

What assumptions about Human Behaviour Underlie Asylum Judgments?

PUBLISHED IN

International Journal of Refugee Law, Int J Refugee Law (2010) 22 (3):351-366
Published online 14 July 2010 in International Journal of Refugee Law
(irjl.oxfordjournals.org) DOI: 10.1093/ijrl/eeq027

AUTHORS

*Jane Herlihy, † Kate Gleeson & ‡ Stuart Turner

* Jane Herlihy, MPhil, DClinPsych, CPsychol.

† Kate Gleeson, PhD, Clinical Psychology, Bristol.

‡ Stuart Turner, MD, BChir, MA, FRCP, FRCPsych.

ACKNOWLEDGEMENTS

The authors acknowledge the generous help and support of staff and clients of Wilson & Co. Solicitors, Tottenham, London, and the Greater Manchester Immigration Aid Unit (GMIAU), Crumpsall Green, Manchester. The authors are grateful to Jenni Millbank and Mike Kagan for their helpful comments on an earlier draft of this article.

Jane Herlihy, Kate Gleeson, Stuart Turner, "What Assumptions about Human Behaviour Underlie Asylum Judgments?" (2010) 22 *International Journal of Refugee Law* 351–366; <https://doi.org/10.1093/ijrl/eeq027>

What Assumptions about Human Behaviour Underlie Asylum Judgments?

Jane Herlihy, Kate Gleeson & Stuart Turner

Abstract

In order to claim recognition as a refugee, individuals must give a 'plausible' account of persecution. Decision makers must then decide on the truthfulness of the account, and whether the person fits the legal definition of a refugee. Decision makers often have little corroborating evidence, and must make an assessment of credibility, largely a subjective response, involving a reliance on assumptions about human behaviour, judgements, attitudes, and how a truthful account is presented.

This article describes a study of the assumptions in judgments made by UK immigration judges. Assumptions were defined and a coding structure used to systematically extract a list of assumptions from a series of written determinations. These assumptions were then submitted to an inductive thematic analysis. The resulting themes are compared briefly to the psychological and psychiatric literature, raising the question of whether assumptions used in asylum decision making are in line with current empirical evidence about human behaviour. The article recommends cross-disciplinary research to build an evidence base in order to help inform the decision making process in this crucial area of law.

1. Introduction

In order to claim asylum in the UK, or other signatory countries to the Convention Relating to the Status of Refugees (Refugee Convention),¹ the applicant must satisfy state authorities that they have a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion', are outside of their country of nationality and are 'unable or unwilling' to return to the

¹ United Nations, Convention relating to the Status of Refugees, adopted 28 July 1951, entered into force 22 Apr. 1954, (1951).

protection of that country, as laid out in the Convention. This normally requires the presentation of a credible narrative account to a state or judicial decision maker in the receiving country. In 2008, 13,505 UK asylum applications (70 per cent of all applications) were refused by the Home Office. During the same period, 10,720 appeals against Home Office decisions were heard, of which 2,475 (23 per cent) were allowed. Whilst this figure includes cases where home country conditions or other facts of the situation have changed, it also leaves room to suppose that a significant number of initial decisions may not be correct.²

These are unusual cases in law. In a personal injury claim, for example, there is usually a wealth of material from sources other than the claimant, for example, health and police records. In asylum cases, there are often only the narratives from applicants themselves. If they were tortured, for example, it is most unlikely that the state responsible will admit to the fact. This means that judges have to reach their determinations on very limited evidence and it becomes a matter of importance to examine how this is done.

Largely because of the paucity of supporting evidence, asylum decisions very often rest on a judgement of whether or not the claimant and their story are credible.³ The Independent Asylum Commission recommend that judges use 'common sense and experience' in judging asylum cases.⁴ Graycar explores the 'experience' of judges, in a discussion about judicial decision making. She concludes that much of the 'experience' judges use is personal experience and, at worst, amounts to the question 'what would I, or people I know, do in this situation?'.⁵ Credibility assessment has been the focus of criticism by a number of authors, who claim that these judgements are particularly open to subjectivity.⁶

² Home Office Statistical Bulletin: 'Initial decisions sometimes have a post-decision review on them for a number of reasons. An asylum decision by the Secretary of State can be later reviewed as a result of additional information and/or significant changes in the applicant's current circumstances and the relevant country of origin information', <<http://rds.homeoffice.gov.uk/rds/pdfs09/hosb1409.pdf>>.

³ R. Thomas, 'Evaluating tribunal adjudication: administrative justice and asylum appeals' (2005) 25 *Legal Studies* 462-98. C. Jarvis, 'The Judge as Juror Re-visited' (2003) *Immigration Law Digest* 7-23.

⁴ Independent Asylum Commission, 'Fit for purpose yet? The Independent Asylum Commission's Interim Findings', (London, 2008), 34. ⁵ R. Graycar, 'The Gender of Judgments: An Introduction' in M. Thornton (ed.), *Public and Private Feminist Legal Debates* (Melbourne, 1991), 262-82.

⁶ A. Macklin, 'Truth and Consequences: Credibility Determination in the Refugee Context', *International Association of Refugee Law Judges* (1998); and, 'The Truth about Credibility', *International Association for Study of Forced Migration* (Canada: Toronto, 2006). G. Coffey, 'The Credibility of Credibility Evidence at the Refugee Review Tribunal' (2003) 15 *IJRL* 377-417. 352

Kagan⁷ suggests that the solution to what is perhaps an inevitable subjectivity in credibility assessment is the practice of careful recording of the detail of each decision. For example, one of the features of claimants' accounts that is often taken by decision makers to be an indication of lying is internal inconsistencies in the claim.⁸ Kagan contrasts two forms

of decision – one where an official comments ‘I can tell if someone is lying or not in the first minute of the interview’ and a second where there is a written determination detailing the number and nature of the inconsistencies. The detailed justification is undoubtedly clearer and is available to appeal. However, this still does not require the decision maker to document the basis for believing that inconsistencies suggest lying. There is evidence that, in fact, inconsistency can be a poor indication of fabrication.⁹ If there is a general acceptance of an unfounded assumption about how people tell the truth, then written determinations simply allow that assumption to become enshrined in the system.

In order for asylum decisions to be made, assumptions about human behaviour and truth-telling are being made both by individual decision makers and by the asylum system as a whole. Which of these assumptions is in line with what we know about human behaviour and which is not is an empirical question.

There is a need for more empirically based knowledge in the asylum system.¹⁰ Before we can clarify which assumptions are based on valid established evidence based on empirical understandings of human behaviour, we need to know what assumptions are commonly being made by decision makers. This is the rationale for the current study.

2. Previous reviews of determinations

Reviews of written determinations have been conducted before.

Spijkerboer¹¹ reviewed the case files of 252 single female asylum applicants to the Netherlands raising questions concerning the role that gendered stereotypes play in asylum decisions. For example, a woman protesting about a missing son was characterised not as engaging in political activity, but as expressing her maternal grief. Spijkerboer shows how

⁷ M. Kagan, ‘Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determinations’ (2003) 17 *Georgetown Law Journal* 1-68.

⁸ P. A. Granhag, ‘Granting asylum or not? Migration board personnel’s beliefs about deception’ (2005) 31 *Journal of Ethnic and Migration Studies* 29-50.

⁹ J. Herlihy, P. Scragg and S. Turner, ‘Discrepancies in Autobiographical Memories - Implications for the Assessment of Asylum Seekers: repeated interviews study’ (2002) 324 *British Medical Journal* 324-27.

¹⁰ J. Herlihy and S. Turner, ‘Editorial - Asylum claims and memory of trauma: sharing our knowledge’ (2007) 191 *British Journal of Psychiatry* 3-4.

¹¹ T. Spijkerboer, *Gender and Refugee Status* (Aldershot: Ashgate Publishing, 2000).

emotion has to be expressed within ‘normal’ limits, a finding also seen in the experimental literature of jury decision making, where ‘appropriate’ emotional expression is associated with a higher likelihood of being judged credible.¹² Similarly, behaviour that fits with expected norms – often connected to gender – is more likely to be seen as credible. The mother who leaves her children behind when she flees persecution is not readily believed. This study also demonstrated rape being constructed as an act of male lust, even in the contexts of detention and interrogation.

Dauvergne and Millbank¹³ reviewed a series of written determinations from the Canadian Immigration Refugee Board (IRB) and the Australian Refugee Review Tribunal (RRT), examining how evidence was treated in each jurisdiction with regard to claims on the basis of sexuality. They found evidentiary practices and procedures to be flawed, and concluded that ‘this area of law encodes and

reflects homophobic stereotyping'.¹⁴

Rousseau, Crépeau, Foxen & Houle¹⁵ examined a sample of forty determinations where the decision had been a refusal of refugee status, but where other professionals involved (lawyers, doctors and psychologists) had disagreed with this conclusion. The authors formed focus groups involving researchers and experts in order to establish a list of legal, psychological and cultural factors likely to explain the divergence of opinion. Ten cases were examined in depth, in order to develop a description and categorisation of these factors. A grid was thus formed of coded items which could be applied to the remainder of the sample of determinations. This allowed a quantitative analysis of the importance of each of the factors and the interrelationships between them. They found problems in the legal conduct of hearings and a lack of understanding of the psychological impact of trauma, both on claimants, and, vicariously, on those hearing the stories of persecution. They suggest that vicarious traumatising provides an explanation for the significant levels of avoidance, lack of empathy, expression of prejudice, cynicism, denial and the trivialisation of extreme events that they found among the various actors, particularly decision makers. They found many examples of cross-cultural misunderstanding and they questioned the assumption, implicit in some of the cases, that the cultural norms of the court setting would be shared by claimants.

¹² G. Kaufmann, G. Drevland, E. Wessel, G. Overskeid and S. Magnussen, 'The importance of being earnest: Displayed emotions and witness credibility' (2003) 17 *Applied Cognitive Psychology* 21-34.

¹³ C. Dauvergne and J. Millbank, 'Burdened by Proof: How the Australian Refugee Review Tribunal has Failed Lesbian and Gay Asylum Seekers' (2003) 31 *Federal Law Review* 299-342.

¹⁴ *Ibid.*, at 1.

¹⁵ C. Rousseau, F. Crépeau, P. Foxen and F. Houle, 'The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board' (2002) 15 *JRS* 43-70.

Jarvis, a senior Immigration Judge in the UK, asked peers for a list of factors that they considered relevant to the assessment of credibility. These twenty-seven factors were then presented to a sample (n=44) of immigration judges in London who were asked to rate them from 1 (not important) to 10 (very important) in terms of their importance in credibility decisions in refugee status appeal hearings. She found indications of a lack of methodology and consistency in many areas, including the treatment of demeanour in oral hearings.¹⁶

These four studies have provided systematic analyses of determinations. There are other important contributions to this area of study. However they draw on expert or theoretical definitions in order to establish the focus of their analysis, using case examples to illustrate their points.¹⁷ To date, no-one has applied a data-driven, grounded analysis of the data of written determinations, using established qualitative methodology.

This study used grounded, data driven methods to develop a coding framework in order to identify assumptions reliably in judicial determinations. The aim was to identify and fully describe the assumptions underlying decisions made in refugee status determinations in the UK. This article first describes the method by which assumptions were identified and analysed and then shows the results of the analysis. In the final sections the findings are discussed, relating them to existing literature in the

field, before outlining a programme of research to further investigate the weight, importance and validity of the assumptions and their use in refugee law.

3. Method

3.1 Sample

Since this study is data, not theory driven, an opportunistic sampling of determinations was made. Two firms of solicitors were recruited to the study. Consent for the use of their files was obtained from clients who had received at least one appeal determination – whether positive or negative. Copies were made of each full written determination on the client's file. Copies were also made of the Reasons for Refusal Letter, for the purposes of clarification only. Determinations were dated between 2001 and 2007 and covered different countries of origin, varied reasons for claims (for example, political activity, sexual preference, gender, etc.) and claims involving and not involving medical evidence. By accessing

¹⁶ Jarvis, above n. 3

¹⁷ E.g., J. Millbank and L. Berg, 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants' (2009) 22 *JRS* 195-223. See also, R. Barsky, *Constructing a Productive Other: Discourse Theory and the Convention Refugee Hearing* (Montreal, Canada, 1994).

determinations through law firms, a sample of decisions from different immigration judges at different times and in different locations was obtained.

No comment is made on the nature of the decisions recorded in the determinations, whether they were positive or negative, nor on the validity of the assumptions found.

Ethical and research committee scrutiny for the study was provided by the University of Plymouth.

3.2 Procedure

A coding framework was established in stages. Firstly, JH read twenty determinations, noting any phrases that suggested assumptions on the part of the decision maker. This suggested an initial definition of what constitutes an assumption, and some initial categories and sub-categories.¹⁸ This initial definition was taken back through all twenty determinations, checking for any further examples under each of the defined categories and sub-categories, and for any examples of what seemed to be assumptions, but that had not been caught by the existing definition. KG was instructed in the overall aims of the research, and the categories and sub-categories as defined thus far. She read the same determinations, blind to JH's coding, coding examples to fit the definition and also looking for further examples that were not covered. At this stage JH had identified 309 examples of assumptions. KG identified a further twenty-five assumptions. Of the 309, JH had included sixteen that KG hadn't identified. All discrepancies between the coders in their use of the categories were resolved by discussion. A fresh set of determinations was then coded by both coders, until no more new assumptions were found – this took ten determinations. At least one example of each category was identified. No further examples were found that could not be coded. These ten determinations yielded 117 examples of assumptions that were submitted to the thematic analysis.

3.3 Analysis

An inductive, thematic analysis on the assumptions data set was performed.¹⁹ Thus the research question(s) evolved through the process of coding and describing the themes in the data, rather than being pre-conceived, or theory driven.

¹⁸ Please contact the first author for the full definition and coding structure.

¹⁹ See, V. Braun and V. Clarke, 'Using thematic analysis in psychology' (2006) 3 *Qualitative Research in Psychology*, 77-101, for a full description of this approach.

Thematic analysis is a broad term, which is often used loosely. This analysis was guided by Braun and Clarke²⁰ and an approach that is not purely positivist/empiricist was chosen, in that it acknowledges the contribution of the researcher. However, the analysis is essentialist, in that, for the purpose of this study, a unidirectional relationship between meaning and language was assumed, and no theorising is made about the constructionist process by which sociocultural conditions enable the accounts used. The starting point was that this set of people (the immigration judges) have a set of 'working hypotheses' about the world. These have developed through judicial knowledge and experience,²¹ and form the frame of Graycar's 'mirror'. With this thematic analysis the task was to report and describe, at the semantic level, with very little interpretation. The analysis does not go beyond the data to theorise or link to models of judicial thinking.

Every assumption was coded for potential themes and an initial thematic map was proposed. Each theme was then checked for internal homogeneity (the assumptions in a group should be similar to each other) and external heterogeneity (the assumptions in different groups should be different from each other) and the initial thematic mapping was reviewed. A final thematic map was developed in an organic, reiterative process between themes and data, producing a model that provided an overall account of the data examined. These two steps were performed independently by two of the authors and resolved by consensus (JH and KG). Finally a coherent and internally consistent narrative of each theme was constructed, drawing on the collated data extracts and relating themes to each other and to the data set as a whole, ensuring reliability of the relationships between thematic map, themes and data.

4. Results

The major themes in the assumptions extracted from the set of determinations were:

4.1 Theme 1: There – how others behave:

4.1.1 how individuals and families behave in danger & following trauma;

4.1.2 how authorities behave.

4.2 Theme 2: Here – the asylum system:

4.2.1 appellants;

4.2.2 other professionals/actors.

²⁰ Ibid., at 85

²¹ J. Barnes, 'Expert Evidence - The Judicial Perception in Asylum and Human Rights Appeals', paper prepared for the joint ILPA/IARLJ Conference (2004) 16 *IJRL* 349-57.

4.3 Theme 3: A truthful account.

4.3.1 demeanour.

Examples of inconsistent assumptions are also reported (4.4).

4.1 Theme 1: There – how others behave

4.1.1 Sub-theme – how individuals and families behave in danger and following trauma All of the determinations contained assumptions concerning what judges considered people 'would have done' in the situations described. This was a large theme with many exemplars. Credible individuals were assumed to act in accordance with their fears – assumptions that people behave 'rationally' in the face of danger. This begs the question of whose rationality is being applied. People who continued to live in a place where they were experiencing persecution were seen as undermining their own claim. An assumption of consistency of behaviour also ran through a number of the determinations. If someone had not acted due to fear in one situation, it was not accepted that they might then act in a similarly fearful situation at another time.

One thread running through this theme was assumptions about how families behave following traumatic events, including who decides which family member gets to flee the country and who looks after whom.

The appellant's story as to how she raised money to come to the UK does not ring true . . . The month after the appellant arrived in the UK, her mother followed. Her fare was paid for by an unnamed woman friend in <country>. Her mother left her six girls aged 9-15 by themselves to be looked after by neighbours. Apparently her mother was more at risk than [sic] her daughters [that is, the appellant's sisters]. What about her husband?

These also included assumptions made about the meaning of others' (possibly traumatic) experience to them, and to their families. This quotation is part of the same reasoning as the previous one:

Her husband sent her to this country ahead of anyone in his own family, including his sister who had been raped.

Included in this theme is a group of extracts which seem to speak directly to what is outside of the individual experience of the Immigration Judge. One extract speaks of part of an appellant's account which 'stretch[es] the imagination', and many speak of plausibility.

I do consider it implausible that a family in fear, on seeing a man throw something over the fence and into their garden . . . would go to investigate it.

Assumptions are made in relation to information that is known to the court in relation to the country from which the applicant is fleeing. In some cases country information is overridden:

we did not find it implausible that on occasions members of majority clans might assist members of minority clans especially as there had been a previous personal friendship.

but in others, the provided information takes priority:

the fact that both appellants said that the light-skinned Ashraf do marry the dark-skinned Ashraf is in complete contradiction to the information given to the fact-finding mission.

4.1.2 Sub-theme – how authorities behave

Another well-represented theme was immigration judges' assumptions about how authorities in other states will behave. It is not clear on what this knowledge is based.

if the authorities wanted to know anything about the appellant and his family . . . they could have easily made discrete [sic] enquiries [instead of arresting him].

It is possible that here, again, judges are applying expectations built on their own experience:

I do not find it credible that a public prosecutor who did not know the appellant at all would swear at him, at Kurds generally and at the appellant's mother.

Part of this sub-theme is the distinction, rarely made explicitly but sometimes apparent in assumptions, between what is deemed to be political activity by the decision maker and what may be perceived as political by others. The wearing, or not, of a veil, can take on political meaning in some contexts but not in others. Thus to make assumptions about who is and is not political from outside a situation may be problematic.

his previous alleged association with the MDC would significantly compound that vulnerability.

I find that the appellant had no activities at that time other than playing [traditional Kurdish] music and attending meetings.

4.2 Theme 2: Here – the asylum system

4.2.1 Sub-theme - appellants

The genuine appellant is assumed to know what they need to do to satisfy the asylum process, to know how to present themselves and any documentary evidence appropriately and to express emotion in a recognisable fashion. In the days of accessible and sufficient legal representation, it might be fairly assumed that, by virtue of representation, this knowledge would be in place. However, asylum seekers in the UK are increasingly

managing their applications with little or no support²² and these assumptions are accordingly more important to the course of justice.

we did not find it credible that if the appellant had fled <country> in fear of his life . . . that he would have made no effort to seek asylum when he arrived.

As well as knowing how to proceed through the asylum application and appeal processes, there is an assumption that appellants will abide by the rules of discourse. These ‘rules of conversation’ were delineated by Grice,²³ who identified four maxims: (a) The Maxim of Quality (roughly: ‘Say the truth!’); (b) The Maxim of Quantity (roughly: ‘Do not give more nor less information than is required!’); (c) The Maxim of Relation (‘Be relevant!’); (d) The Maxim of Manner (‘Be perspicuous!’).²⁴

These rules are of course predicated to the particular situation of the court. So ‘be relevant’ would mean relevant to the asylum system, thus assuming knowledge of what is and isn’t relevant. Grice’s suggestion was not that these maxims cannot be violated, but that when they are, further meaning is implied, such as comedic effect, irony, or, as is perhaps the case in the determinations in this study, fabrication.

none of the supporting letters from the sponsor or his family make mention of the appellant’s alleged depression. I am also surprised that they did not attend the hearing to give evidence.

In a determination that allowed an appeal, keeping to the rules of conversation meant that the appellant was judged as credible:

he gave his answers in a very measured way and he did not give the impression that he was exaggerating or seeking to embellish what he was saying.

There is also an assumption in this theme that appellants will know the extent of the information required of them and have no compunction about revealing what may be sensitive matters to the Court:

none of the three witnesses testified about any of the hardships faced by the appellant and her family.

the appellant [a man alleging persecution on the grounds of his homosexuality] denies having slept with the sponsor, which the sponsor [a UK citizen] says has occurred.

²² K. Ward, ‘ICAR Navigation guide Key issues: UK asylum law and process’, ICAR Navigation Guides (London, 2006).

²³ H. P. Grice, ‘Logic and conversation’ in P. Cole and J. Morgan (eds.), *Syntax and Semantics 3: Speech Acts* (New York, 1975).

²⁴ M. Dascal and J. Wroblewski, ‘The rational law-maker and the pragmatics of legal interpretation’ (1991) 15 *Journal of Pragmatics* 421-44.

4.2.2 Sub-theme - other professionals/actors

It is the role of the court to take information from sources relevant to the case and to apply judgement in

assessing the weight to be accorded to such information. Assumptions are made related to the length and methodology of clinical interviews and when it is stated that clinicians and other professionals rely solely on the appellant's story for their opinion.

Ms C's assessment of the appellant's circumstances was based on a single visit of one and a quarter hours during which she spoke to the appellant through an interpreter.

Examples in this sample showed not only assumptions about clinicians' judgements, but also about the 'clinical' judgements of others, arguably not at all qualified to make such judgements.

it is the appellant's representative who suggests the appellant sees a psychiatrist, but not until three months after the appellant's arrival.

Some of these assumptions suggested a reliance on other parties to make appropriate judgements, in the absence of which, the assumption was, there was nothing to report.

we do not have any evidence from the prison service or immigration detention service . . . to indicate that there had been any issues of this kind [bullying re. the appellant's sexuality].

4.3 Theme 3: a truthful account

The third theme, discovering the truth, comprised the assumptions apparent when judges described how they had come to the decision that an account was either truthful or fabricated. A true account was assumed to be detailed; in line with empirical knowledge about autobiographical memory,²⁵ a rich account is assumed to be more likely to be an account of events that actually happened.

However, there were also assumptions in line with the lay assumption that traumatic material is always clearly remembered.

given that rape is such a serious thing to happen to any women, I would have expected a raped person to know when they were raped. This is not the type of event which I would expect a person to forget about or confuse.

In line with other surveys of asylum decision making,²⁶ a prevalent assumption was that a true story should remain internally consistent, with

²⁵ D. B. Pillemer, *Momentous Events, Vivid Memories* (Cambridge, Mass., 1998).

²⁶ Granhag, above n. 8. Jarvis, above n. 3.

one assumption suggesting that the 'widely assumed premise that liars eventually slip up when carefully questioned'²⁷ may underlie decision making in the appeal process:

[he] was able to withstand a cross examination from Mr H that lasted for over one hour without any serious discrepancies coming to light.

In one determination being untruthful was damning to the whole,

he was probably guilty as found of selling on false passports – and that this matter further undermined the appellant’s late claim for asylum on the grounds of his sexuality.

but there were other examples where it was not,

even if I had disbelieved that aspect of the appellant’s evidence it would not mean that the remainder of his account was fabricated.

4.3.1 Demeanour

Despite demeanour being widely discredited as providing useful evidence for the courts in the US, Canadian, Australian and UK systems,²⁸ in the current sample there were assumptions made about what could be expected of an ‘intelligent man’. There was also one example of an apparent judgement relying on demeanour: ‘the opportunity of observing the appellant’ allowed the judge to conclude that:

his behaviour supports the appellant’s assertion [of being gay].

4.4 Inconsistent assumptions

Finally, it was notable that some assumptions made across the determinations examined contradicted each other (examples have already been provided in this article).

For one judge, a story about fleeing danger had to be plausible, within their understanding of such situations:

that the car should have been ready packed with the family’s important documents inside is . . . implausible.

whilst for another, some level of implausibility was acceptable:

while this part of the appellant’s account does stretch the imagination, that is not sufficient reason for coming to the conclusion that it is not credible.

²⁷ Kagan, above n. 7 at 29.

²⁸ Kagan, above n. 7.

5. Discussion

This is the first systematic inductive analysis of assumptions made within the asylum decision making process which draws on recognised qualitative methodology. The data set consists of a group of assumptions, representative of each of the categories of assumptions in a data-derived definition drawn from thirty UK determinations.

Themes found in the data represented assumptions about people’s behaviour in refugee producing countries, people’s behaviour in the asylum process, and the nature, or quality of a truthful account.

5.1 There: Human behaviour under persecution

In this large theme, there were many examples of judgements about ‘likely’ behaviour. Jarvis speaks of the danger of applying the question ‘what would I have done in this situation’ in order to make a judgement about others’ actions.²⁹

In order to function in the social world we all resort to stereotyping, that is, making assumptions about each other, and predictions about possible and likely behaviour. However, we form stereotypes from our own personal first and second hand experiences; they are reflections of the world we have inhabited thus far. The mental world we construct amounts to what we describe as ‘common sense’. Jarvis argues that this mental world is a ‘partial view of the world’. There are certain experiences that we just cannot all have, and some that we cannot even imagine. In these realms our otherwise useful stereotypes are insufficient. When judges are asked to make decisions in such realms, what are they to draw on? Graycar suggests that they still draw on their own experiences, their own version of ‘common sense’. It could be argued, with Barnes,³⁰ that judges have more understanding than most of the behaviour of appellants in asylum courts, but Graycar cites Justice Bertha Wilson of the Canadian Supreme Court, criticising the ‘belief that judges and juries are thoroughly knowledgeable about “human nature” and that no more is needed’.³¹ More is indeed needed if these crucial decisions are to be the best decisions it is possible to make in this difficult area.

This is further discussed by Kagan,³² who considers that requiring an asylum account to be plausible ‘adds nothing’. He argues that a judgement of implausibility can only be valid if it is justified by referring to information about the country in question, in which case it is a finding of external

²⁹ Jarvis, above n. 3.

³⁰ Barnes, above n. 21.

³¹ Graycar, above n. 5 at 278.

³² Kagan, above n. 7 at 33.

inconsistency. A finding of plausibility based on ‘common sense’ cannot be acceptable, he argues, since common sense may differ across countries and situations.

5.2 Here: consideration of evidence from others

Judgements have to be made about the quality of expert evidence to the court. However, as Rhyss Jones and Verity-Smith warn, “[c]onsideration and evaluation” [of medical evidence] cannot amount to the ability to replace clinical judgement with judicial’.³³

Again, to quote Rhyss-Jones and Verity-Smith ‘Is an hour sufficient time for a very experienced psychiatrist to examine a claimant and reach a diagnosis? More to the point, who is best placed to determine clinical practice in this matter?’.³⁴

5.2.1 Nature of a truthful account

Although there is a strong lay belief that ‘keeping the story straight’ is the hallmark of a truthful account,

this is contrary to a growing empirical literature emphasising that memory for traumatic events is often inconsistent and ill-recalled.³⁵

5.2.2 *Asylum judgments*

This is an important area of law, as it bears the weight of our immigration policy and border control, as well as being potentially crucial to individuals' lives.³⁶ It is an interesting area of law because decision makers make judgements with little or no objective evidence. Due to the paucity of objective evidence, these decisions are inevitably based on assumptions about the content and quality of the information presented. These assumptions draw on subjective understandings of human interaction and behaviour.

Where there is subjectivity there is inevitably inconsistency. If decisions are being made inconsistently, drawing on divergent assumptions, it is imperative that a methodology be applied with which to study which

³³ D. Rhyss-Jones and S. Verity-Smith, 'Medical Evidence in Asylum and Human Rights Appeals' (2004) 16 *IJRL* 381-410 at 386.

³⁴ *Ibid.*

³⁵ E.g., above n. 9; see also, C. A. Morgan, G. Hazlett, A. Doran, S. Garrett, G. Hoyt, P. Thomas, M. Baranoski and S. Southwick, 'Accuracy of eyewitness memory for persons encountered during exposure to highly intense stress' (2004) 27 *International Journal of Law and Psychiatry* 265-79; T. Valentine and J. Mesout, 'Eyewitness identification under stress in the London Dungeon' (2009) 23 *Applied Cognitive Psychology* 151-61.

³⁶ R. Thomas, 'Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined' (2006) 8 *European Journal of Migration and Law* 79-96.

assumptions are in line with the current, best available knowledge. Without accepted 'yardsticks' by which to examine asylum decisions, governments and immigration judges remain beyond criticism.³⁷ It also becomes important as more time pressure is put on decision makers. We use assumptions and stereotypes as heuristics to help us make decisions when we lack the time to gather more idiosyncratic information about the situation on which we must decide.³⁸

5.2.3 *Future research*

What these findings do not tell us is which of these assumptions are consistent with current knowledge on human behaviour, particularly during and following situations of danger, and the process of remembering and presenting an account of possibly traumatic situations in the context of a legal process. Empirical knowledge is deemed to be the best knowledge available in medical and many other settings.

The data from the current study provides the basis of an agenda for improvement and contribution to this process. However, alone, a qualitative data driven study like this does not provide all the answers. The next step is to assess how frequent and how crucial the assumptions identified here are in current decision making processes. This will involve further collaboration between health and legal professionals. From this, priorities for further empirical (hypothesis driven) research will be derived. It is known that the assumption that inconsistency indicates truthfulness is viewed by decision makers as

helpful from previous studies in Sweden³⁹ and the UK.⁴⁰ Anecdotally, it would seem to be prevalent in actual decisions, as well as crucial – practitioners will be aware of credibility assessments which rest on the issue of internal inconsistencies in the claimant or appellant’s accounts. This should be shown systematically. Work is underway to gather scientific evidence of other psychological reasons for inconsistency in traumatised asylum seekers. Having submitted the other assumptions identified in this study to a survey of frequency and importance, it will be possible to submit those key assumptions to hypothesis testing using scientific methods.

5.3 Limitations of the study

The sample was restricted to adults, to facilitate the consent process, and because asylum decision making in the case of children involves specific

³⁷ G. Noll, ‘Introduction: re-mapping evidentiary assessment in asylum procedures’ in G. Noll (ed.), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Leiden, 2005).

³⁸ see, T. Spijkerboer, ‘Stereotyping and Acceleration - Gender, Procedural Acceleration and Marginalised Judicial Review in the Dutch Asylum System’ in Noll (ed.), *ibid.*

³⁹ Granhag, above n. 8.

⁴⁰ Jarvis, above n. 3.

questions (for example, age determination) that were not the focus of this study. The analysis was performed by psychologists with no legal training. Thus it may be that some of the legal aspects of the determinations were misunderstood. This may, on the other hand, be a strength in terms of the stated aim to perform an analysis that is data-driven, rather than trying to fit any pre-existing theory or framework.⁴¹

Some of the assumptions were made by judges in the course of their own thinking and decision making processes; others are assumptions enshrined in policy. One example of this is the UK Home Office directive regarding the claiming of asylum in the first country of safety. Decision makers are required to regard a failure to do so as damaging to credibility.⁴² However, this study does not distinguish between assumptions made at the system or the individual level. It is the intention to subject any assumptions that emerge in this analysis to empirical enquiry.

6. Conclusion

Established, data-driven, qualitative methodology was used to identify and classify assumptions in UK refugee status determinations. Further research efforts are needed to identify which are the most important – that is, frequent and crucial – of these assumptions, and then to establish which of these key assumptions can be said to be well-founded, that is, consistent with empirical findings, and which not. Where the current knowledge base cannot answer these questions, cross-disciplinary primary research is needed to address this area and to ensure that this crucial area of decision making is based on sound empirical knowledge.

By drawing on the authority of the scientific method, more empirical knowledge can be introduced into decisions made in the refugee status determination process such that the best decisions possible are made consistently for all asylum claimants, in a system in which we can have full confidence. This agenda needs collaboration and support across legal and medical professions.

41 Braun & Clarke, above n. 19.

42 Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.