether it is seen as correctly identifying *invalid* claims<sup>37</sup> Both tasks are involved, of course, but the point is which has priority. The briefest familiarity with tribunal work will disclose that some members are more worried than others that they may be fooled by an applicant. Some members are more confident than others that they can uncover the truth. While these are matters of personal temper much turns on this basic attitude. Every effort should be made to promote the idea that the point of refugee fact-finding is to identify valid claims. The greater worry is that genuine refugees are found to be otherwise.

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<sup>37</sup> A point made by S Taylor above at 63.