

# **Procedural Fairness in Asylum Appeal Hearings through a Structure and Agency Lens**

**Lauren Cooper**

**School of Law and Politics**

**Cardiff University**

**DECEMBER 2021**

**This thesis is submitted in partial fulfilment of the requirements for the  
degree of Doctor of Philosophy (Law)**

## **Abstract**

Asylum seekers are uniquely vulnerable; they often have little knowledge of the English language or legal process and have few country, family, or support networks to help guide them through it. The UK is bound by international law to protect this group, but whilst it may be following the letter of its international obligations, it may not always act in accordance with the spirit in which these obligations were made in order to provide access to justice for those seeking protection.

This thesis investigates whether there is space for asylum seekers to assert agency in their asylum appeal, highlighting some of the structures which hinder or facilitate this ability. In so doing, the thesis responds to broader issues of procedural fairness and access to justice, with a focus on effective communication. It presents a theoretically and empirically grounded investigation into procedural fairness in the asylum appeal hearing, through a structure and agency lens, and contributes to the fields of refugee law, communication studies, and empirical legal research by improving understanding of the procedural challenges and legal structures faced by asylum seekers in their appeal hearing.

A multi-method approach of 90 court observations and 21 semi-structured interviews is used in an attempt to apply structuration theory to a non-ideal society to investigate procedural fairness and access to justice in asylum appeal hearings. This allowed for an understanding of the meanings, understandings, and experiences that asylum seekers attach to procedural fairness and access to justice, and an exploration of how these experiences intersect with the behaviours and experiences of other actors within the process; considering whether the right to a fair hearing is undermined by increasingly hostile policies and barriers to agency.

It is argued that, whilst legal structures, hostile policies, and the agency of others work to constrain the ability of the asylum seeker to assert agency in their appeal, they are able to carve out space to communicate effectively, through access to effective interpretation and legal representation, and by using the resources available to them, thus enhancing the likelihood of a fair hearing and access to justice.

## **Acknowledgments**

Firstly, to the nine asylum seekers who gave up their time to talk to me. Without you, there would be no thesis. You are all so kind, and are undoubtedly some of the bravest people I have ever met. Thank you for agreeing to be interviewed during such hard times. Whilst I cannot begin to fathom the challenges you have faced to get to this point, I hope I have managed to do justice to your stories in this research. Thank you to the legal representatives for finding time to talk so openly with me. Your insights have been invaluable.

To Bernie and Rachel. I feel so lucky to have had you both as not only supervisors, but role models, therapists, cheerleaders and, where necessary, purveyors of tough love. Thank you for helping me balance the demands of a PhD with being an international athlete. You helped me to believe that I could do both. Thank you for being accepting of my quirks, providing workarounds, and taking the time to sugar coat criticisms for the sake of my sanity.

To my family, thank you for always being there for me, and for your unwavering support, especially when you had no idea what I was talking about. Your faith in my ability far surpasses my own, and I will be forever grateful to you for constantly reminding me that I can do anything I put my mind to. Thank you for being so openly proud of every little milestone, for being a captive audience whilst I rehearsed presentations and for providing free proofreading services throughout.

To Matthew (and Daisy), for keeping me grounded. Your constant questioning of my timelines and techniques meant that, despite the numerous distractions you provided, the PhD was never far from my mind. Our radically different viewpoints on every aspect of my research have ensured that I have no fear of others criticising my work- I now know that my arguments are robust throughout. There's no one I would rather have by my side, or looking over my shoulder. Thank you.

To all of the staff at the Cardiff School of Law and Politics, thank you for making me feel so welcome and valued. And of course, to the postgraduate community at 8-10 North Road. I have never met a group of more intelligent, kind, warm hearted, funny individuals. My life is brighter for having you in it.

To CUAC, especially Sarah, Cadie, and James, for reminding me that there is life outside the PhD, and for making me feel old at every opportunity. Your talent, hard work and resilience are inspirational.

<b>Chapter 1- Introduction</b>	<b>1</b>
1.1 Contextualising the ‘asylum problem’ in the UK.	1
<b>Chapter 2- Legal Context; how global and domestic laws protect refugee rights.</b>	<b>18</b>
2.1.1 Defining fairness in the legal context.	19
2.1.2 Procedural and substantive fairness in asylum appeals.	20
2.1.3 Justification for focussing on procedure.	21
2.2 Refugee Protection in International Law.	22
2.2.1 Who is a refugee?	22
2.2.2 The principle of non-refoulement.	23
2.2.3 Who falls within the Convention definition?	24
2.2.4 Seeking an adequate definition of persecution.	25
2.2.5 What constitutes a ‘well-founded’ fear?	27
2.2.6 European Convention on Human Rights (ECHR).	29
2.2.7 Reception, Procedures and Qualification Directives.	30
2.3.1 The positive correlation between increasing numbers of asylum applications, and harsher immigration controls being introduced.	33
2.3.2 Good race relations or more of the same; 1997 New Labour.	34
2.3.3 Further constraints under the <i>Nationality, Immigration and Asylum Act 2002</i> .	36
2.3.4 Aims of deterrence under the <i>Asylum and Immigration (Treatment of Claimants) Act 2004</i> .	37
2.3.5 Prioritising speed and efficiency over fair decisions; NAM and the <i>Immigration, Asylum and Nationality Act 2006</i> .	38
2.3.6 Deterrence through emphasising the negative aspects of asylum: The UK Borders Act 2007.	40
2.4.1 Too many asylum seekers?	41
2.4.2 Policy change as a result of social justifications.	42
2.4.3 Economic and social justifications.	43
2.5 What is a fair asylum system?	45
2.6 Individuals in the asylum process in the UK – The role of the appeal.	45
2.7 The assessment of credibility in asylum cases.	50
2.7.1 Shortcomings of narrative evidence.	53
2.7.2 Linguistic and cultural barriers.	54
2.7.3 Assuming the worst- A culture of disbelief.	55
2.8 Legal representation as a necessary facet of access to justice.	57
2.9 Conclusion	58
<b>Chapter 3- A Non-Ideal Theory of Justice as Fairness through a Structure and Agency Lens</b>	<b>60</b>

<b>3.1 What is justice?</b>	60
<b>3.1.1 Justice as Fairness</b>	61
<b>3.1.2 Rawls' original position and principles of justice</b>	62
<b>3.1.3 Moral Powers- the capacity to be rational and reasonable</b>	64
<b>3.1.4 Rawls' international theory</b>	65
<b>3.1.5 Ideal v non-ideal theory</b>	67
<b>3.2 Justice as fairness for asylum seekers?</b>	69
<b>3.3 The role of agency in justice as fairness</b>	72
<b>3.3.1 Are asylum seekers effective agents?</b>	73
<b>3.4 Competing definitions of structure</b>	76
<b>3.4.2 Human and non- human resources- virtual or actual?</b>	78
<b>3.5 Conceptualising the relationship between structure and agency.</b>	80
<b>3.5.1 Giddens' attempt at clarifying the relationship; Structuration theory.</b>	81
<b>3.5.2 The importance of duality of structure.</b>	83
<b>3.6 The effect of knowledge, power, and control on agency.</b>	84
<b>3.7 Using structuration theory in practice; the applicability of the theory to empirical studies.</b>	85
<b>3.7.1 Applying structuration theory to Refugee Studies.</b>	86
<b>3.8 Language as a structural constraint.</b>	89
<b>3.9 The role of legal representation in enabling appellants to be effective agents.</b>	89
<b>3.10 Conclusion.</b>	90
<b>Chapter 4- Methods and Methodology</b>	92
<b>4.1 Overview.</b>	92
<b>4.2 Key questions and hypotheses.</b>	94
<b>4.3 A reflexive approach to methodology, epistemology, and ontology.</b>	95
<b>4.4 Asylum appeal hearings in Wales- Situating the research.</b>	98
<b>4.5 Research design</b>	102
<b>4.6 Enhancing validity and reliability through trustworthiness.</b>	104
<b>4.7 Ethics and anonymity.</b>	105
<b>4.8 Using ethnography as a starting point to capture the everyday realities of asylum appeal hearings.</b>	108
<b>4.9 Observations on observation.</b>	109
<b>4.11 Limitations of the data collection, and variations to the original project.</b>	120
<b>4.12 Conclusion.</b>	121
<b>Chapter 5- 'Telling the judge my story'. Strategies used by appellants to communicate effectively and assert agency in their asylum appeal hearing.</b>	122
<b>5.1 The relationship between structure and agency</b>	123

5.1.1 The role of the individual- are asylum seekers effective agents?	123
5.1.2 Agency in the face of ontological security.	125
5.1.4 Asylum seekers can assert agency through using the resources available to them.	127
5.2 Methods.	132
5.3 Transcending cultural and linguistic barriers through discourse.	133
5.4 The importance of demeanour and non-verbal agency- the role of eye contact and body language.	138
5.5 Trust as a means of enabling agency.	142
5.6 Agency through the eyes of legal representatives and asylum seekers- a common thread of evidence.	144
5.6.1 Bringing witnesses to the appeal hearing.	152
5.6.2 'The most effective example of agency? Turning up, answering questions.'	153
5.7 Is there a lack of agency on part of the asylum seekers during the hearing?	155
5.7.1 Constraining agency for the good of the case?	159
5.8 Conclusion.	160
Chapter 6- Language and the Role of Interpreters in Asylum Appeal Hearings.	163
6.2 The right to interpretation.	165
6.3 Interpreters in literature.	166
6.4 Limits of interpretation: Limits of the interpreter in the appeal.	168
6.4.1 Cultural and dialect difference.	168
6.4.2 Judicial guidance.	169
6.4.3 Euphemisms and omissions.	169
6.5 Methods.	170
6.6 Primary Analysis.	171
6.6.1 The importance of interpreters: Absence in observations.	171
6.7 Behaviour of other parties.	173
6.7.1 Interpreters and time.	175
6.7.2 Importance of interpretation in interview data.	179
6.8 Are interpreters effective?	180
6.8.1 What makes an effective interpreter?	180
6.9 'Hit-and-miss' interpretation.	184
6.10 Ineffective interpretation.	187
6.10.1 Misinterpretations.	190
6.10.2 Culture and dialect.	195
6.10.3 Simultaneous interpretation.	198

<b>Chapter 7: Effective communication in the asylum appeal hearing- the role of legal representation.</b>	202
<b>7.1.2 Representation is necessary to redress power imbalances within the appeal.</b>	205
<b>7.1.3 Knowledge in an adversarial system.</b>	206
<b>7.2 What constitutes effective representation?</b>	208
<b>7.4 Methods.</b>	211
<b>7.5 Legal representation in empirical data.</b>	212
<b>7.5.1 Are representatives necessary in asylum appeals?</b>	212
<b>7.5.2 Are lawyers more important than asylum seekers?</b>	213
<b>7.5.3 Asylum seekers' thoughts on the importance of representatives.</b>	214
<b>7.5.4 Effective communication is a central element to justice.</b>	215
<b>7.6 Evidence of effective representation in asylum claims.</b>	218
<b>7.6.1 The importance of procuring relevant evidence in asylum claims.</b>	219
<b>7.6.2 Effective representatives interrupted HOPO's inappropriate questioning.</b>	220
<b>7.6.3 Preparing the client- Effective explanations.</b>	221
<b>7.6.5 Supporting clients- Building trust.</b>	224
<b>7.6.6 Identifying misinterpretations.</b>	226
<b>7.6.7 Endorsements of representatives from asylum seekers.</b>	227
<b>7.7 Ineffective representation</b>	228
<b>7.7.1 Evidence of ineffective representation.</b>	228
<b>7.7.2 Poor presentation of evidence and submissions.</b>	229
<b>7.7.3 Lack of engagement with clients.</b>	231
<b>7.7.4 Failure to adequately consult with the client before the hearing.</b>	233
<b>7.8 Conclusion.</b>	235
<b>Chapter 8- Conclusion</b>	238

## Chapter 1- Introduction

### 1.1 Contextualising the ‘asylum problem’ in the UK.

The United Nations Refugee Agency (UNHCR) has estimated that at the end of 2020, 82.4 million people around the world had been forced from their homes due to persecution, conflict, and human rights violations.<sup>1</sup> This number includes 29.6 million refugees, 4.2 million asylum seekers, and 45.7 million internally displaced people.<sup>2</sup> In the same year, 32,423 asylum applications were made in the UK. As a signatory to the 1951 Refugee Convention,<sup>3</sup> the UK is obliged to protect these asylum seekers, but due to the number of applications, recent governments have attempted to limit the number of asylum seekers granted refugee status.<sup>4</sup> Of these 32, 423 applications, the UK offered some form of protection to 16,952 people, 8% lower than the previous year, although higher than levels seen prior to 2019.<sup>5</sup>

This is not a recent problem. Since the late 1990s, debates about asylum seekers in the UK, as in many other European countries, have been dominated by concerns about the high number of asylum applications compared to the mid-1980s, and a desire to reduce the numbers reaching the UK to seek asylum. With immigration playing a key part in the debate around the UK’s decision to leave the European Union in 2016, the topic has remained highly politicised in recent years.<sup>6</sup> During this debate, many right-wing politicians have explicitly argued that leaving the EU would bring about a decrease in the number of immigrants, and a higher sense of Britishness, which would be a benefit to the UK.<sup>7</sup>

---

<sup>1</sup> UN High Commissioner for Refugees (UNHCR), ‘Mid-Year Trends 2020’ (2020) <<https://www.unhcr.org/statistics/unhcrstats/5fc504d44/mid-year-trends-2020.html>> accessed 13 March 2021.

<sup>2</sup> Ibid.

<sup>3</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

<sup>4</sup> Frances Kendall, ‘“Catch-22”? The Assessment of Credibility in UK Asylum Applications’ (Master’s thesis, Malmo University 2020).

<sup>5</sup> Home Office National Statistics, *How many people do we grant asylum or protection to?* <https://www.gov.uk/government/statistics/immigration-statistics-year-ending-june-2020/how-many-people-do-we-grant-asylum-or-protection-to#:~:text=The%20UK%20offered%20protection%20%E2%80%93%20in,levels%20seen%20prior%20to%202019> accessed 13 March 2021.

<sup>6</sup> Andrew Geddes, Leila Hadj-Abdou and Leiza Bruma, *Migration and Mobility in the European Union* (2<sup>nd</sup> edn Macmillan 2020).

<sup>7</sup> Sophie Rose Shuttleworth, ‘Moving language: the language geographies of refugees and asylum-seekers in Glasgow’ (PhD thesis, University of Glasgow 2018).



This desire to reduce the numbers of asylum seekers reaching UK shores, and being granted protection, has been reflected in government policy, evidenced through the Home Secretary's aim to create 'a really hostile environment for illegal migration' in the UK in 2012.<sup>8</sup> Following Brexit, it is likely that further hostile policies will be introduced in the UK, including increased protection and maintenance for UK borders. This protection will be designed to allow 'good' migrants in, and to keep 'bad' migrants out.<sup>9</sup> The UK cites economic and social reasons to justify a restrictive approach to refugee protection. Such an approach is deemed necessary in order to exclude 'unsubstantiated' asylum claims and thus protect resources, maintain social cohesion, and identify and defend the country from terrorist activity. This indicates that asylum claims take place within a complex nexus of politics and morality where the priorities and values of the State are in conflict with those of individuals; the right of the individual to claim asylum, versus the right of the State to protect its own community. It is in both the State's interests and in the interests of individuals seeking asylum, that claims are determined fairly and accurately, ensuring that those who are entitled to refugee status or humanitarian protection are identified and granted protection accordingly.<sup>10</sup> However, in practice, the rights of the community often trump the rights of the individual.<sup>11</sup>

The ability to claim asylum in the UK has been restricted through various measures of control, including no-choice dispersal and the removal of permission to work,<sup>12</sup> and this hostile environment has been further enhanced by public media portrayals of 'bogus' asylum seekers.<sup>13</sup> An asylum seeker is defined as someone who

---

<sup>8</sup> The Joint Council for the Welfare of Immigrants, 'The Hostile Environment Explained' (2020) <<https://www.jcwi.org.uk/the-hostile-environment-explained>> accessed 15 March 2021.

<sup>9</sup> Sukhwant Dhaliwal and Kirsten Forkert, 'Deserving and undeserving migrants' [2015] *Soundings* 61, 49-61.

<sup>10</sup> Robert Thomas, 'Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined' [2006] 8, *European Journal of Migration and Law* 79.

<sup>11</sup> See for illustration Hathaway's argument on interest convergence/divergence. James Hathaway 'Can International Law be Made Relevant Again?' In James Hathaway (ed) *Reconceiving International Law* (Brill, 1997) pp XVII-XX.

<sup>12</sup> See Chapter 2, section 2.3.1.

<sup>13</sup> See for example, Daily Mail, 'Tories will be tough on "bogus" asylum seekers' (*Daily Mail*, 30 May 2001) <https://www.dailymail.co.uk/news/article-49963/Tories-tough-bogus-asylum-seekers.html>, James Slack, 'Up to 80,000 bogus asylum seekers granted "amnesty"' (*Daily Mail*, 8 December 2006) <https://www.dailymail.co.uk/news/article-404269/Up-80-000-bogus-asylum-seekers-granted-amnesty.html> Ian Drury, 'Only one in three failed asylum seekers end up leaving Britain as the others vanish into the "black

has been forced to flee from their home state, due to a well-founded fear of persecution based on a limited number of grounds<sup>14</sup>, who seeks protection, and despite media evidence to the contrary, there is no such thing as a ‘bogus’ or an ‘illegal’ asylum seeker. When seeking asylum, the individual enters into a legal process of refugee status determination, and everybody has a right to seek asylum in another country.<sup>15</sup>

Human rights, such as the right to seek asylum, are proposed to be universal, and available to all. When such a right is violated, there needs to be some form of effective redress; the availability for people to obtain some remedy. There is a need then, for access to justice. This thesis considers what access to justice means in practice for asylum seekers in Wales, through a fairness lens. It introduces the increasingly restrictive asylum policies in the UK and presents empirical data from eighteen months of courtroom observations, and interviews with asylum seekers and legal representatives. This data seeks to highlight the dual role of court actors in both enhancing fairness and perpetuating unfairness in the appeal system, and the tactics and resources used by asylum seekers to present their case to the judge. This chapter lays the foundations for an in-depth examination of procedural fairness in the appeal hearing through a brief discussion of the rationale behind the focus on asylum seekers, fairness, and access to justice in the asylum hearing, and the role of agency and communication. The aims of the thesis and contribution to knowledge are then discussed, before ending with an outline of the subsequent chapters.

## **1.2 Asylum seekers in the UK- vulnerable or threatening?**

Asylum seekers have been defined by the European Court of Human Right (ECHR) as a particularly vulnerable group in *MSS v Belgium*.<sup>16</sup> They are non-citizens, fleeing from their country of origin, who are denied critical rights within and between political domains.<sup>17</sup> When they reach the UK, evidence suggests that asylum seekers become victims of othering. ‘Othering’ is a process that ‘serves to mark and name those thought

---

economy”, damning report reveals’ (*Daily Mail*, 11<sup>th</sup> January 2009) <https://www.dailymail.co.uk/news/article-6579657/Only-one-three-failed-asylum-seekers-end-leaving-Britain.html> accessed 12 February 2021.

<sup>14</sup> These grounds are race, religion, nationality, political opinion, and membership of a particular social group. Refugee Convention (n 3), a1.

<sup>15</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) a14.

<sup>16</sup> [2012] ECtHR - M.S. v. Belgium, No. 50012/08.

<sup>17</sup> Michael Watts and Hans Bohle, ‘The space of vulnerability: the causal structure of hunger and famine’ (1993) 17 *Progress in Human Geography* 43–67.

to be different from oneself'.<sup>18</sup> Asylum seekers experience this as a process of marginalisation, disempowerment and social exclusion, which effectively creates a separation between 'us' and 'them'.<sup>19</sup> Rather than being seen as vulnerable people trying to escape threat, who need protection, they are seen as the threat, to national security and established ways of life.<sup>20</sup> In discourse, language of natural and biblical disasters are used to describe influxes of asylum seekers, such as 'floods' and 'swarms', suggesting that the UK is 'overrun' by this group.<sup>21</sup> They are also described as threats to security; they are 'illegal', and are often put in 'detention'. National press coverage has bolstered the 'us' and 'them' divide, identifying asylum seekers as potentially disruptive burdens.<sup>22</sup>

It has been argued that the criminalisation and 'othering' of asylum seekers has justified hostile policies that are detrimental to the integration of asylum seekers and refugees, such as the use of detention and the removal of the right to work for asylum seekers.<sup>23</sup> However, it may be argued that the government has a right and a responsibility to act in the interests of citizens, which may include preventing unwanted others from entering the country, or justifying the use of controls on asylum seekers and refugees.<sup>24</sup> This is discussed in more depth in Chapter 2, section 2.4.

Despite instances of othering emerging in the empirical data, it is outside the scope of this thesis to discuss it in any depth.<sup>25</sup> However, it cannot be ignored that

---

<sup>18</sup> Lois Weis, 'Identity formation and the process of 'othering': unravelling sexual threads' (1995) 9 *Educational Foundations* 17–33.

<sup>19</sup> Natalie Grove and Anthony Zwi, 'Our health and theirs: Forced migration, othering, and public health' (2006) 62 *Social science & medicine* 1931-42.

<sup>20</sup> Olga Bailey and Ramaswami Harindranath, 'Racialized 'othering' The representation of asylum seekers in news media' in Stuart Allen (ed), *Journalism: critical issues* (Open University Press 2005) 274-286.

<sup>21</sup> David Shariatmadari, 'Swarms, floods and marauders: the toxic metaphors of the migration debate' (*The Guardian*, 10<sup>th</sup> August 2015) <https://www.theguardian.com/commentisfree/2015/aug/10/migration-debate-metaphors-swarms-floods-marauders-migrants> accessed 10 January 2021.

<sup>22</sup> Maggie O'Neill, *Asylum, Migration and Community* (Polity Press 2010). See also ARTICLE 19 (with Cardiff School of Journalism) *What's the Story? Results from research into media coverage of refugees and asylum seekers in the UK* (TKO 2003).

<sup>23</sup> Margaret Malloch and Elizabeth Stanley, 'The Detention of Asylum Seekers in the UK Representing Risk, Managing the Dangerous' (2005) 7(1) *Punishment & Society* 53-71; Gareth Mulvey, 'When Policy Creates Politics: the Problematizing of Immigration and the Consequences for Refugee Integration in the UK' (2010) 23(4) *Journal of Refugee Studies* 437-462.

<sup>24</sup> Home Office, *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain* (February 2002) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/250926/cm5387.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/250926/cm5387.pdf) accessed 12 December 2020.

<sup>25</sup> For more information on 'othering' asylum seekers, see Amanda Haynes, Eoin Devereux and Michael Breen 'Fear, Framing and Foreigners: The Othering of Immigrants in the Irish Print Media' (2006) 16 *International Journal of Critical Psychology* 100-121; Grove and Zwi (n 20).

asylum seekers do face othering. This in part may be due to the ethnic minority backgrounds of the majority of asylum seekers. There are arguably racist structures within the UK asylum system, as the whole asylum system is set up to keep people (others) out.<sup>26</sup> Race was undeniably an issue in developing laws, and exclusionary discourse has been shown to focus on features such as ‘colour’ as a ‘signifier of imperfection or inferiority’.<sup>27</sup> Colour then, is synonymous with otherness. The lens put forward in the following two chapters could be used for future research into the effect of ‘othering’ in the asylum system.

These sections have shown that the UK asylum system must be placed in the context of an increasingly hostile environment for migrants as a whole.<sup>28</sup> Often, the decision-maker must decide whether the individual in front of them is a ‘bogus’ asylum seeker and thus unworthy of protection. The next section will discuss procedural fairness and access to justice in this increasingly hostile environment.

### **1.3 Fairness and access to justice in an increasingly hostile environment.**

Fairness is an important value of law. If fair procedures are employed, then individuals are treated with dignity.<sup>29</sup> In the asylum context, fairness is balanced with efficiency and cost. Fairness will be defined in Chapters 2 and 3, and a modified version of John Rawls’ justice as fairness will be taken forward. Rawls’ appeal to justice as fairness is attractive in framing access to justice in the asylum process because the original position places everyone on equal footing, and everyone should have a similar expectation of what justice means.<sup>30</sup> The concept is to be applied to ensure that the least advantaged members of society are considered.

In the UK, there is an idea of equal justice under the law, that like cases should be treated alike. Decision makers should properly consider the claims of asylum-seekers within the spirit, purpose, and principles of the Refugee Convention,<sup>31</sup> and there are guidelines in place for determining appeals, which are not dependent on

---

<sup>26</sup> Shirin Hirsch, ‘Racism, ‘second generation’ refugees and the asylum system’, [2019] *Identities*, 26(1), 88-106.

<sup>27</sup> David Sibley, *Geographies of Exclusion: Society and Difference in the West* (Routledge 1995).

<sup>28</sup> As discussed in sections 2.1, and 2.3 onwards.

<sup>29</sup> Robert Thomas, ‘Asylum appeals: The Challenge of Asylum seekers to the British legal system’ in Prakash Shah (ed) *The Challenge of Asylum to Legal Systems* (Cavendish Publishing 2005). John Rawls, *A Theory of Justice* (Harvard University Press 1971).

<sup>30</sup> See Chapter 2, section 3.1.

<sup>31</sup> Tawseef Yaqub Khan, ‘Investigating the British Asylum System for Lesbian, Gay and Bisexual Asylum Seekers: Theoretical and empirical perspectives on fairness’ (PhD thesis, University of Liverpool 2005).

race, gender, or whether the judge likes the appellant for example. The right to fair treatment is an important facet of legal philosophy,<sup>32</sup> and an accepted standard in UK law, associated with the principle of due process.<sup>33</sup> Although the philosophical conceptions of fair treatment in the legal process are nuanced, the central link between fairness and equality (or equal treatment) is inherent in many understandings. Fairness is vitally important in the asylum process as, if the claim is rejected, a life may be at stake.

Much attention has been paid to substantive fairness in asylum law by academics and policy makers, yet its day to day implementation often escapes critical academic scrutiny.<sup>34</sup> Nick Gill *et al* argue that this is because relatively few non-legal scholars study the law, meaning that most analysis is focussed on substantive and doctrinal legal issues rather than questions of process, implementation, and experience.<sup>35</sup> However, the perception of fairness is known to be at least, if not more, important than the outcome of legal processes for securing obedience to the law, and hence the rule of law.<sup>36</sup> Attitudes towards the law are centred on procedural fairness rather than the outcome. Agents of the legal system care about dignity and respect when it comes to legal authorities. This can be problematic as accounts indicate that the procedures asylum seekers go through, such as the asylum process, are unfair.<sup>37</sup> There is an expectation that procedures and standards of fairness will be equal wherever an asylum application is made. However, it is unclear as to how well this has been achieved in practice.<sup>38</sup> The ways in which the law is performed- the procedures employed- are a key mechanism of social reproduction, including social inequality.<sup>39</sup> This highlights the importance of the relationship between procedural fairness, structure, and agency, which is discussed in Chapter 3. This thesis will focus on

---

<sup>32</sup> Ibid.

<sup>33</sup> Timothy Endicott, *Administrative Law* (OUP 2009) 18.

<sup>34</sup> Nick Gill, Jennifer Allsopp, Andrew Burridge, Daniel Fisher, Melanie Griffiths, Jessica Hambly, Jo Hynes, Natalia Paszkiewicz, Rebecca Rotter, 'Experiencing Asylum Appeal Hearings: 34 Ways to Improve Access to Justice at the First-tier Tribunal' (Public Law Project, 2020) <https://publiclawproject.org.uk/resources/experiencing-asylum-appeals/> accessed 5 March 2021.

<sup>35</sup> Ibid.

<sup>36</sup> Tom Tyler, *Why people obey the law* (Princeton University Press 2006).

<sup>37</sup> Robert Thomas, 'Evaluating Tribunal Adjudication: Administrative Justice and Asylum Appeals' (2005) 25(3) *Legal Studies* 462-498. Patricia Ewick and Susan Silbey, *The Common Place of Law Stories from Everyday Life* (Chicago Series in Law and Society 1998).

<sup>38</sup> Nick Gill, Rebecca Rotter, Andrew Burridge, Melanie Griffiths and Jennifer Allsopp, 'Inconsistency in asylum appeal adjudication' [2005] *Forced Migration Review*.

<sup>39</sup> Tyler (n 37).

procedural fairness; on how asylum appeals are conducted, and how the legal context and procedural structures affect agency.

This research begins with the hypothesis that the UK asylum system is failing to treat asylum appeals with the procedural fairness required. As outlined above, the right to seek asylum is a fundamental human right, a right which, as a signatory to the Refugee Convention, the UK has unreservedly agreed to protect. However, there is an apparent contradiction between the UK's commitment to protecting refugees, and the increasingly restrictive policies adopted.<sup>40</sup> The following chapters look through a structure and agency lens to determine what procedural fairness means to the actors within the asylum process. Procedural fairness should lead to substantive fairness, but it is beyond the scope of this thesis to discuss substantive fairness in any depth. The focus will be on the nature of structures within the asylum system, considering whether they constrain or enable agency and effective communication, to investigate whether asylum seekers have access to justice. The next section provides a brief account of the asylum process in the UK, highlighting the link between the right to appeal, and procedural fairness.

#### **1.4 Procedural fairness in asylum appeals; the role of the appeal.**

As will be discussed in Chapter 2, section 2.6, in the UK, a claimant enters the asylum system by lodging an application at a UK port of entry, or by presenting in person to the Home Office. They first attend a short screening interview with the Home Office, followed by a much longer substantive interview. Following the substantive interview, the Home Office must then decide whether or not to grant refugee status, or some form of protection to the applicant, in the form of a grant or refusal letter. Applicants may be granted refugee status, or subsidiary protection if they do not meet the Refugee Convention's legal definition of a refugee but are still in need of international protection. The EU Qualification Directive provides subsidiary protection for those facing the death penalty or execution; torture, inhuman or degrading treatment or punishment; or threats from an international or internal armed conflict if returned to their country of origin.<sup>41</sup> The UK uses the legal term

---

<sup>40</sup> See Chapter 2, section 2.3.

<sup>41</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for

humanitarian protection to meet the standards of this Directive.<sup>42</sup> Applicants can also be given 'discretionary leave to remain', a form of temporary permission which is unlikely to be more than three years.<sup>43</sup> In the substantive interview, the burden of proof is on the asylum seeker, and the standard they need to prove is 'a reasonable degree of likelihood' that they would face persecution if returned to their country of origin.<sup>44</sup> A good quality initial decision is highly important as it may be difficult for the applicant to obtain legal representation to appeal, and poor decisions are difficult to challenge.<sup>45</sup> Despite the importance of a good quality decision, the actual quality has not matched this, and the process has received sustained criticism.<sup>46</sup> In 2019/20 almost half (48%) of initial claims were refused.<sup>47</sup>

Asylum refusals have a high rate of challenge, due to the consequences of asylum seekers being sent back to their country of origin. Unsuccessful applicants have a right of appeal to the Immigration and Asylum Chamber of the First-tier Tribunal. In the UK, tribunals were set up to be inquisitorial.<sup>48</sup> The Franks Committee outlined 3 fundamental objectives for tribunals; openness, fairness, and impartiality.<sup>49</sup> Tribunals were supposed to have the advantages of cost effectiveness, efficiency, accessibility, freedom from technicality, expedition, and expert knowledge, when compared with traditional courts.<sup>50</sup> Applying these principles to asylum appeal tribunals, it can be said that justice may be judged in terms of accuracy and fairness.

According to Robert Thomas, tribunals occupy a difficult position between the executive and judicial branches of government, and this tension is more evident in the context of asylum appeals than in other areas.<sup>51</sup> The decision maker must balance the

---

a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), a9(1)(a) (Qualification Directive).

<sup>42</sup> Home Office, *Humanitarian Protection* (May 2013)

<https://www.gov.uk/government/publications/humanitarian-protection-instruction> accessed 17 May 2021.

<sup>43</sup> Home Office, *Discretionary Leave* (June 2013) <https://www.gov.uk/government/publications/granting-discretionary-leave> accessed 17 May 2021.

<sup>44</sup> *R v. Secretary of State for the Home Department, Ex parte Sivakumaran and Conjoined Appeals (UN High Commissioner for Refugees Intervening)* [1988] AC 958, [1988] 1 All ER 193, [1988] 2 WLR 92.

<sup>45</sup> Gina Clayton and Georgina Firth, *Immigration and Asylum Law* (8<sup>th</sup> edn OUP 2018) Chapter 11.

<sup>46</sup> *Ibid.*

<sup>47</sup> Refugee Council, 'Asylum statistics Annual Trends (February 2020) <refugeecouncil.org.uk > wp-content > uploads > 2020/03>' accessed 12 January 2021.

<sup>48</sup> Andrew Bano, 'Fundamentally Different from Courts' (Presentation given to the Tribunals Judicial Training Group 20 February 2011) [https://www.judiciary.uk/wp-content/uploads/2016/01/bano\\_inquisitorial-interventions-pt1-summer2011.pdf](https://www.judiciary.uk/wp-content/uploads/2016/01/bano_inquisitorial-interventions-pt1-summer2011.pdf) accessed 5 December 2020.

<sup>49</sup> The concept of fairness is discussed in depth in Chapters 2 and 3.

<sup>50</sup> University of Oxford, *Report of Commission of Inquiry* (OUP 1966) vol 1, ch 3 (Franks Report).

<sup>51</sup> Thomas, 'Asylum appeals: The Challenge of Asylum seekers to the British legal system' (n 30).

competing interests of the individual, and the implementation of public policy. Whilst tribunals are purported to be less formal and adversarial than formal court litigation, they must be contextualised in light of the court-focused adversarial process adopted in the UK.<sup>52</sup> The knowledge and power disparities amongst the actors contributes to an adversarial feel to proceedings for appellants.

Despite issues with an adversarial process, and disparities in knowledge and power, the right of appeal is an important safeguard in terms of procedural fairness, as the judiciary is presumed to be independent. The asylum process is often deemed procedurally fair on the basis that the asylum seeker has access to an appeals system. Without a right of appeal, the UK would fail to adhere to its obligations under the Refugee Convention as, discussed below, the success rate at appeal is high, indicating that many decisions are overturned on appeal. This right of appeal allows appellants to present a well-prepared claim, and the opportunity to adduce supporting evidence. There is little scope for compromise at appeal hearings, as decisions are binary; protection is either granted or refused. Each case is highly fact specific, and appeals can be based on new evidence, in addition to identifying errors in the initial decision.

Asylum appeals in the UK are heard at one of 13 hearing centres. This thesis focusses on the sole asylum Tribunal in Wales; Columbus House, which is situated in Newport, Wales' third largest city. In 2020, 41% of initial decisions were overturned on appeal.<sup>53</sup> According to Thomas, one important aim of the appeal process is to ensure that accurate decisions are reached through fair procedure.<sup>54</sup> Whilst judges can consider extra evidence at these appeals, and decide if they will face persecution at the date of the hearing as circumstances in the appellant's country of origin may have changed, this figure suggests that some initial decisions may have been erroneous. This shows the necessity of appeals for procedural fairness.

As will be shown in section 2.2.5, in order to gain asylum, the claimant must show that they have a fear of persecution (subjective element) and that there are

---

<sup>52</sup> Ibid.

<sup>53</sup> The Migration Observatory, 'Asylum and refugee resettlement in the UK' (Briefing paper 4<sup>th</sup> December 2020) <https://migrationobservatory.ox.ac.uk/resources/briefings/migration-to-the-uk-asylum/> accessed 15 December 2020. Whilst this figure is proportionate to previous years, fewer appeals were heard in 2020 due to Covid-19. As will be discussed in section 4.4, Asylum Justice recorded a success rate of 77% in 2019.

<sup>54</sup> Thomas, 'Evaluating Tribunal Adjudication' (n 38).



reasonable grounds for believing that the fear is well-founded (objective element).<sup>55</sup> Credibility assessments can contribute to the 'well-founded fear' aspect. Asylum law compensates for the difficulties in adducing evidence by adopting a lower standard of proof; whether there is a 'reasonable degree of likelihood'. Although a lower burden of proof is adopted, it can still be difficult to attain. The UNHCR Handbook describes the asylum process as 'fact-finding', advocating a more positive approach to the asylum seekers' narrative on the part of the decision-maker.<sup>56</sup> Assessing credibility can be problematic, due in part to linguistic and cultural barriers to communication.<sup>57</sup> It is necessary to have flexible tests for determining credibility, due to the magnitude of an erroneous decision and the difficulties arising from the process of giving evidence. Many of the problems with the quality of decision making rests on an over-emphasis on, and/or a flawed assessment of credibility.<sup>58</sup> Despite making up just one aspect of the asylum claim, most refusals are based on credibility, with the Home Office claiming that the asylum seeker's story lacks credibility as a result of alleged inconsistencies in their answers, between their answers and the cited Country of Origin Information (COI), or because their story is deemed inherently unlikely due to Western assumptions.<sup>59</sup> The importance of credibility is discussed in Chapter 2, section 2.7 and throughout Chapter 5.

Research has shown that, throughout the asylum process, asylum seekers often experience difficulties including a culture of refusal and disbelief, delays, a lack of understanding of the language, their rights, or the legal system,<sup>60</sup> poor quality of interpreters,<sup>61</sup> and inadequate legal representation.<sup>62</sup> It has also been shown that asylum seekers have a general sense of being 'punished' for seeking asylum.<sup>63</sup> Some

---

<sup>55</sup> This is set out in UNHCR, 'Beyond proof: Credibility assessment in EU asylum systems' (2013) <http://www.refworld.org/docid/519b1fb54.html> accessed 30 March 2018.

<sup>56</sup> Ibid.

<sup>57</sup> See Chapter 6.

<sup>58</sup> Clayton and Firth (n 46).

<sup>59</sup> As discussed in Chapter 2, section 2.7 and Chapter 5, section 5.1.5.

<sup>60</sup> See Chapter 2.

<sup>61</sup> Helen Baillot, 'Hearing the Right Gaps: Enabling and Responding to Disclosures of Sexual Violence within the UK Asylum Process' (2012) 21(3) *Social and Legal Studies* 269-296.

<sup>62</sup> Helen MacIntyre, 'Imposed dependency: client perspectives of legal representation in asylum claims' (2009) 23(2) *Journal of Immigration, Asylum and Nationality Law* 181.

<sup>63</sup> Maria De Angelis, 'Female Asylum Seekers: A Critical Attitude on UK Immigration Removal Centres' (2019) 19(2) *Social Policy and Society*.

asylum seekers interviewed for this thesis reported that going through the system contributed to a loss of self-respect and self-esteem, addressed in Chapter 5.

Research has also shown that case outcomes differ widely, irrespective of similarity.<sup>64</sup> These inconsistencies can undermine our sense of justice; that like cases should be treated alike. Inconsistencies are also troubling, as disparate outcomes may indicate substantively incorrect outcomes.<sup>65</sup> Accuracy is important, and the system needs to apply the law correctly and objectively. At worst, an incorrect refusal may result in torture, persecution, or death,<sup>66</sup> and an erroneous positive decision will undermine the policy objective of maintaining immigration control.<sup>67</sup>

At appeal, asylum seekers face a range of challenges. As will be shown in Chapter 2, in addition to being unfamiliar with the English language and legal system, many asylum seekers carry the scars of the traumatic experiences which have led them to seek asylum.<sup>68</sup> They may struggle to disclose important aspects of their case, and their memory may be impaired.<sup>69</sup> Without an accessible process, appellants may be unable or unwilling to speak and participate in their appeal, and therefore important pieces of evidence may not be considered.<sup>70</sup> This would have an adverse impact on procedural fairness, and access to justice would be impaired.<sup>71</sup> This section highlights the complexity of the UK asylum procedure, showing a real need for procedural fairness and access to justice. As will be shown in Chapter 2, the legal context surrounding asylum is multifaceted, and constantly changing. Asylum seekers may therefore need support, from legal representatives and interpreters, to help navigate the journey of asylum, and to enable them to communicate their story effectively to the judge.

---

<sup>64</sup> Robert Thomas, 'Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom' (2008) 20(4) *International Journal of Refugee Law* 489.

<sup>65</sup> *Ibid.*

<sup>66</sup> Thomas, 'Asylum appeals: The Challenge of Asylum seekers to the British legal system' (n 30).

<sup>67</sup> See Chapter 2, section 2.5.

<sup>68</sup> Gill *et al*, 'Experiencing Asylum Appeal Hearings' (n 35).

<sup>69</sup> See Chapter 2, section 2.7.2.

<sup>70</sup> Helen Baillot, Sharon Cowan and Vanessa Munro, 'Reason to (Dis)believe: Evaluating the Rape Claims of Women Seeking Asylum in the UK' (2014) 10 *International Journal of Law and Context* 105.

<sup>71</sup> Gill *et al*, 'Experiencing Asylum Appeal Hearings' (n 35).

### **1.5 Structure, agency, and the importance of communication.**

Throughout this thesis, it will be argued that effective communication is a key facet of procedural fairness. In order to communicate their story to the judge during their appeal, asylum seekers need agency. This thesis engages with the general structure/agency debate, looking at procedural fairness and access to justice for the asylum-seeking population through a structuration lens. For the purpose of this thesis, the focus of agency will be on choice, and the asylum seekers' ability to communicate effectively and influence their case. I argue that agency may be viewed as a spectrum, where different agents stand at different points in terms of how much agency they possess. As will be discussed in Chapter 3, section 3.4, structures are defined as the external forces that have an effect on our decisions.<sup>72</sup> They constrain (and enable) the choices we are able to make. The definitions of structure and agency, and the relationship between the two are highly contested. This thesis uses Anthony Giddens' structuration theory to help explain this relationship; focussing on the duality of structure.<sup>73</sup>

Structuration theory considers the relationship and interactions between the structure of society and the agency of humans within that social structure. It allows us to move away from viewing asylum seekers as entirely independent actors, or as puppets whose actions are determined by structural mechanisms. This comes within the framework for developing a non-ideal theory of justice as fairness as the person in the modified original position is impacted by structuration theory, and structural constraints. They are both constrained and enabled by structures, and are able to assert agency in deciding their conception of the good.

This theoretical framework was selected in order to focus on the effect of structures on the agency of asylum seekers and their ability to communicate effectively in their appeal. Whilst agency is highlighted, structuration theory also emphasises the importance of structures in constraining and enabling agency, and this is taken forward throughout the following chapters. I argue that agency is constrained and enabled through knowledge and power, and the disparities between these in asylum appeal hearings.

---

<sup>72</sup> Anthony Giddens, *The Constitution of Society* (Polity 1984).

<sup>73</sup> See Chapter 3, section 3.5.1

By gathering and analysing empirical data, this research aims to develop a deeper understanding of the ways in which asylum seekers assert agency and communicate effectively in their hearing, and the structural forces which hinder and enable this ability, thus establishing an awareness of reality as experienced by asylum seekers through their behaviour and knowledge. The research question underpinning the study considers whether procedural fairness is linked to agency and effective communication. The hostile environment and restrictive policies outlined in section 1.1 create societal structures which can hinder the ability of the asylum seeker to assert agency. The following chapters will consider how these policies, alongside other structures, including language, affect the agency of the appellant in their appeal, with a focus on effective communication and procedural fairness.

The ability to communicate is central to human interaction and participation.<sup>74</sup> Language and communication underpin human rights and social justice,<sup>75</sup> as the ability to communicate freely and successfully underpins not only Article 19 of the Universal Declaration of Human Rights, but most other human rights as well.<sup>76</sup> However, recent research shows that asylum seekers face significant communication challenges in engaging with legal systems.<sup>77</sup> Linguistic and cultural barriers, and the complexity of the legal system means that understanding the asylum process is difficult for asylum seekers. There are significant disparities in knowledge and power between the actors in the appeal hearing, which can also hinder effective communication.<sup>78</sup> Few studies exist which consider how legal representatives, Home Office Presenting Officers (HOPOs), interpreters and asylum seekers actually negotiate understanding where these linguistic and cultural barriers exist. In order to enhance procedural fairness, this thesis will make several recommendations as to how communication can be improved in the appeal setting.<sup>79</sup>

---

<sup>74</sup> Sharynne McLeod, 'Communication rights: Fundamental human rights for all' (2018) 20(1) *International Journal of Speech-Language Pathology* 3-11.

<sup>75</sup> Ingrid Pillar, 'Linguistic intermarriage: Language choice and negotiation of identity in Multilingualism' in Aneta Pavlenko, Adrian Blackledge, Ingrid Pillar and Marya Teutsch-Dwyer (eds) *Second Language Learning, and Gender* (Mouton de Gruyter 2011).

<sup>76</sup> McLeod (n 75).

<sup>77</sup> Jeffrey Killman, 'Interpreting for asylum seekers and their attorneys: the challenge of agency' (2020) 28(1) *Perspectives* 73-89; MigrationWork, 'Quality of legal services for asylum seekers' (*Solicitors Regulation Authority*, 2016) [www.sra.org.uk/sra/how-we-work/reports/asylum-report/](http://www.sra.org.uk/sra/how-we-work/reports/asylum-report/) accessed February 10 2021.

<sup>78</sup> See Chapter 3, section 3.6, and Chapter 6, section 6.1.

<sup>79</sup> See Chapter 8.

## **1.6 Thesis aims and original contribution to knowledge.**

The main aim of this study is to explore access to justice in asylum appeal hearings, considering structural barriers faced by asylum seekers and the ways in which they overcome these barriers and assert agency. The themes underpinning this thesis are access to justice, procedural fairness and structure and agency. They are flexibly arranged and intersect frequently throughout the following chapters. The purpose of the thesis is to present a theoretically and empirically grounded investigation into procedural fairness in the asylum appeal hearing, through a structure and agency lens. I demonstrate the importance of procedural fairness and the influence of structure and agency within the asylum appeal system, providing a full and holistic account of the various ways in which asylum seekers are constrained and enabled by legal structures, and the resources used to assert agency and achieve procedural fairness in their appeal. I aim to contribute to an understanding of how structure, agency, and communication influence procedural fairness and access to justice for asylum seekers in Wales. More specifically, the aims of the thesis are firstly, to gain an understanding of the meanings, understandings, and experiences that asylum seekers attach to procedural fairness and access to justice and to explore how these experiences intersect with the behaviours and experiences of other actors within the process; and secondly, to consider whether the right to a fair hearing is undermined by increasingly hostile policies and barriers to agency.

Much of the work in the field of fairness and access to justice for asylum seekers focusses on the outcomes of asylum cases; and whether these are 'fair'. This thesis aims to move away from outcome and substantive fairness, to investigate whether the procedures followed in appeals are fair. As I did not pursue the outcome of cases I observed, or appellants interviewed (decisions are usually delivered by post after the hearings), I was able to guarantee that my study is focused on process rather than outcomes, thus remaining distinct from work that considers outcomes as the sole indicator of fairness and thus providing an original contribution to knowledge.

The examination of these structural barriers to justice is through a critical review of academic literature and original empirical research. The latter consists of a multi-method approach of 90 court observations and 21 semi-structured interviews in an

attempt to apply structuration theory to a non-ideal society to investigate procedural fairness and access to justice in asylum appeal hearings. Courtroom observations and interviews with legal representatives and asylum seekers give an original insight into procedural fairness and access to justice for asylum seekers throughout the following chapters. The multi-method approach used allowed me to examine experiences and situate them in broader society, whilst still recognising their subjectivity.

The theory used within this thesis is also original, as I further develop a non-ideal theory of justice as fairness, which would accommodate the asylum seeker as an outsider, and apply it to asylum seekers in the appeal hearing, through a structuration lens. Few studies consider how the actors in asylum appeal hearings actually negotiate understanding where linguistic and cultural barriers exist, and how these impact on fairness within the appeal. The thesis contributes to work on structuration theory, as the duality of structure is highlighted throughout. The findings provide new insights into the role of agency and communication in the asylum appeal hearing. I focus on access to justice on the ground; how structural factors intercede to make it difficult for asylum seekers to access justice, whilst also showing how asylum seekers use their resources to assert agency and tell their story. Whilst empirical literature in this field focusses heavily on structures and constraints, this thesis analyses episodes of agency, highlighting the resources used by asylum seeking appellants which enable them to be effective agents. The thesis also introduces original, empirical evidence of how power influences the appeal system, and how those with limited power carve out space for agency. Previous research is written *about* asylum seekers; this thesis gives them a voice.

Finally, this thesis considers what access to justice means in practice for asylum seekers in Wales. This is important given that a particular problem in Wales is a lack of immigration lawyers.<sup>80</sup>

---

<sup>80</sup> Jo Wilding, *Droughts and Deserts: A report on the immigration legal aid market* (2019) <http://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf>. Helen O’Nions, ‘Fat cat’ lawyers and ‘illegal’ migrants: the impact of intersecting hostilities and toxic narratives on access to justice’ (2020) 42(3) *Journal of Social Welfare and Family Law* 319-340; Stephanie Rap, ‘Access to Justice and Child-friendly Justice for Refugee and Migrant Children: International and European Legal Perspectives’ (2020) 2 *Europe of Rights & Liberties*.

## **1.7 Structure of the thesis.**

The thesis begins by providing background and context to the later chapters. Chapter 2 provides an overview and critique of refugee protection in the modern world, with a focus on domestic and global legislation. The chapter identifies the development of fairness in the system with regards to a fair hearing, focussing on procedural fairness. It introduces a focus on the development of appeal rights as a facet of access to a fair system of justice which will allow for a subsequent discussion of the role of agency in asylum appeal hearings throughout the remainder of the thesis. Through this chapter, I aim to consider whether the policies and legislation surrounding the asylum system promote fairness through ensuring that asylum seekers have access to justice and a fair hearing, and a chance to assert agency.

Chapter 3 moves on to consider procedural fairness as a necessary element of justice in the context of the asylum appeal hearing, and how it can be applied within this context. It introduces Rawls' theory of justice as fairness,<sup>81</sup> proposing a theoretical framework which is applicable to the non-ideal society of which asylum appeals are a part. Having argued for the importance of fairness and access to justice in asylum appeals, the chapter considers structuration theory as a lens through which to analyse procedural fairness within the multifaceted nature of the asylum appeals process, in order to examine different factors that constrain and enable agency.

Chapter 4 outlines and justifies the methods used to conduct this investigation before Chapter 5 investigates the tactics and resources used by asylum seekers to put forward their case in a way that is meaningful to them, and to assert their own agency. It argues that, whilst heavily constrained within the asylum appeals process, asylum seekers are able to demonstrate agency, through discourse, demeanour, trust, external evidence, and informal support networks.

Chapter 6 begins to explore the external factors which constrain and enable asylum seekers in their appeal hearing. The chapter highlights the role of language and communication, and the use of interpreters in asylum appeal hearings, considering whether they constrain or enable the agency of the asylum seeker, and

---

<sup>81</sup> Rawls, *A Theory of Justice* (n 30).

their role in achieving procedural fairness. I argue that language is both an agency and structural force as the means by which individuals and society communicate, and effective communication may be compromised for those who do not speak the mainstream language. I then consider whether effective interpreters can alleviate some of the discomforts faced by asylum seekers, such as not being able to communicate effectively, and not understanding the process.

In Chapter 7 I continue to explore the factors which constrain and enable asylum seekers and their ability to communicate effectively in their appeal hearing, focussing on legal representation. I examine the role of legal representatives, and whether they enable the asylum seeker to assert agency and further their case, or whether they constrain this ability. Finally, I draw together the analyses in Chapter 8, reviewing the evidence presented and providing recommendations to enhance procedural fairness and access to justice for asylum seekers in the appeal hearing.



## Chapter 2- Legal Context; how global and domestic laws protect refugee rights.

*'Fair? Nothing. Nothing is fair here. I don't understand what is happening, no one will help, the Home Office say I am liar. I don't know about the judge. Is he good? Is he nice? Will he listen? Those things would be a bit fair. But no'. (Asylum Seeker 8)*

### 2.1 Asylum Law in an Increasingly Hostile Environment.

Asylum policy has long been a topic of debate in the UK. Justice for asylum seekers comes from a protection framework, and the UK is obliged to protect refugees and those seeking asylum.<sup>82</sup> The tension between these legal obligations towards asylum seekers, and the political need to maintain effective immigration control has resulted in a continually changing legal landscape. Asylum claims take place within a complex nexus of politics and morality where the priorities and values of the State are in conflict with those of individuals. It is within this delicate balance that interconnections of agency are highlighted.<sup>83</sup> It is therefore in both the State's interests and in the interests of individuals seeking asylum, that claims are determined fairly and accurately, ensuring that those who are entitled to refugee status or humanitarian protection are identified and granted protection accordingly.<sup>84</sup> The international and domestic context in which asylum claims occur has a profound influence on asylum seekers' experiences of the claims process. To understand this context, in this chapter I will discuss the legal framework surrounding asylum in the UK, highlighting the emergence of increasingly restrictive legislation and policies, and considering the appropriate level of protection that asylum seekers should receive in the UK. Matthew Gibney argues that whilst great importance is given to the principle of asylum, in practice, great efforts are made to make sure that asylum seekers never reach the State that will provide this protection.<sup>85</sup> Despite this, the number of arrivals of those seeking asylum has increased.<sup>86</sup> Within the context of increasing asylum claims and increasingly limited resources, a delicate balance must be struck to ensure that asylum is not denied to those in the need of protection.

---

<sup>82</sup> Refugee Convention (n 3).

<sup>83</sup> Matthew Gibney, *The Ethics and Politics of Asylum Liberal Democracy and the Response to Refugees* (Cambridge University Press 2004).

<sup>84</sup> Thomas, 'Assessing the Credibility of Asylum Claims' (n 10).

<sup>85</sup> Gibney (n 84).

<sup>86</sup> UNHCR 'Mid-Year Trends 2020' (n 1).

I will identify the development of fairness in the system with regards to a fair hearing, focussing on procedural fairness. The chapter begins with a brief discussion of fairness as a conceptual framework before analysing the history of asylum laws which are applicable to the UK; both domestic and supranational. Fairness is discussed here as it is used throughout the development of UK asylum law, for instance as justification for regulation. The chapter demonstrates the use and need for procedural fairness in the asylum system. This sets the context for the discussion of what this means theoretically in terms of access to justice in Chapter 3. Having discussed the asylum laws which are applicable in the UK, the current process and procedures in place for seeking asylum are then analysed. This introduces a focus on the development of appeal rights as a facet of access to a fair system of justice, allowing for a subsequent discussion of the role of agency in asylum appeal hearings throughout the remainder of the thesis. This chapter lays the foundations for the arguments presented in chapters 5-7, through considering the distinction between refugee protection and immigration control; the competing interests which play out in the courtroom, with a focus on language and legal representation. The chapter ends by highlighting the potential impediments of the legal structures in place in the asylum appeal system in the UK, and whether they allow asylum seekers to assert agency and have their case heard fairly, in order to determine whether the system provides access to justice. This chapter fits into the thesis as agency is undermined through hostile policies, especially where an asylum seeker's credibility is questioned during the asylum process. Through this chapter, I aim to consider whether the policies and legislation surrounding the asylum system promote fairness through ensuring that asylum seekers have access to justice and a fair hearing, and a chance to assert agency.

### **2.1.1 Defining fairness in the legal context.**

Fairness is a guiding principle of international Human Rights law. It can be argued that people comply with the law because they believe that the law is just, and that abiding by it will result in a morally positive outcome. For the purposes of this thesis, fairness equates to justice.<sup>87</sup> Justice as fairness can provide justification and language for legal policy decisions. Manifestations of fairness include the protection

---

<sup>87</sup> See Chapter 3, section 3.1.1.

of rights and freedoms, such as the right to fair treatment. Whilst the Refugee Convention, the EU Qualification Directive, and the European Convention on Human Rights (ECHR) set out the eligibility criteria for those who should be afforded protection, aside from the EU Procedures Directive, none of the legal instruments discussed in section 2.2 stipulate how claims should be determined. The Procedures Directive sets out fair procedures and limits discretion, but still allows much discretion to States.<sup>88</sup> Governments therefore have discretion as to how they process asylum claims.

The right to fair treatment is an important facet of legal philosophy<sup>89</sup> and an accepted standard in UK law, associated with the principle of due process.<sup>90</sup> Although the philosophical conceptions of fair treatment in the legal process are nuanced, the central link between fairness and justice is inherent in many understandings.<sup>91</sup> Principles of fairness limit the exercise of power by decision-makers and is thus vitally important in the asylum process as, if the claim is rejected, a life may be at stake. Where physical or mental safety is concerned, a higher standard of fairness is needed.

### **212.1.2 Procedural and substantive fairness in asylum appeals.**

Procedural fairness can be defined as the step-by-step process that a case goes through; the procedures involved in a case, rather than the outcome. Procedural fairness also concerns the protection of fundamental rights and legal certainty. The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status sets out procedural requirements for asylum seekers. These include the right to a fair trial, transparency, and legal certainty, as well as the right to representation, correct judicial guidance and training, and impartiality.<sup>92</sup> However, the handbook does not stipulate

---

<sup>88</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, a10 (1) (a, d, e) and 8(2)(b) (Procedures Directive).

<sup>89</sup> Khan (n 32).

<sup>90</sup> Endicott (n 34).

<sup>91</sup> For example, according to Newman, in a democratic society justice should mean fair treatment for all under the law, and for Hart, fairness concerns treating like cases alike. Daniel Newman, *Legal Aid Lawyers and the Quest for Justice* (Hart 2013); H.L.A Hart, *The Concept of Law* (Oxford University Press 1961). Dworkin defines fairness as equal concern and respect. He believes in law as integrity, that the government should 'extend the same substantive standards of justice and fairness as it uses for some'. Ronald Dworkin, *Law's Empire* (Fontana Press 1986) 191.

<sup>92</sup> Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva 1992) 46.

the exact form of these requirements, which can lead to confusion, and misapplication.<sup>93</sup>

Procedural fairness also concerns the proper use of accurate and relevant guidance. This encompasses the right to hold the decision-maker to account. It includes the right to notice, the right to reasons for a negative decision being communicated, and the right to be consulted before a benefit is denied.<sup>94</sup> Public authorities must ensure that decision-makers are able to access accurate, up-to-date information. This is in order for decision-makers to be able to treat like cases alike, and to prevent lengthy, costly appeals. Conversely, substantive fairness focusses on the written or statutory law which governs relationships between parties. Whilst procedural fairness focusses on process, substantive fairness is concerned with retribution, outcome, success, and corrective justice.

### **2.1.3 Justification for focussing on procedure.**

The UK asylum system must be placed in the context of an increasingly hostile environment for migrants as a whole.<sup>95</sup> Often, the decision-maker must decide whether the individual in front of them is a refugee and thus worthy of protection. One important aim of the asylum appeal process is to ensure that accurate decisions are reached through fair procedure. Attitudes towards the law are centred on procedural fairness; people care about dignity and respect when it comes to legal authorities. This can be problematic as accounts indicate that the procedures asylum seekers go through, such as the asylum process, are not fair.<sup>96</sup> There is an expectation that procedures and standards of fairness will be equal wherever an asylum application is made.<sup>97</sup> However, it is unclear as to how well this has been achieved in practice.<sup>98</sup> This thesis will focus on procedural fairness; on how asylum appeals are conducted, and how the legal context and procedural structures affect agency. Before engaging with the restrictive legislation and policies in place internationally and in the UK, it is important to examine the legal definition as to who should be considered a refugee.

---

<sup>93</sup> Nick Gill and Anthony Good, 'Introduction' in Nick Gill and Anthony Good (eds) *Asylum Determination in Europe* (Palgrave 2019).

<sup>94</sup> Khan (n 32), Procedures Directive (n 89).

<sup>95</sup> As discussed in sections 2.1, and 2.3 onwards.

<sup>96</sup> Thomas, 'Evaluating Tribunal Adjudication' (n 38); Ewick and Silbey (n 38).

<sup>97</sup> This is the basis for harmonisation under the Common European Asylum System.

<sup>98</sup> Gill *et al*, 'Inconsistency in asylum appeal adjudication' (n 39).

## 2.2 Refugee Protection in International Law.

### 2.2.1 Who is a refugee?

Following World War II, the United Nations General Assembly established the Office of the United Nations High Commissioner for Refugees (UNHCR) in recognition that international standards for the rights of refugees and State obligations were needed.<sup>99</sup> This was a response devised by Western states to over 30 million displaced persons in Europe. The focus here was partly on the protection of the rights of refugees, but also to a large extent on controlling borders and state interest, evidenced in the leeway given to countries receiving refugees, with regards to the methods and criteria for determining refugee status.<sup>100</sup> A year later, in 1951, the *International Convention Relating to the Status of Refugees*<sup>101</sup> (The Convention) was drafted. The Convention is based on ‘the principle that human beings shall enjoy fundamental rights and freedoms without discrimination’<sup>102</sup> The preamble refers to the UN Charter and 1948 Universal Declaration of Human Rights.<sup>103</sup> These rights are universal and include the right to life, liberty, and security of the person; the right not to be subjected to torture or cruel, inhuman or degrading treatment or to arbitrary arrest; and the right to seek and enjoy asylum in other countries. The UK ratified the Convention in 1954, however legislation was not passed until 1993, entrenching it as a cornerstone of domestic legislation.<sup>104</sup> According to the Convention, a refugee is defined as:

*“Someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.”*<sup>105</sup>

Asylum seekers are those claiming refugee status, but who have not yet had their claim granted. The Convention definition must be interpreted in light of its object and

---

<sup>99</sup> UNHCR, ‘Statute of the Office of the United Nations High Commissioner for Refugees’ (Res 428 (v) 14 December 1950).

<sup>100</sup> Francesco Cherubini, *Asylum law in the European Union* (Routledge 2014). James Hathaway, ‘The Evolution of Refugee Status in International Law: 1920-1950’ (1984) 33(2) *The International and Comparative Law Quarterly* 348-380.

<sup>101</sup> Refugee Convention (n 3).

<sup>102</sup> Ibid.

<sup>103</sup> United Nations, ‘Charter of the United Nations’ (1 UNTS XVI, 24 October 1945) Universal Declaration of Human Rights (n 16).

<sup>104</sup> Liza Schuster and John Solomos, ‘Asylum, Refuge and Public Policy: Current Trends and Future Dilemmas in the UK’ (2001) 6(1) *Sociological Research Online*.

<sup>105</sup> Refugee Convention (n 3), Introductory Note.

purpose.<sup>106</sup> This indicates that the Convention should be interpreted in a pragmatic way as there needs to be protection for refugees, regardless of whether the exact circumstances were envisaged when drafting the Convention. It has been left to states to interpret the definition in light of non-binding guidance from UNCHR. As Millbank suggests, the wording in the convention has led to 'creative interpretation and expansion' by the judiciary, in an attempt to include modern day people and situations, legislation has largely been interpreted to allow governments to enforce more restrictive definitions.<sup>107</sup>

### **2.2.2 The principle of non-refoulement.**

Signatories to the Convention commit to the principle of non-refoulement; agreeing not to return a person to a place where their life or freedom would be under threat due to their race, religion, nationality, membership of a particular social group or political opinion.<sup>108</sup> This principle cannot be said only to apply to recognised refugees (people who have been accepted as a refugee after their claim been examined), as those seeking asylum could then be legally denied entry without having their claim examined, through a misuse of the State's coercive power. This would undermine both the Convention and procedural fairness. There is a consensus therefore that the principle applies regardless of whether a person has been formally recognised as a refugee.<sup>109</sup> It is difficult however, for a State to know when an applicant wishes to invoke the principle as it is unlikely that they could articulate the exact article or instrument of law. The attention of the State may be drawn to the principle if the claimant refers to a risk to their life, safety, security, or freedom. Kritzman and Spijkerboer propose that a State should also consider the principle whenever the person is from a refugee producing country, such as Somalia or Eritrea.<sup>110</sup> States argue however, that, if asked whether they mean to, or would like to invoke the principle, economic migrants and other non- asylum seekers would recognise the

---

<sup>106</sup> Ibid, Preamble.

<sup>107</sup> Adrienne Millbank, *The Problem with the 1951 Refugee Convention* (Department of the Parliamentary Library, 2000).

<sup>108</sup> Refugee Convention (n 3), a33.

<sup>109</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007)

<sup>110</sup> Tally Kritzman-Amir and Thomas Spijkerboer, 'On The Morality and Legality of Borders: Border Policies and Asylum Seekers' (2013) 26 *Harvard Human Rights Journal* 1-38.

opportunity and say yes. They argue then, that it is impossible to know who is genuinely in need of protection from refoulement.<sup>111</sup>

The principle of non-refoulement shows that responsibility for refugees is distributed between States on the basis of proximity: States have obligations to those refugees who arrive at or within their territorial boundaries.<sup>112</sup> States have a duty to consider the principle of non-refoulement, even if it not asserted by the claimant. However, they have no legal duty to provide assistance or protection to refugees beyond these boundaries (specifically when they do not come under their jurisdiction). Non-refoulement is generally now accepted by most States (at least in theory) once a claimant makes it to the border.<sup>113</sup>

### 2.2.3 Who falls within the Convention definition?

One of the fundamental issues with the Convention definition which can lead to inconsistent decisions and a lack of procedural fairness is that, despite the significant amount of discretion facilitated by the treaty, it remains outdated. It was written in, and for, a different era. Drafters were focused on what they thought was a temporary European problem- evidenced by the temporal and geographical limits which were not removed until 1967.<sup>114</sup> Additionally, the Convention was written during the aftermath of WWII, when there was a need for labour in developed countries; this need is no longer the determining force behind the Convention. Indeed, it is now used to limit access.<sup>115</sup> This has the effect of becoming a barrier that asylum seekers must face in their attempt to gain protection and the limitations of the universal definition creates problems with traversing linguistic and cultural boundaries.<sup>116</sup> In the current context, the elements in the treaty that facilitate the exercise of discretion are interpreted narrowly to limit claims. Whilst a need for unskilled labour would suggest liberal legislation rather than a barrier, the prevailing circumstances have contributed to a

---

<sup>111</sup> Aoife Duffy, 'Expulsion to Face Torture? Non-refoulement in International Law', (2008) 20(3) *International Journal of Refugee Law*, 373–390.

<sup>112</sup> Gibney (n 84) 240.

<sup>113</sup> Goodwin Gill and McAdam (n 110).

<sup>114</sup> Adrienne Millbank, 'The Elephant on the Boat: The Problem that is the Refugee Convention' (2010) 18(4) *People and Place* 41-49.

<sup>115</sup> Heaven Crawley, 'The Politics of Refugee Protection in a (Post)COVID-19 World' (2021) 10(3) *Social Sciences*.  
Lama Mourad and Kelsey Norman, 'Transforming refugees into migrants: institutional change and the politics of international protection' [2020] *European Journal of International Relations*, 26(3), 687–713.

<sup>116</sup> Simon Behrman, 'Refugee Law as a Means of Control' [2019] *Journal of Refugee Studies*, 32(1), 42–62,  
Katrijn Maryns, *The Asylum Speaker: Language in the Belgian Asylum Procedure* (Routledge 2006).

hostile environment, where asylum seekers are seen as a threat, as 'other'.<sup>117</sup> It can be argued that the wording of the Convention is intentional, as prescriptive definitions do not allow the flexibility to adapt to changing times and circumstances.<sup>118</sup>

The definition has been widely contested, due in part to its ambiguity and scope. To have access to protections afforded by the Convention, asylum seekers must show a well-founded fear of persecution linked to a one of a closed list of grounds, demonstrating their individual incompatibility with their State of origin.<sup>119</sup> This narrow definition has led to States limiting those who can access protection. An example of the limited scope is the exclusion of people fleeing from generalised violence. It has been argued that the Convention should provide concrete (clearly defined) protection, rather than outlining an aspiration; the aspirational language of the Convention facilitates State discretion, and it is the exercise of this discretion which creates inconsistencies between the aspirations of the Convention and the application by the State.<sup>120</sup> However, due to limited resources, a broad, clear definition may prevent States from offering protection to those deemed most in need of help.

#### **2.2.4 Seeking an adequate definition of persecution.**

In order to be granted refugee status, asylum seekers must demonstrate a well-founded fear of persecution. Persecution is not defined within the Convention and so its meaning is open to interpretation. This omission from the Convention is deliberate.<sup>121</sup> It is intended to emphasise the subjective nature of persecution, and to allow for inclusivity of the types of harm, as a concrete definition could exclude 'new' types of harm not thought of in 1951. Whilst this discretion was envisaged to allow States to adopt broad interpretations, covering different types of harm, the reality is that States interpret persecution narrowly, excluding some types of harm from its scope, and undermining access to the protection of the Convention.<sup>122</sup>

---

<sup>117</sup> See Chapter 1, section 1.2.

<sup>118</sup> Goodwin-Gill and McAdam (n 110); James Hathaway, *The Law of Refugee Status* (Butterworths 1991).

<sup>119</sup> Refugee Convention (n 3), a1(A)(2).

<sup>120</sup> Eunice Collins, 'The case for reforming the definition of 'Refugee' in the 1951 UN Convention Relating to the Status of Refugees' (2019) 6 *Bristol Law Review*.

<sup>121</sup> Goodwin-Gill and McAdam (n 110); James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> ed, Cambridge University Press 2014).

<sup>122</sup> Hassan Faruk Al Imran, 'An Overview of Development of Gender Based Persecution in Refugee Law under Membership of a Particular Social Group: A Study of Comparative Jurisprudence of Canada, UK & USA' (2015) 39 *Journal of Law, Policy and Globalization* 258-275. Goodwin-Gill and McAdam (n 110); Hathaway and Foster (n 122).



Gibney suggests that narrow interpretations of persecution have been used to exclude many people who have been forced from their homes. The examples he gives are the refusal to grant refugee status in France and Germany to women fleeing the Taliban, Iraqis fleeing war, and Zairians fleeing the Ebola virus.<sup>123</sup> To resolve this issue, guidance has been provided to the courts on what persecution means.<sup>124</sup> One well-versed definition is 'the sustained or systemic violation of basic human rights resulting from a failure of State protection'.<sup>125</sup> Persecution then, covers 'sufficiently serious' acts, causing a severe violation of basic human rights.<sup>126</sup> This wide definition aims to ensure that asylum claims are considered on a case-by-case basis, thus enhancing procedural fairness as it allows for recognition of different forms of persecution.

The Qualification Directive provides some clarity for decision-makers as article 9(2) gives a list of examples of acts which could constitute persecution.<sup>127</sup> The Directive continues a human rights approach which is currently the dominant approach to determining whether the threshold of persecution as defined above has been met in asylum cases in the UK.<sup>128</sup> This approach is defined by Hathaway as 'requiring there to be 'sustained or systemic violation of basic human rights demonstrative of a failure of State protection'.<sup>129</sup> This allows for the much-needed flexibility, whilst having an identifiable standard. This approach considers persecution as existing where a State fails to protect the individual, causing them to seek protection elsewhere. The State must therefore be proven to have been complicit in the mistreatment experienced or feared.<sup>130</sup> The decision-maker must decide whether there has been a failure by the State to meet its obligations.<sup>131</sup> The human rights approach was first used by the Court of Appeal in *Ravichandran*<sup>132</sup> and reinforced in *Blanusa*<sup>133</sup> where the focus of the

---

<sup>123</sup> Gibney (n 84).

<sup>124</sup> Hathaway and Foster (n 122), 101; UNHCR, *Handbook* (n 93).

<sup>125</sup> Ibid.

<sup>126</sup> See UNHCR, *Handbook* (n 93).

<sup>127</sup> Qualification Directive (n 41), a9(2).

<sup>128</sup> Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (CUP 2007).

<sup>129</sup> Hathaway and Foster (n 122).

<sup>130</sup> Matthew Price, 'Persecution Complex: Justifying Asylum Law's Preference for Persecuted People' (2006) 47 *Harvard International Law Journal* 413.

<sup>131</sup> Hathaway and Foster (n 122).

<sup>132</sup> *R v Secretary of State for the Home Department, ex parte Ravichandran (NO. 1) [1996] Imm Ar97* para 51. Simon Brown LJ.

<sup>133</sup> *R v Secretary of State for the Home Department, ex parte Blanusa [1999] All EE(D) 499*, Schiemann LJ.

judges' analysis was on the invasion of fundamental human rights. The approach was confirmed in the House of Lords.<sup>134</sup> Lord Hoffman reiterated the Gender Guidelines for the Determination of Asylum Claims in the UK and defined persecution as 'serious harm and failure of State protection'.<sup>135</sup> The focus of the judges' analysis was on human rights, and centred on State failure to protect. There are then, three steps which need to be satisfied; a) the treatment must relate to the fundamental right, b) the State must have a duty towards this right, and c) the State fails to comply with this duty. Whilst this offers a shorthand definition, it has been criticised as it implies persistency; the mistreatment must be 'sustained and systemic'.<sup>136</sup> This would entail decision makers to reject claims where there has been a single act of serious harm or violence.<sup>137</sup> It has been argued that this was restrictive and fails to consider the refugee experience in full.<sup>138</sup> In *RT (Zimbabwe)v SSHD (2012)*,<sup>139</sup> the UK Supreme Court held that, for treatment to reach the threshold of serious harm, both the harm inflicted upon and subjective perceptions of the individual must be considered. This brings us on to discuss the concept of a well-founded fear.

### **2.2.5 What constitutes a 'well-founded' fear?**

To meet the criteria for well-founded fear, the fear of persecution must be subjectively genuine and objectively reasonable. To the element of fear, a state of mind and a subjective condition, is added the qualification "well-founded". This means that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term "well-founded fear" therefore contains a subjective and an objective element; the applicant must show actual fear, and a good reason for this fear.<sup>140</sup> The explanation given in the UNHCR Handbook offers clear support for this two-stage test. The dominant view is that "fear of persecution without a valid justification is irrational and therefore insufficient to form the basis of an asylum claim."<sup>141</sup> The subjective fear requirement

---

<sup>134</sup> *Shah & Islam v Secretary of State for the Home Department* [2001] IAC 489.

<sup>135</sup> *Ibid* para 654.

<sup>136</sup> Hathaway and Foster (n 122).

<sup>137</sup> Hugo Storey, 'What Constitutes Persecution? Towards a Working Definition' (2014) 26(2) *International Journal of Refugee Law* 272-285.

<sup>138</sup> *Ibid*.

<sup>139</sup> *RT (Zimbabwe) and others (Respondents) v Secretary of State for the Home Department (Appellant)* [2012] UKSC 38.

<sup>140</sup> UNHCR, *Handbook* (n 93), 38.

<sup>141</sup> *Tesfu v Ashcroft* (2003) 322 F.3d 477 (USCA 7<sup>th</sup> Cir., Mar. 14 2003) at 481.

in the Convention can be said to be an additional burden to be discharged, as refugee status must be denied where subjective fear cannot be demonstrated, even where there is evidence of a genuine, objective risk.<sup>142</sup> Analysing an individual's emotional state is highly problematic, due in part to the diversity among applicants.

People may show fear in different ways, and this is especially true for applicants whose culture discourages open displays of emotion. These individuals may have anxiety and extreme fear on the inside, but outwardly present as brave or stoic.<sup>143</sup> Such people are likely to be denied refugee status, as they have failed to demonstrate a subjective fear of persecution. Applicants may also face difficulties with communicating their fear to the Home Office or Immigration judge. Uneducated or inarticulate applicants may be fearful, yet unable to put their feelings into words.<sup>144</sup> Applicants who need to communicate through an interpreter may also be seen to lack fear where their words and expressions are translated in ways that fail to fully convey their fear.<sup>145</sup>

Even where an applicant can prove subjective fear, this alone is insufficient to be granted refugee status; the fear must also be verified objectively. The applicant must show a 'reasonable risk' of persecution by the State, or a lack of State protection.<sup>146</sup> The asylum seeker must show that, in addition to their own fear, a reasonable person would fear persecution in the same circumstances. They must demonstrate a significant, actual risk of persecution. Evidence is essential to this element of the claim, and must be put forward to corroborate the claim due to the growing practice of equating any lack of credibility with absence of subjective fear.<sup>147</sup> Hathaway and Foster argue that the test should be objective, with less emphasis on credibility.<sup>148</sup> This would solve some of the issues stemming from a preoccupation with credibility, identified in section 2.7 and highlighted throughout the thesis. Perhaps in recognition of the shortcomings found within the Convention definition, refugee

---

<sup>142</sup> Hathaway and Foster (n 122).

<sup>143</sup> James Hathaway and William Hicks, 'Is There a Subjective Element in the Refugee Convention's Requirement of Well-Founded Fear' (2005) 26 *Michigan Journal of International Law* 518.

<sup>144</sup> Hathaway and Foster (n 122).

<sup>145</sup> See Chapter 6, section 6.10.2.

<sup>146</sup> Refugee Convention (n 3), a1(A)(2).

<sup>147</sup> Hathaway and Hicks (n 144), 518. See section 2.7

<sup>148</sup> Hathaway and Foster (n 122).

protection is not found solely in the Refugee Convention, it is cumulative and can be found in other international and domestic provisions, such as UNHCR reports, UK Country Guidance, and international bodies.<sup>149</sup>

### **2.2.6 European Convention on Human Rights (ECHR).**

In addition to the protection offered by the Refugee Convention, the European Convention on Human Rights also protects asylum seekers and refugees through a number of provisions.<sup>150</sup> Whilst Article 6 generally protects the right to a fair trial, it was held not generally applicable to immigration matters in *Maaouia v France*, as decisions governing entry into a State concern public rather than private law rights.<sup>151</sup> In this case, a 4-year delay in reaching an exclusion order was held not to be a criminal or civil matter and thus fell outside the scope of Article 6.

Article 5 protects liberty and security, and can assist asylum seekers through reviewing detention.<sup>152</sup> Article 14 asserts that the protection of convention rights cannot be conducted in a discriminatory or prejudicial manner.<sup>153</sup> Article 13 concerns the right to an effective remedy. However, Article 13 and Article 14 cannot be used in isolation, rather they must be used in conjunction with another Convention Right.<sup>154</sup> Articles 2 and 3 concern the right to life and the right not to be subjected to torture or inhumane and degrading treatment.<sup>155</sup> Alongside Article 8, the right to a private and family life, these have been applied to asylum cases concerning the consequences of return.<sup>156</sup> These, through the provisions in the Human Rights Act<sup>157</sup> can be used to raise human rights claims in appeal hearings and judicial review, especially to prevent removal and to challenge detention and conditions of detention.<sup>158</sup>

---

<sup>149</sup> Including but not limited to UNHCR reports, UK Country Guidance, and international bodies.

<sup>150</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

<sup>151</sup> (39652/98) (2001) 33 EHRR 42.

<sup>152</sup> *Ibid*, a5.

<sup>153</sup> *Ibid*, a14.

<sup>154</sup> *Ibid*, a13.

<sup>155</sup> *Ibid*, a2, 3.

<sup>156</sup> See for example, *Ilhan v Turkey* App no 22277/9 (27 June 2000) Article 3 and 13; *Ipek v Turkey* App no 25760/94 (17 February 2004) Articles 2, 3, 5, 13; *NA v UK* App no 25904/07 (17 July 2008); *MSS v Belgium and Greece* App no 30696/09 (21 January 2011).

<sup>157</sup> Human Rights Act 1998.

<sup>158</sup> Though Article 8 has been limited by the Immigration Act 2014.

The ECHR has also protected the right to a fair trial through the 'equality of arms' principle.<sup>159</sup> This requires a fair balance between the opportunities afforded to the parties involved in litigation. Since the Treaty of Amsterdam 1997<sup>160</sup> came into force in 1999, the EU has also adopted a Common European Asylum System. This system aims to create common standards of protection across member States. This includes increased cooperation, support, and solidarity on matters of asylum.<sup>161</sup> The system promotes a united, cooperative approach to asylum claims. Refugee protection is also ensured through a range of Directives.

### **2.2.7 Reception, Procedures and Qualification Directives.**

The Asylum Procedures Directive sets common procedures for EU Member States for granting and withdrawing international protection.<sup>162</sup> It sets out clear rules for making applications, allowing those who request international protection to do so quickly and effectively. The Directive also sets a time-limit for the examination of applications while providing for the possibility to accelerate applications that are likely to be unfounded and provides for clearer rules on appeals in front of courts or tribunals.<sup>163</sup> The Reception Conditions Directive aims to ensure better and more harmonized reception conditions in the EU.<sup>164</sup> It includes access to housing, food, clothing, health care, and education for minors.<sup>165</sup> Whilst the aim of these Directives is harmonisation, they do leave discretion to states regarding application.

The Qualification Directive defines the rights afforded to refugees.<sup>166</sup> The Directive has provisions on protection from refoulement, access to education, social welfare, healthcare, accommodation, and specific provisions for children and vulnerable persons. The Directive also allows Member States to adopt more favourable standards than those set out in its provisions.<sup>167</sup> Article 4(1) states that it is the duty of the Member State to assess the relevant elements of each asylum

---

<sup>159</sup> ECHR (n 151), a6.

<sup>160</sup> European Union: Council of the European Union, *Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts*, 10 November 1997.

<sup>161</sup> Khan (n 32).

<sup>162</sup> Procedures Directive (n 88). See Colin Yeo, *Free Movement* <https://www.freemovement.org.uk/> for updates following Brexit.

<sup>163</sup> Ibid a19.

<sup>164</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (Reception Directive).

<sup>165</sup> Ibid, a2, a14, a17.

<sup>166</sup> Qualification Directive (n 41).

<sup>167</sup> Ibid, a3.

application. This enhances the point that, whilst the burden of proof rests on the claimant, the duty to evaluate the relevant facts is shared between the claimant and the decision-maker.<sup>168</sup> The provisions in this Directive appear to allow for the positive assessment of credibility, but also introduces measures which may militate against this.<sup>169</sup> The UK has opted out of the second phase of the Reception, Procedures and Qualification Directives. It was decided that adopting a common policy was not 'right' for the UK.<sup>170</sup> At this point in time, State autonomy was deemed more important than strengthening asylum seekers' protection rights.<sup>171</sup> This chapter now moves on to discuss domestic legislation, and how restrictive laws can adversely affect procedural fairness and agency.

### **2.3 Refugee protection at State level- How does the UK protect refugees?**

In recent decades, there has been a 'moral panic' over asylum seekers in the UK, and political parties have come under increasing pressure to reassure the general public that immigration is 'under control'.<sup>172</sup> As security, cultural and economic threats, migrants are seen as unwanted 'others'.<sup>173</sup> Hughes claims that despite States becoming more multicultural, asylum seekers in the UK, US, Australia and much of Europe are still represented as dangerous strangers in dominant discourses.<sup>174</sup> They represent the unknown, and evoke thoughts of war and suffering that remind citizens that the same situation could befall them. Even if the actual effects of immigration are limited, many citizens perceive negative consequences in terms of both the economy and society as a whole. According to Sarah Spencer, this hostility towards 'others' would be exacerbated if they believed that immigration was not effectively controlled,

---

<sup>168</sup> Thomas, 'Assessing the Credibility of Asylum Claims' (n 10).

<sup>169</sup> See section 2.7.

<sup>170</sup> Cathryn Costello and Emily Manco, 'Policy Primer: The UK, the Common European Asylum System and EU Immigration Law' (*Migration Observatory* 2004) <https://migrationobservatory.ox.ac.uk/resources/primers/the-uk-the-common-european-asylum-system-and-eu-immigration-law/> accessed 16 March 2021.

<sup>171</sup> Ibid.

<sup>172</sup> Stan Cohen, *Folk Devils and Moral Panics* (3rd edn Routledge 2004); Kerry Moore, "'Asylum Crisis", National security and the re-articulation of human rights' in Kerry Moore, Bernhard Gross and Terry Threadgold (eds), *Migrations and the Media* (Peter Lang 2021).

<sup>173</sup> Emma Stewart and Gareth Mulvey, 'Seeking Safety beyond Refuge: The Impact of Immigration and Citizenship Policy upon Refugees in the UK' (2014) 40(7) *Journal of Ethnic and Migration Studies* 1023-1039.

<sup>174</sup> Gordon Hughes, 'Community Cohesion, Asylum Seeking and the Question of the 'Stranger'' (2007) 21(6) *Cultural Studies* 931-951. Patricia Tuitt, *False Images: Law's Construction of the Refugee* (Pluto Press 1996)

as a lack of control poses a threat to security.<sup>175</sup> This hostile environment is not new, ‘outsiders’ have been portrayed as a problem in legislation as far back as 1793 and race and otherness has undoubtedly been an issue in developing laws since.<sup>176</sup> These factors, alongside the discretion afforded to States by the Refugee Convention, have contributed to increasingly hostile policies being introduced. Asylum policies and political discourse focus on control rather than protection. There is an emphasis on tightening controls, as opposed to protecting asylum seekers.<sup>177</sup> Asylum seekers are treated with suspicion and are often disbelieved and accused of lying, or bringing fraudulent claims.<sup>178</sup> This undermines procedural fairness and the purpose of the Convention; the right to asylum.

UK asylum law is governed by primary legislation and a set of immigration Rules. Whilst the first Aliens Act was introduced in 1793 as a reaction to the French Revolution, regulation of asylum seekers in the UK was ad hoc throughout the 19<sup>th</sup> century. The *Aliens Act 1905*<sup>179</sup> was the first piece of modern immigration legislation passed in the UK which recognised an increasing demand for some form of control.<sup>180</sup> In order to gain protection, asylum seekers were required to prove that they were seeking admission into the country solely to avoid punishment or persecution on religious or political grounds.<sup>181</sup> This act is important as it contained a more concrete right to claim asylum than previous legislation. The *Aliens Act 1914*<sup>182</sup> was then introduced at the beginning of World War I to restrict the stay and movement of refugees. The Act gave increased powers of arrest, and required refugees to register with authorities.<sup>183</sup> Debate around these acts centred around the need for ‘fairness’, without adequately defining the term. There is no explicit mention of the right to a fair trial within these acts, but liberal, procedural fairness was discussed explicitly in

---

<sup>175</sup> Sarah Spencer, ‘The Impact of Immigration Policy on Race Relations’ in Tessa Blackstone, Bhikhu Parekh and Peter Sanders (eds), *Race Relations in Britain: A Developing Agenda* (Routledge 1998).

<sup>176</sup> Aliens Act 1793.

<sup>177</sup> Bob Mouncer, ‘Dealt with on their Merits? The Treatment of Asylum Seekers in the UK and France’ (PhD Thesis, University of Hull 2009).

<sup>178</sup> Disbelief and credibility are discussed in more depth in section 2.7.

<sup>179</sup> Aliens Act 1905.

<sup>180</sup> Dallal Stevens and Maria O’Sullivan (eds), *States, the law, and access to refugee protection: fortresses and fairness* (Hart Publishing 2017).

<sup>181</sup> Prakash Shah, *Refugees, Race and the Legal Concept of Asylum in Britain* (Cavendish 2000).

<sup>182</sup> Aliens Act 1914.

<sup>183</sup> Rebecca Rotter, ‘‘Hanging In-Between’’: Experiences of Waiting among Asylum Seekers Living in Glasgow’ (PhD Thesis, Edinburgh University 2010).

Hansard reports.<sup>184</sup> These focussed on process, procedural fairness, and the need to protect refugees.

Whilst there have always been limitations put on outsiders,<sup>185</sup> the UK had a long-standing reputation of hospitality towards asylum seekers. As Robin Cohen noted, '[i]t is often asserted and widely believed that Britain has an exemplary record of offering hospitality to those fleeing from political and religious persecution'.<sup>186</sup> However, whilst this was widely asserted (though not necessarily true, as noted above) post World War II, when there was a need for labour and better economic conditions,<sup>187</sup> the UK's stance on asylum seekers has since changed dramatically, coinciding with a rise in number of people seeking asylum from the late 1980's onwards.

### **2.3.1 The positive correlation between increasing numbers of asylum applications, and harsher immigration controls being introduced.**

During the early 1980's asylum applications remained steady, and reasonably low, at around 4000 per year. This increased drastically to 44,840 in 1990 and again to 80,315 in 2000<sup>188</sup> partially due to more accessible travel, better economics, and the end of the Cold Wars. The rise in numbers led political leaders to discuss the issue of immigration and asylum seekers in manifestoes and policy decisions:

*"Good community relations in this country depend upon a clear structure of immigration controls which are fair, understandable and properly enforced."*<sup>189</sup>

From 2000 onwards, tension between effective immigration control and the UK's national and international legal obligations began to escalate. As explained in section 2.2, the UK is obliged under the 1951 Refugee Convention to protect refugees.<sup>190</sup> The Convention states that participating countries must provide free access to courts for

---

<sup>184</sup> See for example HC Deb 03 July 1905 vol 148 cc794-847.

<sup>185</sup> See for example Aliens Act 1793 and 1905.

<sup>186</sup> Robin Cohen, *Frontiers of Identity: The British and the Others* (Longman 1994).

<sup>187</sup> Michael Marrus, *The Unwanted: European Refugees in the Twentieth Century* (OUP 1985).

<sup>188</sup> The Migration Observatory (n 54).

<sup>189</sup> John Major, 'British Conservative Party Manifesto' (*Politics News* 1992)

<http://www.conservativemanifesto.com/1992/1992-conservative-manifesto.shtml> accessed 25 May 2018.

<sup>190</sup> Refugee Convention (n 3).



refugees,<sup>191</sup> and prohibits them from forcibly returning refugees to their country of origin.<sup>192</sup> This makes it more difficult for government to radically change the law to remove asylum seekers from the UK, but has failed to prevent successive governments from adopting increasingly restrictive policies regarding this group.<sup>193</sup>

Zetter and Pearl reiterate this, arguing that ‘since the mid-1990s, policies and legislation for refugees and asylum seekers have become increasingly restrictionist in the UK’.<sup>194</sup> In 1993, the Conservative government adopted the *Asylum and Immigration Act*.<sup>195</sup> This gave immigration authorities the power to detain asylum-seekers. It removed the right of asylum seekers to secure social housing tenancies and provided that if asylum seekers had any access to a roof, however temporary, they were not to be housed. Shortly afterwards, the *Asylum and Immigration Act 1996* removed the right to cash benefits from ‘in-country’ asylum applicants and those appealing a negative decision.<sup>196</sup> This Act also introduced restrictions on employment, meaning that asylum seekers could not work legally. This has had an adverse effect on the agency of asylum seekers and their access to justice.

### **2.3.2 Good race relations or more of the same; 1997 New Labour.**

When it came to power after the 1997 General Election, New Labour attempted to make it clear that they were very different from the Conservative Party by emphasising the need for good race relations, and social justice for racial minorities.<sup>197</sup> However, they followed in Conservative footsteps by continuing to restrict the rights of asylum seekers. During this period, New Labour undertook several initiatives including the Macpherson report<sup>198</sup> (following the Lawrence Enquiry), *Crime and Disorder Act 1998*,<sup>199</sup> and the *Race Relations (Amendment) Act 2000*<sup>200</sup> but migrants and asylum

---

<sup>191</sup> Ibid, a16.

<sup>192</sup> Ibid, a33.

<sup>193</sup> Lisa Schuster, *The use and abuse of political asylum in Britain and Germany* (Frank Cass 2003).

<sup>194</sup> Roger Zetter and Martyn Pearl, ‘The minority within the minority: Refugee community-based organisations in the UK and the impact of restrictionism on asylum-seekers’ (2000) 26(4) *Journal of Ethnic and Migration Studies* 675-697.

<sup>195</sup> Asylum and Immigration Act 1993.

<sup>196</sup> Asylum and Immigration Act 1996.

<sup>197</sup> Schuster and Solomos (n 105).

<sup>198</sup> Sir William MacPherson, *The Stephen Lawrence Inquiry*, Report of an Inquiry (The Stationary Office 1999).

<sup>199</sup> Crime and Disorder Act 1998.

<sup>200</sup> Race Relations (Amendment) Act 2000.

seekers continued to be the targets of racist campaigns, implying that the Acts did very little to soothe public and media misperceptions about these groups.<sup>201</sup>

The *Immigration and Asylum Act*<sup>202</sup> set the tone for Labour's asylum policy. It gave extensive new powers to the home secretary and extended police powers to search, arrest and detain asylum seekers.<sup>203</sup> Benefits were given in the form of vouchers, which could only be redeemed at certain supermarkets. This system has been described as 'widely loathed... cumbersome, inefficient, expensive, and humiliating'.<sup>204</sup> Some supermarkets refused to accept these vouchers or refused to sell 'luxury items'.<sup>205</sup> Following widespread criticism, the voucher system was replaced by weekly cash disbursements under the *Nationality, Immigration and Asylum Act 2002*.<sup>206</sup> The implementation of the 1999 *Immigration and Asylum Act*<sup>207</sup> had the effect of fuelling these campaigns and misperceptions, as the social rights of asylum seekers were separated from those of citizens in order to deter economic migrants.<sup>208</sup> The Act sped up the dispersal of asylum seekers to various parts of the UK and provided that most cases were to be decided within six months by April 2001.<sup>209</sup> The goal of dispersal was to redistribute financial and social costs, reduce social tensions, discourage potential applicants, and exercise greater control over asylum seekers.<sup>210</sup> This system was to be managed by a new government agency, the National Asylum Support Service (NASS), which took over the direct role previously occupied by local authorities. At the same time, regulation of immigration advisors was introduced, as was an increase in airline liaison officers to reduce the number of asylum seekers travelling using forged papers. New Labour's policy-making construed asylum seekers as a threat, creating a sense of crisis which did not reflect the reality, and there was still a strong focus on distinguishing between genuine and bogus claims.<sup>211</sup> The 1998

---

<sup>201</sup> Thomas Hoare, 'An exploration of how adults seeking asylum understand and cope with the asylum journey and process' (PhD Thesis, Cardiff University 2013).

<sup>202</sup> Immigration and Asylum Act 1999.

<sup>203</sup> Rosemary Sales, *Understanding Immigration and Refugee Policy* (Policy Press 2007).

<sup>204</sup> Elinor Kelly, 'Asylum Seekers and Politics in Scotland: August 2001' (2002) 38(1) *Scottish Affairs* 1-26.

<sup>205</sup> Frances Webber, 'Asylum Seekers and Strategic Litigation' in Francesco Vecchio, and Alison Gerard (eds) *Entrapping Asylum Seekers. Transnational Crime, Crime Control and Security* (Palgrave 2017)

<sup>206</sup> Nationality, Immigration and Asylum Act 2002.

<sup>207</sup> Immigration and Asylum Act (n 203).

<sup>208</sup> Teresa Piacentini, 'Solidarity and struggle: an ethnography of the associational lives of African asylum seekers and refugees in Glasgow' (PhD Thesis, University of Glasgow 2012).

<sup>209</sup> Immigration and Asylum Act (n 203) s56.

<sup>210</sup> Shuttleworth (n 7).

<sup>211</sup> Mulvey (n 24).

White Paper, *Fairer, Faster and Firmer – A Modern Approach to Immigration and Asylum*, claimed that '[t]he Government is committed to protecting genuine refugees... But there is no doubt that large numbers of economic migrants are abusing the system by claiming asylum.'<sup>212</sup> In this context, it seems as though 'fairer' meant fairer for UK citizens, as the protection of asylum seekers was seen as secondary to the need to keep out bogus claimants, and sending a signal that migrants are to be feared.<sup>213</sup> The following sections show how these changes were driven by the primary aims of deterrence and restriction, and fairness to the host population, rather than refugee protection. It will be argued that these changes had the effect of undermining the agency of asylum seekers.

### **2.3.3 Further constraints under the *Nationality, Immigration and Asylum Act 2002*.**

The *Nationality, Immigration and Asylum Act 2002*<sup>214</sup> is best known for section 55, under which people who have not managed to apply for asylum within three days of arrival in the UK may be refused all financial support and accommodation and thus left destitute. Although the government claimed that this measure was only aimed at certain illegal categories, increasing numbers of asylum seekers satisfied the criteria.<sup>215</sup> It is seen by many of them, and by many agencies, as a measure aimed at deterring applications, rather than affording protection.<sup>216</sup> The Act also introduced changes which further constrained the agency of asylum seekers. It extended the power to detain, which meant an asylum seeker could be detained at any time during their application, not just prior to removal.<sup>217</sup>

The Act had the effect of segregating asylum seekers further from mainstream society and promoted their speedy removal.<sup>218</sup> It provided for induction and accommodation centres where asylum applicants would be housed while their claims

---

<sup>212</sup> Home Office, *Fairer, Faster and Firmer – A Modern Approach to Immigration and Asylum* (1998) <https://www.gov.uk/government/publications/fairer-faster-and-firmer-a-modern-approach-to-immigration-and-asylum> accessed 25 May 2018.

<sup>213</sup> Grete Brochmann (1992) 'Control at What Cost?' Paper prepared for the workshop on migration into Western Europe, What Way Forward?, London, Royal Institute of International Affairs.

<sup>214</sup> *Nationality, Immigration and Asylum Act* (n 207).

<sup>215</sup> Dallal Stevens, 'The Nationality, Immigration and Asylum Act 2002: Secure Borders, Safe Haven' (2004) 67 *Modern Law Review* 616.

<sup>216</sup> *Ibid*, 629.

<sup>217</sup> *Nationality, Immigration and Asylum Act* (n 207), s62.

<sup>218</sup> Sales (n 204), 149.

were being processed, and where their children could be educated outside the mainstream education system.<sup>219</sup> The 2002 Act reflected the aims of the government, set out in its preceding White Paper, to speed up appeals, set target figures for the deportation of refused applicants and facilitate an increased rate of removals.<sup>220</sup> With these ends in mind, the government announced a 40% increase in removal centre capacity. Indeed, detention – including detention of children – was to play a significant role in the UK asylum system in the following years. On 24 September 2005, according to Home Office figures, there were 1,900 asylum detainees in the UK; 30 of these were under 18.<sup>221</sup> A 2005 report by the charity Save the Children estimated that around 2,000 children are detained with their families every year for the purpose of immigration control, the length of detention ranging from seven to 268 days.<sup>222</sup>

#### **2.3.4 Aims of deterrence under the *Asylum and Immigration (Treatment of Claimants) Act 2004*.**

The *Asylum and Immigration (Treatment of Claimants, etc.) Act 2004*<sup>223</sup> introduced criminal sanctions to punish people who arrived in the UK without a valid travel document unless they had a reasonable excuse not to have one,<sup>224</sup> in a bid to deter behaviour which slowed down the asylum process. It raised doubts about the credibility of applicants who failed to claim asylum when passing through a safe country or who failed to answer certain questions to the satisfaction of Home Office caseworkers or other officials. This is important for the purposes of this thesis as agency is undermined where an asylum seeker's credibility is questioned during the asylum process. As will be discussed in section 2.7, the majority of asylum claims are granted or rejected on credibility grounds. Section 9 also excluded families with children from benefits if, after their final refusal, they failed to make arrangements to leave or volunteer for the government's voluntary returns programme.<sup>225</sup> Families would then face destitution and their children could be taken into local authority care.

---

<sup>219</sup> Ibid, s16.

<sup>220</sup> Home Office, *Secure Borders* (n 25).

<sup>221</sup> Home Office, *Control of Immigration: Statistics United Kingdom 2005* (August 2006)

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/272332/6904.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/272332/6904.pdf) accessed 16 March 2021.

<sup>222</sup> Heaven Crawley and Trine Lester, *No Place for a Child: Children in Immigration Detention in the UK - Impacts, Alternatives and Safeguards* (Save the Children 2005).

<sup>223</sup> *Asylum and Immigration (Treatment of Claimants, etc.) Act 2004*.

<sup>224</sup> Ibid, s8.

<sup>225</sup> Ibid, s9.

The Act also restructured the appeals system. Asylum seekers now have only one right of appeal, to the Asylum and Immigration Tribunal (AIT), despite the fact that asylum adjudication has a much higher challenge rate than other areas.<sup>226</sup>

### **2.3.5 Prioritising speed and efficiency over fair decisions; NAM and the *Immigration, Asylum and Nationality Act 2006*.**

In 2005 the government further tightened controls by announcing a Five-Year Strategy for Asylum and Immigration,<sup>227</sup> including the New Asylum Model (NAM).<sup>228</sup> This was celebrated as a substantial improvement<sup>229</sup> as it assigned individual case-owners to new asylum seeker cases, who handle the claim from start to finish. It was claimed that new procedures would speed up the asylum process, involving shorter timescales, early segmentation of applicants into categories before the details of their cases were fully known, and an even wider use of detention. Under the new Model, refugee status would no longer be permanent; it would now be granted on a temporary basis to be reviewed after five years in relation to the safety of the country of origin.<sup>230</sup> The Refugee Council was concerned that these changes would have a negative impact on the ability of asylum seekers to recover from trauma and prepare their cases, on their chances of finding adequate legal representation and on their access to appeal procedures, as well as placing them in limbo, unable to rebuild their lives for fear of having their refugee status withdrawn.<sup>231</sup> Much of this did not require new legislation but was implemented by means of Home Office rules and other instruments. Where legislation was needed it was provided in the *Immigration, Asylum and Nationality Act 2006*.<sup>232</sup> Despite being hailed as a substantial improvement, reports continued to

---

<sup>226</sup> Ibid, s26, see section 2.6.

<sup>227</sup> Home Office, *Controlling our borders: Making migration work for Britain: Five year strategy for asylum and immigration* (February 2005) <https://www.gov.uk/government/publications/five-year-strategy-for-asylum-and-immigration> accessed 23 April 2020.

<sup>228</sup> Ibid.

<sup>229</sup> UNHCR, *Quality Initiative Project. Key Observations and Recommendations, March 2006 – December 2007* (London 2007).

<sup>230</sup> Sales (n 204).

<sup>231</sup> Immigration Law Practitioners' Association, 'Refugee Council Briefing. New asylum model (NAM)' (March 2006) <https://ilpa.org.uk/refugee-council-briefing-new-asylum-model-nam-march-2006/> accessed 16 March 2020.

<sup>232</sup> Immigration, Asylum and Nationality Act 2006.

indicate the same flaws in the system as before the New Asylum Model was introduced, including a culture of disbelief.<sup>233</sup>

According to Emma Borland, these legal changes have also upset the balance of interests and impaired the fairness of the asylum process within the UK<sup>234</sup> and a large portion of asylum literature reflects this. One provision which has gained criticism is the reduction from 40 to five hours in the amount of legal advice funded by the taxpayer for asylum cases.<sup>235</sup> It is seen as "woefully short of a sufficient time for adequate representation on asylum cases".<sup>236</sup> Many cases are highly complex, and 5 hours is often insufficient for legal representatives to build trust and offer acceptable representation.<sup>237</sup> The clients may be vulnerable, with little knowledge of what is happening to them; if a legal representative spends adequate time building a relationship where they feel comfortable talking about their experiences, they may well run out of time to talk through details and communicate their case fully to the adjudicator.<sup>238</sup> Five hours is not enough to truly assess the merits of a case, meaning many meritorious cases fall by the wayside. The problem of time shortage is exacerbated in the event of a client appealing a Home Office refusal. To be granted legal aid at the appeal stage, a case must have at least a 50% chance of success in the eyes of the legal representative, as explicitly stated in *The Director of Legal Aid Casework and Lord Chancellor v IS*.<sup>239</sup>

---

<sup>233</sup> Jo Pettitt, 'The Use of Country of Origin Information in Reasons for Refusal Letters' in IAS, *The Use of Country of Origin Information in Refugee Status Determination: Critical Perspectives* (IAS 2009); Trevor Trueman, 'Reasons for refusal: an audit of 200 refusals of Ethiopian asylum-seekers in England' (2009) 23(3) *Journal of Immigration, Asylum and Nationality Law* 281-308. Helen MacIntyre, 'The New Asylum Model (NAM) Comes Under Criticism' (2009) 23(1) *Journal of Immigration, Asylum and Nationality Law* 3. See section 2.7.3.

<sup>234</sup> Emma Borland, 'Fairness and the right to legal aid in asylum and asylum related cases' (2016) 2(3) *International Journal of Migration and Border Studies* 245.

<sup>235</sup> Ibid.

<sup>236</sup> Annie Kelly, 'Asylum Aid condemns move to limit legal aid' (*Third Sector*, 3 September 2003) <https://www.thirdsector.co.uk/asylum-aid-condemns-move-limit-legal-aid/article/612337> accessed 20 March 2020.

<sup>237</sup> Andrew BurrIDGE and Nick Gill, 'Conveyor-Belt Justice: Precarity, Access to Justice, and Uneven Geographies of Legal Aid in UK Asylum Appeals' (2016) 49(1) *Antipode* 23-42.

<sup>238</sup> Borland (n 235).

<sup>239</sup> [2016] EWCA Civ 464.

### **2.3.6 Deterrence through emphasising the negative aspects of asylum: The UK Borders Act 2007.**

The bill which was to become the *UK Borders Act 2007*<sup>240</sup> was announced to Parliament before many of the provisions of the 2006 Act had come into force. As the title perhaps suggests, it emphasised the negative aspects of immigration and asylum. The Queen's speech of 15 November 2006 announced that '*A bill will be introduced to provide the immigration service with further powers to police the country's borders, tackle immigration crime, and to make it easier to deport those who break the law*'.<sup>241</sup> The press release on the day of the bill's presentation to the House of Commons explained that these powers would include powers of arrest and detention and, in the context of asylum, powers to arrest those they believe to have fraudulently been acquiring asylum support, and to exercise associated powers of entry, search and seizure. The *UK Borders Act* made no reference to the UK's Refugee Convention obligations to give protection within its borders to those who needed it. The Immigration Acts of 2014<sup>242</sup> and 2016<sup>243</sup> then introduced further restrictions, reducing the number of rights of appeal against immigration decisions from 14 to 7 and ensuring that asylum seekers could be removed to their country of origin pending the outcome of their appeal. Sales concludes that, under both Conservative and Labour governments, asylum policy has continued to treat asylum seekers with suspicion. They are seen as a risk to society rather than as people who are themselves at risk. Policy has therefore aimed at excluding them from developing connections with mainstream society in order to remove them as quickly and easily as possible.<sup>244</sup> Having reviewed the legislation, this chapter now moves on to discuss the policies that underpin it.

### **2.4 Justifications for hostile policies- a balancing act.**

C.J. Harvey argues that the protection of borders has surpassed the protection of needs of asylum seekers.<sup>245</sup> Policies are becoming increasingly restrictive, with the result that people are deterred from reaching Europe, and allowing States to avoid

---

<sup>240</sup> UK Borders Act 2007.

<sup>241</sup> Sales (n 204), 151.

<sup>242</sup> *Immigration Act 2014*.

<sup>243</sup> *Immigration Act 2016*.

<sup>244</sup> Mouncer (n 178).

<sup>245</sup> C.J. Harvey, "Strangers at the Gate: Human Rights and Refugee Protection." *Irish Studies in International Affairs* 10 (1999): 7–20

responsibility for processing asylum claims. Policies are also beginning to focus more heavily on resettlement, especially since the large numbers of Syrians seeking protection in 2015.<sup>246</sup> This approach gives the impression of unity, of a desire to assist those countries in need whilst limiting actual responsibility for those who cross borders. This examination of international and State protection for asylum seekers has highlighted the ways in which the UK uses the discretion afforded to it by the Refugee Convention. It is argued that the procedures are for the benefit of the State (border control), as opposed to the asylum seeker.

The changing policies are indicative of at least four aims; to reduce the number of asylum seekers claiming asylum in the UK, to maintain UK borders by placing firmer controls on entry, to minimise costs associated with supporting asylum seekers, and to manage entries and removals of asylum seekers.<sup>247</sup> These aims have been justified for social, economic and policy reasons.

#### **2.4.1 Too many asylum seekers?**

The ‘problem’ of asylum is not a new one, nor is it specific to the UK. Throughout history, there have been fluctuations in the number of asylum seekers fleeing their country of origin. Since the 1980’s, the number of asylum seekers has increased dramatically. The rising numbers indicate a global problem, with Australia, the USA and Germany all reporting new highs of asylum applications. Immigration debates centre on how to protect States from the ‘threat’ of this unhindered immigration.<sup>248</sup> Those who believe the UK should accept less asylum seekers frequently claim that we are overburdened, and that we take in more than our fair share of asylum cases.<sup>249</sup> States argue that restrictive laws are necessary in order to exclude ‘unsubstantiated’ claims and to identify terrorist activity, a fear which has been growing since the early 2000’s.<sup>250</sup> They claim that their obligations under the Convention are fulfilled in the

---

<sup>246</sup> Arno Van Hootegeem, Bart Meuleman and Koen Abts, ‘Attitudes Toward Asylum Policy in a Divided Europe: Diverging Contexts, Diverging Attitudes?’ *Frontiers in Sociology* (2020)

<sup>247</sup> Shuttleworth (n 7).

<sup>248</sup> Michael Bommers and Andrew Geddes, *Immigration and Welfare: Challenging the Borders of the Welfare State* (Routledge 2000).

<sup>249</sup> House of Commons, ‘Policy on the dispersal of asylum seekers’ (Research Briefing, 29 April 2016) <https://commonslibrary.parliament.uk/research-briefings/cdp-2016-0095/> accessed 16 March 2021.

<sup>250</sup> Marc Helbling and Daniel Meierrieks, ‘Transnational terrorism and restrictive immigration policies’ (2020) 57(4) *Journal of Peace Research*.



protection of 'genuine' refugees,<sup>251</sup> without allowing the 'refugee crisis' in the UK to worsen.<sup>252</sup>

Asylum is set in a climate of suspicion, however only 37,562 asylum seekers launched an application in the year ending September 2021,<sup>253</sup> making up 0.05% of the UK's population. Compare this figure to those in countries such as Germany, and it becomes even less daunting.<sup>254</sup> In fact, the UK is home to less than 1% of the world's refugees, more than 71 million forcibly displaced people worldwide.<sup>255</sup> It is not only other rich, European countries that take in asylum seekers; Amnesty International highlights the role that poorer African countries play in housing this vulnerable group.<sup>256</sup> It is reported that 56 percent of the world's refugees are being hosted by just 10 countries - all in the Middle East, Africa and South Asia.<sup>257</sup> Over 80% of the world's refugees are in developing countries, and the numbers in Europe are still relatively small compared to Africa and Asia. The UK, for example, has taken in fewer than 12,000 Syrians since 2011, while Jordan - with a population almost 10 times smaller than Britain and just 1.2 percent of its GDP - hosts more than 655,000 refugees from its war-torn neighbour.<sup>258</sup> This indicates that the impact on the UK constitutes a small fraction of the global refugee crisis, leading Amnesty to argue that many of the world's wealthiest nations (including the UK) "host the fewest and do the least"<sup>259</sup> when it comes to refugee protection.

#### **2.4.2 Policy change as a result of social justifications.**

Despite critics of the current asylum system claiming that the process is too complicated, unfair, and inhumane,<sup>260</sup> governments that want to be re-elected often

---

<sup>251</sup> Mouncer (n 178).

<sup>252</sup> Ibid.

<sup>253</sup> Home Office, *How many people do we grant asylum or protection to?* (n 5).

<sup>254</sup> In 2019, 165,938 individuals claimed asylum in Germany. European Council on Refugees and Exiles, 'Asylum Information Database: Statistics Germany' (November 2020)

<https://asylumineurope.org/reports/country/germany/statistics/> accessed 16 March 2021.

<sup>255</sup> UNHCR 'Mid-Year Trends 2020' (n 1).

<sup>256</sup> Amnesty International, 'The World's Refugees in Numbers: The Global Solidarity Movement' (*Amnesty International*, 2020 ) <https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/global-refugee-crisis-statistics-and-facts/> accessed 16 March 2021.

<sup>257</sup> UNHCR 'Mid-Year Trends 2020' (n 1).

<sup>258</sup> Amnesty International (n 257).

<sup>259</sup> Ibid.

<sup>260</sup> Fleur Houston, *You Shall Love the Stranger as Yourself: The Bible, Refugees and Asylum* (Routledge 2015).

balance meeting the obligations of the Convention with responding to the concerns of the general public, some of whom are becoming increasingly intolerant of high levels of asylum seekers entering the country as they feel that 'British' culture is being diluted, and the UK cannot cope with any more people (outsiders).<sup>261</sup>

Asylum policies are often assumed to be a response to an emergency that is happening now, such as the war in Syria and resulting 'deals' between the EU and Turkey to prevent an influx of asylum seekers.<sup>262</sup> Although this is true in certain circumstances, research such shows that many policies and laws that are introduced are reactive to political ideologies and attitudes towards 'others', regardless of their reasons for entering.<sup>263</sup>

### **2.4.3 Economic and social justifications.**

States also cite economic and social reasons to justify a restrictive approach to refugee protection. Policy is often influenced by the economic situation in a state as well as by public opinion. If the public believe what they see or hear in the media; that asylum seekers are a huge drain on resources, it is not difficult to see why a government introduces cuts in this area. The government wants to demonstrate and convince people that it is operating under the public interest.<sup>264</sup>

A restrictive approach to refugee protection is deemed necessary by states in order to exclude 'unsubstantiated' claims and thus protect resources, maintain social cohesion and identify and defend the country from terrorist activity, as unregulated immigration threatens peaceful cultural development of our society. It is also claimed that, for the sake of fairness, refugee intake should be regulated and orderly, so that

---

<sup>261</sup> The Migration Observatory, 'UK Public Opinion toward Immigration: Overall Attitudes and Level of Concern' (*Migration Observatory*, 20 December 2020) <https://migrationobservatory.ox.ac.uk/resources/briefings/uk-public-opinion-toward-immigration-overall-attitudes-and-level-of-concern/> accessed 13 March 2021; Robert Booth, Four in 10 think British culture is undermined by multiculturalism (*The Guardian*, 17 September 2018) <https://www.theguardian.com/uk-news/2018/sep/17/four-in-10-people-think-multiculturalism-undermines-british-culture-immigration> accessed 16 March 2021.

<sup>262</sup> European Commission, 'The EU and the Refugee Crisis' (2016) <http://publications.europa.eu/webpub/com/factsheets/refugee-crisis/en/> accessed 8 June 2020.

<sup>263</sup> Daphna Canetti, Keren Snider, Anne Pedersen, and Brian Hall, 'Threatened or Threatening? How Ideology Shapes Asylum Seekers' Immigration Policy Attitudes in Israel and Australia' [2016] *Journal of Refugee Studies* 1-24.

<sup>264</sup> Shuttleworth (n 7).

there is no 'queue-jumping', and to discourage others from making dangerous journeys.<sup>265</sup>

#### **2.4.4 Impact of hostile policies on asylum seekers.**

Restrictive, hostile policies have led to a rise in the number of destitute asylum seekers within the UK.<sup>266</sup> More rights are being taken away as the law becomes stricter, and many refused asylum seekers would rather remain destitute than apply for government support because they fear it will result in deportation.<sup>267</sup> Shami Chakrabarti argues that this undermines the very concept of asylum. She claims that, despite dictionary definitions of 'refugee' and 'asylum' presenting a positive or at least neutral picture of a person in flight from war, persecution or natural disaster and seeking shelter or protection in another country, dehumanizing policies such as forced destitution, and attacks on access to legal processes for those making asylum claims have weakened the fundamental human rights that the UK, as a country, is obliged to provide.<sup>268</sup> This shows that even though the term fairness has been used to justify UK regulation, this fairness is not always focussed on the asylum seeker. Having discussed the increasingly hostile policies in place in the UK, and potential justifications for these, the chapter moves on to discuss how these policies, and the asylum process as a whole, affect procedural fairness in more depth. The focus throughout the remainder of this chapter will be on how asylum appeals are conducted, and whether the legal context and procedural structures can be deemed fair in order to lay the foundation for a grounded investigation into procedural fairness through a structure and agency lens in the next chapter.

---

<sup>265</sup> Paul Chaney, 'Examining Political Parties' Record on Refugees and Asylum Seekers in UK Party Manifestos 1964–2019: The Rise of Territorial Approaches to Welfare?' [2020] *Journal of Immigrant and Refugee Studies*.

<sup>266</sup> The British Red Cross report an increase of 10% since 2015, with over 14,000 asylum seekers seeking destitution support. The true figure is thought to be much higher. EIN (2017) 'British Red Cross reports rise in destitute asylum seekers and refugees in 2016' <https://www.ein.org.uk/news/british-red-cross-reports-rise-destitute-asylum-seekers-and-refugees-2016>.

<sup>267</sup> Heaven Crawley, Neil Price, Joanne Hemmings, 'Coping with Destitution: survival and livelihood strategies of refused asylum seekers living in the UK,' (*Oxfam Research Report Centre for Migration Policy Research: Swansea University* 2011). <http://boaztrust.org.uk/wp-content/uploads/2011/02/rr-coping-with-destitution-survival-strategies-uk-040211-en.pdf> accessed 10 May 2019.

<sup>268</sup> Shami Chakrabarti, 'Rights and Rhetoric: The Politics of Asylum and Human Rights Culture in the United Kingdom' (2005) 32(1) *Journal of Law and Society*.

## **2.5 What is a fair asylum system?**

In order for an asylum system to be described as fair, there needs to be adequate protection for asylum seekers. Incorrect decisions would ideally be eradicated, as errors may cost an individual their life.<sup>269</sup> A fair system should also be a priority for the government as in theory, the fairer the system, the more economically efficient, as the number of appeals should be reduced. In 2019, 9,625 asylum appeals were decided, and 48% were successful,<sup>270</sup> indicating that a large number of initial decisions may have been erroneous. This is troubling as, discussed in section 2.1.2, fairness involves treating like cases alike, and reducing inconsistencies. Certain elements of the UK's legal and political framework have particular impact on how individual claimants experience the asylum process which, in turn, can affect procedural fairness.<sup>271</sup> This chapter now turns to examine the current asylum process that asylum seekers face when arriving in the UK, considering whether procedural fairness is achieved.

## **2.6 Individuals in the asylum process in the UK – The role of the appeal.**

In the UK, a claimant enters the asylum system by lodging an application at a UK port of entry, or by presenting in person to the Home Office. When a person claims asylum in the UK, they first attend a short screening interview with the Home Office where the applicant's fingerprints are taken, and any official documents are surveyed. A Statement of Evidence Form is usually issued, which asks for personal data and reasons for claiming asylum. The applicant is asked whether they have a well-founded fear of persecution, and must answer 'yes' or 'no'.<sup>272</sup> The applicant is to sign the transcript at the end of the interview, to confirm its accuracy. During the screening interview, the applicant's eligibility for NASS support is determined, and they are dispersed to accommodation. The screening interview is followed by a much longer substantive interview. These have been criticised as applicants in a state of distress, exhaustion and confusion may be unprepared to give full, clear accounts of their experiences, which may undermine procedural fairness, and deprive the asylum seeker of effective agency.<sup>273</sup> Following the substantive interview, the Home Office

---

<sup>269</sup> UNHCR, 'Determination of Refugee Status' (1977), RLD 2, Chapter 2.

<sup>270</sup> Refugee Council, 'Asylum statistics Annual Trends' (n 48).

<sup>271</sup> See sections 2.6, 7.5.4 and 7.7.2 on the perceptions of fairness in the appeal setting.

<sup>272</sup> Roxana Rycroft, 'Communicative Barriers in the Asylum Account' in Prakash Shah (ed) *The Challenge of Asylum to Legal Systems* (Cavendish 2005).

<sup>273</sup> Katrin Schock, Rita Rosner and Christine Knaevelsrud, 'Impact of asylum interviews on the mental health of traumatized asylum seekers' (2015) 6(1) *European Journal of Psychotraumatology*.

must then decide whether or not to grant refugee status, or some form of protection to the applicant in the form of a grant or refusal letter. The asylum system is supposed to be impartial and free from bias.<sup>274</sup> The burden of proof is on the asylum seeker; and as discussed above, the standard they need to prove is ‘a reasonable degree of likelihood’ that they would face persecution if returned to their country of origin.<sup>275</sup> In 2019, almost half (48%) of initial decisions were refusals.<sup>276</sup>

Unsuccessful applicants have a right of Appeal to the First Tier Tribunal (Asylum and Immigration Chamber). This is an important safeguard in terms of procedural fairness, as the judiciary serves as an independent adjudicator. The asylum process is often deemed procedurally fair by the government on the basis that the asylum seeker has access to an appeals system, and thus the opportunity to redress an erroneous decision.<sup>277</sup> Thomas extends the requirement beyond the mere provision of a path to appeal to require a fair procedure during the appeal process.<sup>278</sup> This thesis builds on this argument and examines whether the processes employed in the appeal can be considered fair.

Until 1993, appeals fell within the remit of the Immigration Act 1971.<sup>279</sup> Asylum seekers were then given a right of appeal to the Immigration Appeal Authority.<sup>280</sup> The appeal was originally heard by one adjudicator and the asylum seeker could appeal this further decision to the Immigration Appeals Tribunal, comprised of three members. After six pieces of legislation, appeal rights have changed.<sup>281</sup> This reduction to the right to appeal, Thomas argues, must be seen in light of the political context in response to the claims of a ‘culture of abuse’ of the appeals system by ‘unmeritorious applicants’ who wish to delay removal.<sup>282</sup> These claims, as stated above, serve to underpin structures that tip the balance to limit both fairness and access.

---

<sup>274</sup> UNHCR, ‘Beyond Proof’ (n 56).

<sup>275</sup> *Sivakumaran* (n 45).

<sup>276</sup> Refugee Council (n 48).

<sup>277</sup> As highlighted in section 2.1, I discuss procedural fairness throughout this chapter to illustrate why it is important; the following chapter outlines what I mean by the term.

<sup>278</sup> Thomas, ‘Asylum appeals: The Challenge of Asylum seekers to the British legal system’ (n 30).

<sup>279</sup> Immigration Act 1971.

<sup>280</sup> Asylum and Immigration Appeals Act 1993.

<sup>281</sup> Asylum and Immigration Appeals Act 1993; Asylum and Immigration Act 1996; Immigration and Asylum Act 1999; Nationality, Immigration and Asylum Act 2002; Asylum and Immigration (Treatment of Claimants, etc.) Act 2004; UK Borders Act 2007.

<sup>282</sup> Thomas, ‘Evaluating Tribunal Adjudication’ (n 38).

In an attempt to balance the competing interests between protecting 'genuine' asylum seekers and keeping out 'unmerituous' claims, the *Asylum and Immigration (Treatment of Claimants) Act 2004*<sup>283</sup> replaced the appeals system with a single tier; the Asylum and Immigration Tribunal. There is a clear tension between the competing values of appeal tribunals (fairness, accuracy and independent decision-making/efficiency and cost-effectiveness), and it is difficult to assess how well each of these values is fulfilled.<sup>284</sup> This tribunal structure (it is claimed) still allows appellants to present a well-prepared claim, and the opportunity to adduce supporting evidence, whilst safeguarding the appeals system from misuse.<sup>285</sup> The government claimed that this was a positive change, promoting consistency, quality, justice and fairness.<sup>286</sup> As delays can hinder procedural fairness and adversely affect agency, a streamlined system did have the potential to balance these competing interests; promoting cost saving and efficiency, whilst also enhancing fairness. However, it can be argued that the primary aims were speed, and to deter unmerituous applicants, especially as the applicant has only ten days to appeal to the tribunal (five days if in detention).<sup>287</sup> This may promote speed and efficiency at the expense of fairness to the appellant. Asylum refusals have a high rate of challenge, due to the magnitude of being sent back to their country of origin. This shortened single tier system thus provides the government with the means to have external legal control without the expense and delay of judicial review proceedings,<sup>288</sup> as there is little scope for compromise at appeal hearings, as decisions are binary; protection is either granted or refused. Under the previous appeal system, 60% of appeals resulted in the decision of the first-tier being reversed or reconsidered. Without this safeguard, these 60% of cases may go uncorrected and

---

<sup>283</sup> Asylum and Immigration (Treatment of Claimants) Act 2004.

<sup>284</sup> Ibid.

<sup>285</sup> Select Committee on Constitutional Affairs, 'Second Report' (1 March 2004) <https://publications.parliament.uk/pa/cm200304/cmselect/cmconst/211/21108.htm#note38> accessed 9 June 2021.

<sup>286</sup> Joint Committee on Human Rights, 'Thirteenth Report' (4 April 2004) <https://publications.parliament.uk/pa/jt200304/jtselect/jtrights/102/10204.htm> accessed 5 January 2021.

<sup>287</sup> Although fast-track appeal procedures were deemed procedurally unfair and found to be unlawful in 2015, the most recent Nationality and Borders Bill contains provisions on expedited appeals which seem to be a resurrection of the fast track rule. See *R (Detention Action) v First-tier Tribunal (Immigration and Asylum Chamber)* [2015] EWCA Civ 840; [2015] 1 WLR 5341.

<sup>288</sup> Thomas, 'Evaluating Tribunal Adjudication' (n 38).

unaddressed.<sup>289</sup> This can significantly impact procedural fairness and access to justice for the asylum seeker.

Each case is highly fact specific, and can be based on new evidence, as opposed to identifying errors in the initial decision. Appeals must consider the current circumstances and levels of risk in that country, considering any new developments in the appellant's country of origin, alongside the subjective test of credibility discussed below. As with the initial decision, the burden of proof is on the asylum seeker to prove that there is a reasonable likelihood of persecution if they were to be returned.

### **2.6.1 Procedural fairness in the asylum appeal tribunal**

The hearing begins with the examination-in-chief, where the legal representative (if the appellant has one) can question the appellant. In practice, most appellants have a written Statement of Evidence Form, which have been compiled in previous interviews with representatives. The representative asks the appellant to confirm that the contents are true and that the appellant wishes to submit them in evidence. Cross-examination by the HOPO follows, and is routinely the longest part of the hearing, usually involving an attempt to seek inconsistencies which cast doubt on credibility by going over the same ground. The adjudicator may ask questions to clarify matters.<sup>290</sup> The legal representative then has a chance to re-examine their client. The HOPO and representative set out their arguments fully in their final submissions. The judge then 'reserves' their decision and produces a written decision. Appeals are usually open to the public, and expert witnesses may attend unless the appellant requests otherwise, or if they are especially vulnerable, such as a minor or a victim of trafficking.

Many asylum seekers suggest that one of the most difficult things about going through the asylum process is having to wait in uncertainty as to whether they would be granted status.<sup>291</sup> They have highlighted the significant implications that a failed status would have, such as potential deportation and returning to a country which was

---

<sup>289</sup> Select Committee on Constitutional Affairs, 'Second Report' (1 March 2004) <https://publications.parliament.uk/pa/cm200304/cmselect/cmconst/211/21108.htm#note38> accessed 9 June 2021.

<sup>290</sup> Robert Thomas, 'From 'Adversarial v Inquisitorial' to 'Active, Enabling, and Investigative': Developments in UK Tribunals' in Laverne Jacobs and Sasha Baglay (eds) *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives* (Ashgate Publishing 2013).

<sup>291</sup> Melanie Griffiths, 'Out of Time: The Temporal Uncertainties of Refused Asylum Seekers and Immigration Detainees' (2014) 40(12) *Journal of Ethnic and Migration Studies* 1991-2009.

threatening for them and their families. This delay then, can hinder procedural fairness, and adversely affect agency. There is a need for faster processing of asylum claims due to the fear and trauma that the delay can create.<sup>292</sup>

The asylum appeals procedure can also make it difficult for an asylum seeker to assert agency due to the role of the tribunal judge. Tribunals are purported to be less formal and adversarial than formal court litigation. However, they must be contextualised in light of the court-focused adversarial process adopted in the UK.<sup>293</sup> Despite claims that the tribunal procedure is more relaxed than the typical adversarial court case, the judge still plays an adversarial role in the case as they are unable to question the appellant in any depth, thus limiting their ability to ‘fact-find’.<sup>294</sup> The adversarial nature of the system has resulted in a perception of the need for representation. Due to the current shortage of representation there has been a rise in the number of unrepresented asylum seekers who wish to have representation.<sup>295</sup> This may result in procedural unfairness; if a HOPO is present but a legal representative is not, then there may be an inequality of arms, one which cannot be rectified by the judge. The perception for the need for representation is predicated on the central element of the decision making; the assessment of credibility. This assessment at the heart of the outcome, leads to inconsistency, where similar cases can result in different outcomes.<sup>296</sup> It is this inconsistency which has led to the phrase “asylum lottery” in the popular press and academic literature.<sup>297</sup> These inconsistencies can undermine our sense of justice; that like cases should be treated alike. Inconsistencies are also troubling, as disparate outcomes may lead to substantively incorrect outcomes.<sup>298</sup> As the majority of asylum claims are granted or rejected on credibility grounds,<sup>299</sup> this

---

<sup>292</sup> Tim Hilton, ‘Chief Executive: “Asylum System Currently at Lowest Point I’ve Ever Seen”’ (*Refugee Action* 15 March 2021) (<https://www.refugee-action.org.uk/asylum-system-lowest-point/> accessed 17 March 2021); Meka Beresford, ‘Home Office Scraps Six-Month Wait Limit On Asylum Applications Despite Legal Warnings’ (*The Guardian* 8 May 2019)

[https://www.duncanlewis.co.uk/InthePress/Home Office to scrap asylum claims processing target \(The Guardian and RightsInfo\).pdf](https://www.duncanlewis.co.uk/InthePress/Home%20Office%20to%20scrap%20asylum%20claims%20processing%20target%20(The%20Guardian%20and%20RightsInfo).pdf) accessed 17 March 2021.

<sup>293</sup> Thomas, ‘From ‘Adversarial v Inquisitorial’ (n 291).

<sup>294</sup> Jessica Hambly, ‘Interactions and Identities in UK Asylum Appeals: Lawyers and Law in a Quasi-Legal Setting’ in Nick Gill and Anthony Good (eds) *Asylum Determination in Europe* (Palgrave 2019).

<sup>295</sup> Ibid.

<sup>296</sup> Thomas, ‘Consistency in Asylum Adjudication’ (n 65).

<sup>297</sup> Jaya Ramji-Nogales, Andrew Schoenholtz, and Phillip Schrag (eds), *Refugee roulette. Disparities in asylum adjudication and proposals for reform* (New York University Press 2009)

<sup>298</sup> Ibid.

<sup>299</sup> John Campbell, ‘Examining Procedural Unfairness and Credibility Findings in the UK Asylum System’ (2020) 39(1) *Refugee Survey Quarterly* 56-75.



chapter will now discuss how different assessments of credibility can lead to inconsistent decisions and a lack of procedural fairness.

## **2.7 The assessment of credibility in asylum cases.**

Asylum cases often turn on whether the asylum seeker is to be believed. As shown in section 2.2.5, in order to gain asylum, the claimant must show that they have a fear of persecution (subjective element) and that there are reasonable grounds for believing that the fear is well-founded (objective element). Credibility assessments contribute to the 'well-founded fear' aspect. Asylum law compensates for the difficulties in adducing evidence by adopting a lower standard of proof; whether there is a 'reasonable degree of likelihood'. Although a lower burden of proof is adopted, it can still be difficult to attain.<sup>300</sup> According to the Qualification Directive, the applicant must have made a 'genuine effort', and provided a 'satisfactory explanation', which is 'coherent and plausible', thus establishing their 'general credibility'.<sup>301</sup> In 2015, the Home Office published guidance on assessing credibility in asylum claims.<sup>302</sup> The guidance details the burden of proof, evidence to be considered, Country of Origin Information and ways to identify the material facts of a case. The document suggests that the standard of credibility is low, with a subsection entitled 'assessing credibility: the low standard of proof'.<sup>303</sup> Thomas writes extensively on assessing the credibility of asylum claims, claiming that despite a great amount of analysis into the legal tests of determining refugee status, the majority of claims are decided on individual factual circumstances; they must convince the decision maker that they are credible.<sup>304</sup> Credibility then, is arguably the most important facet of the claim as if the claimant's story is disbelieved, the adjudicator can lawfully reject the claim. Despite the low standard of proof, 48% of initial asylum claims were rejected in 2019.<sup>305</sup> Unlike the EU, which promote both the positive and negative assessment of credibility,<sup>306</sup> UK laws tend to promote only the negative side, indicating matters which should be seen by decision-makers as

---

<sup>300</sup> Ibid. Nationality and Borders Bill 2021.

<sup>301</sup> Qualifications Directive (n 42), a4(5).

<sup>302</sup> Home Office, *Assessing credibility and refugee status* (23 January 2015)

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/397778/ASSESSING\\_CREDIBILITY\\_AND\\_REFUGEE\\_STATUS\\_V9\\_0.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/397778/ASSESSING_CREDIBILITY_AND_REFUGEE_STATUS_V9_0.pdf) accessed 10 March 2021.

<sup>303</sup> Ibid.

<sup>304</sup> Campbell, 'Examining Procedural Unfairness' (n 300).

<sup>305</sup> Refugee Council (n 48).

<sup>306</sup> UNHCR, 'Beyond Proof' (n 56).

damaging to credibility.<sup>307</sup> This has been justified as it aims to limit abuse of the system, and promote consistency in the ways in which perpetrators are treated.<sup>308</sup>

The Immigration Rules contain provisions which tend towards the negative assessment of credibility.<sup>309</sup> These Rules state that the decision-maker must have regard to matters which may damage the credibility of the applicant. Currently, the Rules include two matters which may damage credibility; if the applicant has provided manifestly false evidence or made false representations, or if they have lodged concurrent asylum claims in the UK or elsewhere. Section 8 of the *Asylum and Immigration (Treatment of Claimants, etc.) Act 2004*<sup>310</sup> also governs assessments of credibility and includes instances where decision-makers should take statements as being damaging to the claimant's credibility. These include any behaviours by the claimant, which is likely to conceal information, mislead, obstruct, or delay the handling of the claim, such as failure to produce, or destruction of, a passport or ticket. This is justified by a need to deter and reduce the scope for abuse of the system. Section 8 does however, establish a rebuttable presumption rather than an absolute rule, so that asylum seekers can provide a reasonable explanation for their behaviour. In the case of *JT (Cameroon) v Secretary of State for the Home Department*, the Court of Appeal stressed that the weight to be given to section 8 findings was entirely a matter for the fact finder.<sup>311</sup> Some behaviour does not fall under this rebuttable presumption and are presumed to damage credibility regardless of any explanation. An example of this is failure to claim asylum in a safe country, or not to claim asylum until after being arrested. The rebuttable presumption applies not only to Home Office decision-makers, but also to the independent judicial decision-makers; section 8 must be applied by the tribunal. Delay may also damage credibility where no reasonable explanation is given.

It is assumed that genuine asylum seekers will know which details are relevant to the claim, but in reality, they are unlikely to know whether an individual can be protected under the Refugee Convention. According to Thomas, there are three

---

<sup>307</sup> Thomas, 'Assessing the Credibility of Asylum Claims' (n 10).

<sup>308</sup> Ibid.

<sup>309</sup> Ibid.

<sup>310</sup> Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

<sup>311</sup> *JT (Cameroon) v Secretary of State for the Home Department* [2008] EWCA Civ 878.

principal categories in which asylum claims can be found to be lacking credibility.<sup>312</sup> There may be internal inconsistencies, where the claimant changes the nature of their claim, producing an inconsistent account. Other claims may have external inconsistencies, between the claimant's narrative and objective evidence concerning country of origin conditions. Decision-makers may also fail to find credibility due to an assessment of the plausibility and truthfulness of a claim, that is, the likelihood of their story actually happening.<sup>313</sup>

In the UK, the decision maker can be persuaded by the general story a claimant presents, even if he is not convinced of the truth of certain aspects.<sup>314</sup> This can be seen in practice in *Karanakaran* where the Court of Appeal found that an asylum claim could succeed even if the person assessing it doubted parts of the account.<sup>315</sup> Decision-makers can and should use the 'benefit of the doubt' principle, giving protection to asylum seekers despite evidence/credibility issues according to the current Immigration Rules and UNHCR guidance. This guidance determines that as long as the narratives are coherent and plausible as a whole, and as long as they do not contradict well-known facts, the 'benefit of the doubt' principle should be applied.<sup>316</sup> As noted above, the standard to be reached is whether or not persecution is 'likely'. This relates to credibility as decision-makers may only have the asylum seeker's story to base the decision on. Where there are discrepancies in this story, the appellant is often deemed incredible. But discrepancies are not always a sign of a lack of veracity, the discrepancies may also be caused by the fallibility of human memory, especially during times of high stress and fear. It is for the decision makers to consider all of their evidence and make a judgement. However, although discrepancies should not result in a failure of the claim, Jubany researched immigration officers, and found that often, discrepancies within a story result in a refusal, in part because of training where new recruits are taught to 'identify the lies'.<sup>317</sup> The assessment of credibility is made more difficult due to linguistic and cultural barriers to communication (see Chapter 6). In

---

<sup>312</sup> Thomas, 'Assessing the Credibility of Asylum Claims' (n 10).

<sup>313</sup> Ibid.

<sup>314</sup> Campbell, 'Examining Procedural Unfairness' (n 300). Thomas, 'Assessing the Credibility of Asylum Claims' (n 10).

<sup>315</sup> *Karanakaran v. Secretary of State for the Home Department*, [2000] EWCA Civ. 11.

<sup>316</sup> UNHCR, 'Beyond Proof' (n 56).

<sup>317</sup> Olga Jubany, 'Constructing truths in a culture of disbelief: Understanding asylum screening from within' (2011) 26(1) *International Sociology*.

addition to these barriers, asylum seekers can also face issues with obtaining evidence and problems with the reliability of memory, especially for trauma victims.<sup>318</sup> Heaven Crawley argues that the UK approach to ascertaining credibility does not consider a variety of legitimate reasons why applicants may not claim immediately, including anxiety, shame, or a lack of knowledge about procedures.<sup>319</sup>

### **2.7.1 Shortcomings of narrative evidence.**

The importance of the individual is highlighted in credibility assessments. In the appeal, the ability to narrate your story is essential. Asylum seekers may find it difficult to obtain external evidence, and many claims are decided on the basis of narrative evidence alone. Unfortunately, there are many factors which may influence their ability to articulate a convincing narrative which satisfies the criteria of credibility.

To be credible, the level and nature of information provided by the claimant should demonstrate a reasonable depth of personal experience and knowledge.<sup>320</sup> However, research shows that the memory of asylum seekers may be hindered by several factors.<sup>321</sup> Memory fades, especially if something is deemed unimportant at the time. Details or events which may feel unimportant to an asylum seeker might be important to a decision-maker. It can be difficult for applicants to remember everything, especially the order in which events happened, as memories may not always be entirely rational and consistent.

This can lead to discrepancies or inconsistencies in narratives and opportunities for decision-makers to doubt credibility. It has also been shown that experiences of trauma make accurate recall difficult. Due to dissociation and detachment, coherent and accurate recall is unlikely.<sup>322</sup> Discrepancies are a regular

---

<sup>318</sup> Diana Bogner, 'What Prevents Refugees and Asylum Seekers Exposed to Violence from Disclosing Trauma?' (PhD Thesis, UCL 2005).

<sup>319</sup> Heaven Crawley, *Refugees and Gender: Law and Process* (Jordan Publishing 2001).

<sup>320</sup> Home Office, *Assessing credibility and refugee status* (n 303).

<sup>321</sup> Belinda Graham, Jane Herlihy, and Chris Brewin, 'Overgeneral memory in asylum seekers and refugees' (2014) 45(3) *Journal of Behaviour Therapy and Experimental Psychiatry* 375-380.

<sup>322</sup> Diane Bogner, Jane Herlihy, and Chris Brewin, 'Impact of Sexual Violence on Disclosure During Home Office Interviews' (2007) 19(1) *British Journal of psychiatry* 75-78.

feature of asylum narratives.<sup>323</sup> These instances are often exacerbated by long periods of time between interviews and appeals.<sup>324</sup>

This section indicates that narratives can be inconsistent and unpredictable when opened to criticisms such as Home Office questioning, making it easier to claim that an individual is lying. Claimants who have been victims of torture or rape may also be reluctant to disclose experiences.<sup>325</sup> Late disclosure may then seem manufactured. Alternatively, disclosing such information quickly may be doubted as the reasonable person who had suffered these experiences may be unwilling to disclose them.<sup>326</sup> As the asylum appeal is supposed to be inquisitorial, there is an assumption that the Home Office representative will be neutral, and so applicants can give straightforward, truthful answers, but evidence suggests that interviewers often adopt an inappropriate tone or line of questioning, are not gender-appropriate, and fail to give appropriate opportunity to explain inconsistencies.<sup>327</sup> This can contribute to procedural unfairness.

### **2.7.2 Linguistic and cultural barriers.**

Another facet of the determination of credibility beyond the control of the asylum seeker is that they rarely have English as their first language, and so it is often difficult for them to understand, or get their point across clearly.<sup>328</sup> In the context of an asylum appeal, the inability to speak the host nation language places significant additional psychological and structural burdens on the asylum seeker. To mitigate against this during the appeal hearing, asylum seekers can use interpreters. However, even with the help of a competent interpreter, the asylum-seeking appellant may still face misinterpretations and cultural barriers that can have an adverse impact on their claim. It may be that, if they speak slightly different dialects; the interpreter may not have an adequate grasp of the specialist language and so things get lost in translation.<sup>329</sup> Sometimes there is no equivalent word in English, or the interpreter cannot put forward the right meaning, leading to inconsistencies. In these cases, it may look from the

---

<sup>323</sup> Juliet Cohen, 'Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers' (2001) 13 *International Journal of Refugee Law* 293–309.

<sup>324</sup> UNHCR, 'Beyond Proof' (n 56).

<sup>325</sup> Baillot (n 62).

<sup>326</sup> Thomas, 'Assessing the Credibility of Asylum Claims' (n 10).

<sup>327</sup> Shuttleworth (n 7).

<sup>328</sup> Rosalind Edwards, 'A critical examination of the use of interpreters in the qualitative research process' (1998) 24(1) *Journal of Ethnic and Migration Studies* 197-208.

<sup>329</sup> Jan Blommaert, 'Language, asylum, and the national order' (2009) 50(4) *Current Anthropology*, 415-441.

answers given that the asylum seeker is confused, untruthful, or incredible. Whilst interpretation is vital, it can inhibit effective communication, due to the unnaturally slow pace and necessary pauses which break the narrative and can cause the applicant to forget what they intended to say.<sup>330</sup> This is discussed in Chapter 6.

Due to the difficulties described above, it is necessary to have flexible tests for determining credibility, especially given the magnitude of an erroneous decision. In addition to flexible tests, for the process to be fair, impartiality is necessary. There needs to be equal respect and concern for all individuals, and justice must be seen to be done.<sup>331</sup> A lack of impartiality can adversely affect an asylum claim through favouring some asylum seekers to the detriment of others. Asylum seekers need to have their claims decided without prejudice or discrimination. In the UK, it is not necessary for an asylum seeker to corroborate their claim with external evidence; their Statement alone is enough. However, whether or not this statement is accepted is another matter;<sup>332</sup> documentary evidence such as Country of Origin Information and medical evidence is seen as ‘better’ than narrative,<sup>333</sup> with evidence suggesting that narrative alone is often insufficient.<sup>334</sup> This suggests that procedural fairness in the asylum process is hindered by a prevailing ‘culture of disbelief’.

### **2.7.3 Assuming the worst- A culture of disbelief.**

The assessment of credibility relies on evidence, yet asylum seekers often arrive without any form of identification, rendering corroboration of the claim difficult. The absence of corroboration and representations of asylum seekers as dangerous ‘others’ facilitates a culture of disbelief which pervades the asylum process from the earliest point. In their dealings with asylum seekers, border control officials often begin from an assumption that asylum seekers are not telling the truth, creating both an endemic image of asylum seekers as “bogus” and “cheats” and a “culture of disbelief”, operating within a broader institutional “culture of denial”.<sup>335</sup>

---

<sup>330</sup> Edwards (n 329).

<sup>331</sup> Dworkin (n 92).

<sup>332</sup> Thomas, ‘Assessing the Credibility of Asylum Claims’ (n 10).

<sup>333</sup> Ibid.

<sup>334</sup> Ibid.

<sup>335</sup> James Souter, ‘A Culture of Disbelief or Denial? Critiquing Refugee Status Determination in the United Kingdom’ (2011) 1(1) *Oxford Monitor of Forced Migration* 48-59.

Melanie Griffiths argues that a high standard of honesty and a presumption of suspicion can have serious implications, such as detention or refusal of their claim.<sup>336</sup> It is assumed that truthful appellants will have almost perfect recall, plausible facts and the account is consistent and unhesitating.<sup>337</sup> However, as described above, this is often impossible to achieve. The 'right kind' of evidence also needs to be presented, failing to consider that many asylum seekers flee without time to gather documents or other evidence to substantiate their claim.

Several studies consider the 'culture of disbelief' surrounding the UK's procedure for determining refugee status,<sup>338</sup> stemming from the widespread assumption that large numbers of asylum claims are 'bogus' and the resulting hostile environment.<sup>339</sup> In order to prevent abuses of the asylum system, this 'culture of disbelief' has led the Home Office to reject a high number of asylum applications.<sup>340</sup> The disbelief often stems from inconsistencies in peripheral elements of asylum claims,<sup>341</sup> disregarding the fact that, as argued by Trevor Trueman, events are often related in non-linear ways in different cultures.<sup>342</sup> This culture of disbelief can constrain asylum seekers' agency, as disbelief of self-identification (of religion or sexual orientation for example), can result in invasive scrutiny into their ability to 'prove' it. Disbelief can also stem from prejudice and culturally specific assumptions, where the decision-maker is unaware of the existence or importance of cultural differences between themselves and the appellants.<sup>343</sup> This is an example of procedural unfairness, where decision-makers apply Western beliefs and cultures to asylum claims. By failing to take these cultural differences into account, some decision-makers may reject claims on credibility grounds where the inconsistency is unconnected to their central claim. Indeed, in a complex claim process, Guy Coffey suggests that concerns in one aspect of the appellant's story can undermine their credibility, even if

---

<sup>336</sup> Melanie Griffiths, 'Vile liars and truth distorters': truth, trust, and the asylum system' (*Right to Remain*, 9 November 2012) <https://righttoremain.org.uk/vile-liars-and-truth-distorters-truth-trust-and-the-asylum-system/> Accessed 28 March 2018.

<sup>337</sup> Ibid.

<sup>338</sup> See Jubany (n 318) and Souter (n 336).

<sup>339</sup> Sarah Gibson, 'Testimony in a Culture of Disbelief: Asylum Hearings and the Impossibility of Bearing Witness' (2013) 17(1) *Journal for Cultural Research* 1-20.

<sup>340</sup> Souter (n 336).

<sup>341</sup> Baillot, Cowan and Munro (n 71).

<sup>342</sup> Trueman (n 234).

<sup>343</sup> Anthony Good, *Anthropology and Expertise in the Asylum Courts* (Routledge-Cavendish 2007).

it is not central to the claim.<sup>344</sup> The preceding sections show that decision-makers tend to put great emphasis on ‘truth’ when deciding whether to grant protection. This approach is flawed as credibility and truth are not the same thing.<sup>345</sup> It will be argued in Chapter 5 that the correct standard should be believability, rather than whether the decision maker personally believes a story is true. So far, this chapter has shown that asylum seekers can face procedural unfairness in the asylum process, due in part to hostile policies, a culture of disbelief, linguistic and cultural barriers, and a lack of knowledge or understanding of the process. To enhance procedural fairness, and to allow appellants to assert agency and establish their credibility, it is argued that they need access to high quality legal representation.

## **2.8 Legal representation as a necessary facet of access to justice.**

In order to promote procedural fairness, and the right to a fair hearing, asylum seekers have a right to legal representation. However, this right is not absolute; it is contingent on certain factors. These factors include whether the process is adversarial, the importance of the interest at stake, the ability of the individual to present their case, and legal complexity. The UNHCR emphasises that asylum seekers are entitled to legal representation at ‘all stages of the procedure’.<sup>346</sup> The EU Procedures Directive also provides for the right of access to legal assistance and representation.<sup>347</sup> In addition, article 15(2) entitles the asylum seeker to representation in the event that the Home Office reject their claim. This right is important for the purposes of this thesis as legal representation can have a considerable influence on procedural fairness, and whether an asylum seeker can assert agency.<sup>348</sup>

Jaya Ramji-Nogales *et al* assert that legal representation is the single most important factor affecting asylum hearings.<sup>349</sup> Legal assistance is necessary to give full effect to the right to asylum. Despite claims that the tribunal procedure is more

---

<sup>344</sup> Guy Coffey, ‘The Credibility of Credibility Evidence at the Refugee Review Tribunal’ (2003) 15(3) *International Journal of Refugee Law* 377.

<sup>345</sup> UNHCR, ‘Note on Burden and Standard of Proof in Refugee Claims’ (1998) <https://www.refworld.org/docid/3ae6b3338.html> accessed 20 March 2020; Khan (n 32).

<sup>346</sup> UNHCR, ‘Asylum Processes: Fair and Efficient Asylum Procedures’ (2001) <https://www.unhcr.org/uk/protection/globalconsult/3b389254a/asylum-processes-fair-efficient-asylum-procedures.html> para 50. There is discretion as to how this applies. For instance, in the UK, legal aid is provided if conditions are met (see section 2.3.5).

<sup>347</sup> Procedures Directive, a15 (n 89).

<sup>348</sup> See Chapter 7.

<sup>349</sup> Ramji-Nogales *et al* (n 298).



relaxed than the typical adversarial court case, the judge still plays an adversarial (rather than inquisitive) role in the case. Empirical research shows that unrepresented asylum seekers are placed at a disadvantage, primarily due to the complicated process (of which they have limited knowledge) and language barriers; preventing them from effectively communicating their case to the judge.<sup>350</sup> Research highlights the importance of legal representation for asylum appeals.<sup>351</sup> According to Thomas, without acceptable representation, asylum seekers have an inadequate opportunity to put their case forward.<sup>352</sup>

Despite informal support mechanisms such as the shared knowledge in asylum seeker communities, without representation, asylum seekers are unlikely to know how to proceed with the appeal.<sup>353</sup> If a judge helps them in the way a lawyer might, explaining the sorts of answers they should give; procedural fairness may be undermined as judges should only ask questions for clarification. However, if the judge does not help, procedural and substantive fairness decreases, as they may not be able to communicate their story effectively and thus receive a fair hearing. As Daniel Newman argues, representation allows for equality of arms. The judge and HOPO understand the law, yet the asylum seeker is silenced by a lack of understanding.<sup>354</sup> Representation gives them a voice, and allows them some form of agency as their case can proceed more efficiently. The importance of representation is analysed further in Chapter 7.

## **2.9 Conclusion**

The asylum process as a whole can be described as challenging and difficult to negotiate. It is a process filled with uncertainty and limitations. The system of providing support, both financial and housing, appears to focus on deterrence and control rather than protection, which undermines the purpose of the 1951 Convention; the right to seek asylum. It has been shown throughout this chapter that procedures can undermine the substantive principles of the right to seek asylum. Protection under international and supranational law has been discussed, including an examination of

---

<sup>350</sup> Edwards (n 329).

<sup>351</sup> See Hambly (n 295); Thomas, 'From 'Adversarial v Inquisitorial' (n 291).

<sup>352</sup> Thomas, 'Evaluating Tribunal Adjudication' (n 38).

<sup>353</sup> Ibid.

<sup>354</sup> Newman (n 92).

the definition of a refugee given in the Refugee Convention. It has been argued that the lack of a definition of 'persecution' in the 1951 Convention and the need for a subjective fear of persecution when demonstrating a 'reasonable degree of likelihood' for a well-founded fear of persecution have allowed States to adopt increasingly hostile policies with regards to asylum seekers and refugees. The role of language, interpreters and legal representatives have been introduced, highlighting the difficulties asylum seekers face. English is rarely the first language of an asylum seeker, and the asylum process may be too complex for the individual to comprehend without specialist legal help. These issues are analysed in more depth in Chapters 6 and 7, with specific reference to agency, fairness, and access to justice.

Procedural fairness has been discussed, and the chapter has introduced the idea that asylum procedures in the UK can be procedurally unfair. Asylum seekers are treated with suspicion, and are accused of bringing fraudulent claims, highlighting the existence of a culture of disbelief in the UK asylum process. The analysis demonstrates that, as fairness has been used to justify the development of asylum law, then justice as fairness is deemed to be the appropriate lens for this thesis as it is an accepted standard in the UK system. Going forward, Rawls conception of justice as fairness, as outlined in *The Law of Peoples*, will be analysed as a benchmark for considering whether asylum seekers have appropriate access to justice through procedural fairness. The next chapter will analyse the concepts of justice and fairness, with a focus on procedural fairness in the asylum system. It will consider whether the Asylum and Immigration Tribunal, and the asylum process as a whole, provides fairness and consistency for asylum seekers.

## Chapter 3- A Non-Ideal Theory of Justice as Fairness through a Structure and Agency Lens

*'Fairness has to be an inherent part of justice, because without fairness, I think justice would be manipulated.'* (Legal representative 11)

The previous chapter discussed the history of international and domestic asylum law and procedural fairness in the asylum system, highlighting the emergence of increasingly restrictive legislation and policies, and considering the level of protection that asylum seekers should receive in the UK. Yet, throughout the development of UK law, the term fairness has been used to justify policy decisions. This chapter considers procedural fairness as a necessary element of justice in the context of the asylum appeal hearing, and how it can be applied within this context. It introduces Rawls' theory of justice as fairness,<sup>355</sup> proposing a theoretical framework which is applicable to the non-ideal society of which asylum appeals are a part. Having argued for the importance of fairness and access to justice in asylum appeals, the chapter considers structuration theory as a lens through which to analyse procedural fairness within the multifaceted nature of the asylum appeals process, in order to examine different factors that constrain and enable agency. I identify a modified version of Giddens' structuration theory as the most appropriate theoretical and analytical framework as it considers structure and agency as a relationship, giving primacy to neither concept,<sup>356</sup> and this will be taken forward and used as a conceptual framework to examine how the duality of structure operates to constrain and enable asylum seekers and their access to justice.

### 3.1 What is justice?

The context of this thesis is access to justice within the asylum appeal hearing. Before engaging with questions of access, it is important to adopt a valid definition of justice as 'an adequate empirical study of access to justice must rest on a normatively defensible account of justice'.<sup>357</sup> In the context of this thesis, the definition of justice must be applicable to the asylum seeker. In practice, and as discussed in the previous chapter, an accessible justice system needs to produce just results and encompass

---

<sup>355</sup> Rawls, *A Theory of Justice* (n 30).

<sup>356</sup> Giddens, *The Constitution of Society* (n 73). See section 3.5.1.

<sup>357</sup> Peter Cane and Herbert Kritzer, *The Oxford Handbook of Empirical Legal Research* (OUP 2010).

fair treatment. As noted in Chapter 2, the focus of this thesis is on procedural justice. Justice should be provided at a reasonable cost and speed, and the process should be understandable to users. The system should be responsive to needs, provide certainty, and have adequate resources.<sup>358</sup> Going forward, Rawls' conception of justice as fairness, as outlined in *The Law of Peoples*, will be used as a benchmark for considering whether asylum seekers have appropriate access to justice.<sup>359</sup> Rawls' original position is useful for asylum seekers as it places everyone on equal footing. As will be discussed below however, it may not be applicable to the context of this thesis, as the original position is bounded by geography and fails to include outsiders such as asylum seekers.

### 3.1.1 Justice as Fairness

For Rawls, justice is the basic structure of society; the ways in which social institutions distribute fundamental rights and duties, and determine the division of advantages from social cooperation. Rawls' conception of justice is outlined in the first part of *A Theory of Justice*.<sup>360</sup> The theory provides a framework for the use of political power. It attempts to solve the problem of distributive justice (the distribution of goods in a society), but it is unclear whether it could be expanded to legal justice.<sup>361</sup>

In Rawls' theory, people are free and equal, and possess two moral powers, a capacity for a sense of justice and for a conception of the good.<sup>362</sup> According to Rawls, they are equal to other members of society if they have these powers to the degree necessary to be 'fully cooperating members of society'.<sup>363</sup> This conception of justice rests on a notion of reasonable citizens. For Rawls, 'citizens are reasonable when, viewing one another as free and equal in a system of cooperation over generations, they are prepared to offer one another fair terms of social cooperation. and they agree to act on those terms, even at the cost of their own interests in particular situations'.<sup>364</sup> 'Citizens' is an important notion here; asylum seekers are seen as outsiders, and are not afforded the same rights, or treated the same as citizens, and Rawls did not include

---

<sup>358</sup> Lord Woolf, 'Access to Justice. Draft civil proceedings rules' (London HMSO 1996) 32.1-32.9 (Woolf rules).

<sup>359</sup> John Rawls, *The Law of Peoples* (Harvard University Press 1999).

<sup>360</sup> Rawls, *A Theory of Justice* (n 30).

<sup>361</sup> Seyla Benhabib, 'The Law of Peoples, Distributive Justice, and Migrations' (2004) 72 *Fordham Law Review* 1761.

<sup>362</sup> Rawls, *The Law of Peoples* (n 360).

<sup>363</sup> *Ibid.*

<sup>364</sup> *Ibid.*

non-citizens in *A Theory of Justice*. In this respect, they are not equal. Rawls' domestic understanding of justice applies primarily to how the 'basic structure' of society should be set out and regulated, including assigning rights and duties to citizens.<sup>365</sup> For Rawls, justice is defined "by the role of its principles in assigning rights and duties and in defining the appropriate division of social advantages."<sup>366</sup>

### **3.1.2 Rawls' original position and principles of justice**

In order for a society to be just, Rawls begins with a thought experiment in which parties are to select the principles which would determine the structure of their 'just' society. This is known as the original position. Participants would select these principles from behind the veil of ignorance, that is, they would not know anything about their gender, race, ethnicity, intelligence, financial status, physical ability and so on. They would not know the political or economic system, or the class structure of their society. They would, however, be aware that the citizens of the society have different life plans, and all are interested in having more primary goods. They would also be aware of the principle of moderate scarcity, that there will be enough to go around, but not so much that everyone can get what they want, and general facts about social life and science. This thought experiment was designed to minimise bias. Without knowledge of personal attributes, it is assumed that every citizen would make the rational choice to make the society as fair as possible, for all members. This is because humans are self-interested, and we are most likely to choose the option that is most advantageous to us. Thus, every citizen would make a pragmatic, rational decision in case it transpired that the participant was one of the least advantaged members of society. Rawls argues that this thought experiment would yield principles which oppose discrimination.<sup>367</sup> These are the general principles of justice on which he writes; the Liberty principle, the Fair Equality of Opportunity principle and the Difference (Equality) principle.<sup>368</sup> Taken together, these form a single, comprehensive conception of justice as fairness. The application of these principles would ensure the 'least advantaged' are benefitted rather than hurt or forgotten.

Rawls' principle of liberty provides that every individual has an equal and inalienable right to basic liberties; a right which no government can infringe or remove.

---

<sup>365</sup> Rawls, *A Theory of Justice* (n 30).

<sup>366</sup> Ibid.

<sup>367</sup> Ibid.

<sup>368</sup> Ibid.

All citizens then, should have the same basic rights and liberties such as freedom of speech, the right to vote, and to be treated in accordance with the Rule of Law. As unequal rights would not benefit those who would get a lesser share, justice requires equality. This principle takes priority, indicating that basic rights and liberties must not be traded off against other social goods. The equality principle is an attempt to establish distributive justice. It can be broken down further into two conditions which any social and economic inequalities must satisfy in order to be permissible; the first being fair equality of opportunity, meaning that positions and offices should be open to any individual. This equality needs to be stronger than formal equality, individual chances should be effectively equal. Jobs should be allocated based on talent and merit, as opposed to factors such as gender, race, wealth, or social class. The remaining element of the equality principle is known as the difference principle. This aims to regulate inequalities, whilst permitting those which benefit the least advantaged in society. This conception differs from utilitarianism as it does not ask the least advantaged members to accept inequalities that do not benefit them; thus, reciprocity is upheld. This principle is partly based on the idea that the distribution of natural assets is undeserved.<sup>369</sup>

Rawls does not give examples of any permissible inequalities, simply stating that 'the general conception of justice imposes no restrictions on what sort of inequalities are permissible; it only requires that everyone's positions be improved'. However, he goes on to clearly suggest that certain inequalities of property and wealth are restricted even if all positions are improved.<sup>370</sup> He claims that society is well-organised when his principles of justice are in operation. Basic liberties are respected, but there must also be a certain level of equality. This minimum level of equality can accommodate permissible inequalities. This principle is relevant to asylum seekers (if they can be included in the theory), as they face inequalities and at present, do not always receive a fair deal. If the position of asylum seekers can be viewed through Rawls' lens, then the application of these principles can provide a foundational understanding of justice for asylum seekers. As the difference principle concerns making things better for the least advantaged members of society, the following chapters will investigate whether the procedures and structures of the asylum appeal

---

<sup>369</sup> Rawls, *A Theory of Justice* (n 30).

<sup>370</sup> *Ibid.*

system enable asylum seekers to communicate effectively and be better off in terms of effective agency; discussing whether the inequalities they face are 'permissible'. These justice principles are a good place to start when analysing whether a situation is just, yet they do not go into enough detail to be able to use them to resolve actual dilemmas faced in real society, and Rawls fails to give adequate guidance on how best to apply them.<sup>371</sup> This is discussed in more depth in section 3.1.5.

### **3.1.3 Moral Powers- the capacity to be rational and reasonable**

In addition to liberty and equality, for Rawls, there are two moral powers which exist within his idea of justice and the person. These are capacity to be rational, or the ability to recognise the conception of 'good' and to pursue their individual 'good', and the capacity to be reasonable, where an individual has the power to pursue their own interests, deciding the methods employed to do so in order to live a good life.<sup>372</sup> These moral powers are relevant to the discussion of structure and agency further on in this chapter as agency can be thought of as similar to the power or capability of an agent to pursue their 'good'.<sup>373</sup> Rawls argues that 'rational' refers to 'a single, unified agent', and concerns how the ends and interests of that agent are adopted and affirmed; how they are given priority, and the choice of means used to pursue them.<sup>374</sup> It is not always the case that rational agents act solely in a self-interested manner; they may pursue interests that help others, such as relatives, friends, community, or country.<sup>375</sup> Victims of persecution that have fled their country of origin cannot be expected to have full capacity to follow Rawls' conception of a 'good life' However, the needs of asylum seekers should be recognised and responded to, and so policies regulating the provision of asylum should be subject to the test of reasonableness.

Reasonableness is referred to by Rawls as having a sense of justice.<sup>376</sup> Reasonable individuals will act on fair terms of cooperation, even at the expense of their own goals, as long as others are willing to do the same. Reasonable individuals recognize others as free and equal agents and "take into account the consequences

---

<sup>371</sup> Ibid.

<sup>372</sup> This is similar to the concept of agency discussed in 3.3.

<sup>373</sup> Amartya Sen, 'Well-Being, Agency and Freedom: The Dewey Lectures 1984' (1985) 82(4) *The Journal of Philosophy*.

<sup>374</sup> Shaun Young, 'The (Un)Reasonableness of Rawlsian Rationality' (2006) 24(4) *South African Journal of Philosophy*.

<sup>375</sup> John Rawls, *Political Liberalism* (Columbia University Press 1996).

<sup>376</sup> Ibid.

of their actions on others' well-being".<sup>377</sup> This notion of reasonableness can also be used as a regulatory mechanism in order to test whether a policy or law meets an appropriate standard of social justice.<sup>378</sup> The thresholds for the assessment would be made on the grounds of whether the worst off in society have the capacity to create and pursue a real conception of the good, and whether they are effective agents who are able to pursue their fundamental interests, or whether they are constrained by societal structures. This theoretical framework for assessment will be drawn upon throughout this thesis, considering whether the procedures and structures of the asylum appeal system allow asylum seekers to communicate effectively and be effective agents.

The second part of *A Theory of Justice* discusses the implications of the theory on society.<sup>379</sup> Despite highlighting how societies are failing to measure up to his standards of justice, Rawls fails to give any guidance as to the actual content of justice and what it may look like for a particular society. Without such guidance, it is difficult to imagine when behind the veil, which type of societal system would best benefit the lives of the least advantaged. As noted above, the original position is bound by geography, and does not include outsiders such as asylum seekers. Rawls' second book considers international law, but still fails to address asylum seekers (or anyone other than citizens) in any depth. Rawls provides an excellent framework to consider the fairness of the asylum appeals process, but does not explicitly address the issue of asylum seekers.

### **3.1.4 Rawls' international theory**

Rawls argues that *The Law of Peoples* is an extension of his domestic theory as both begin from the 'original position' where the parties must agree on a public criterion of justice. However, the parties in the international case are seen to represent peoples (rather than persons), and no weight is given to the interests of the individual, a central element of the 'original position'. As such, authors such as Pogge, believe that the theories presented in both books differ in both substance and structure.<sup>380</sup> Beyond the argument that any people who are 'ready and willing to constitute itself as a well-

---

<sup>377</sup> Ibid.

<sup>378</sup> Ibid.

<sup>379</sup> Rawls, *A Theory of Justice* (n 30).

<sup>380</sup> Thomas Pogge, 'The Incoherence between Rawls's Theories of Justice' (2004) 72 *Fordham Law Review* 1739.



ordered society' should have the necessary economic means to do so,<sup>381</sup> the deliberators have no thoughts of those individuals who are very poor. Pogge criticises this as disregarding the basic liberties of persons who are outside of Rawls' well-ordered societies.<sup>382</sup> It is difficult to imagine the conditions asylum seekers would face in this scenario, whether they would be classed as a people whose basic needs should be met, or those who fall outside their society, and so are not considered. It may be that their needs would not be met, as the international original position is 'fair to peoples and not to individual persons'.<sup>383</sup>

The 'peoples' in his later work are ideally defined as 'liberal peoples' with a just constitutional democratic government serving their fundamental interests. They are citizens united by 'common sympathies' and a 'moral nature'.<sup>384</sup> Seyla Benhabib argues that viewing peoples in this way is both sociologically wrong and obstructive, and harmful to those who have been excluded when they refuse to conform to the moral code, arguing that the definition 'slides over into nationalism'.<sup>385</sup> For Benhabib, a better option would be to view the world community as a 'global civil society'.<sup>386</sup> In this view, peoples (as States) would play an important role, but not the sole part. For Glover, Rawls struggles to extend his theory internationally.<sup>387</sup> When expanding liberal toleration, reciprocity, and respect outwards to the society of people, it is difficult to retain the conception of human rights.<sup>388</sup> Rawls does not however, depart dramatically from the principles behind justice as fairness, rather he somewhat revises his previous position into something less utopian; a 'better' way of imagining a well-ordered society.<sup>389</sup> Both theories are examples of a 'purely recipient-oriented approach' to moral questions.<sup>390</sup>

Rawls' has also been criticised for his relative silence as to how to apply the theory, especially with regards to race. This is important for this thesis as race is one

---

<sup>381</sup> Ibid.

<sup>382</sup> Ibid.

<sup>383</sup> Ibid.

<sup>384</sup> Charles Mills, 'Rawls on Race/Race in Rawls' [2009] *The Southern Journal of Philosophy*.

<sup>385</sup> Benhabib (n 362).

<sup>386</sup> Ibid.

<sup>387</sup> Robert Glover, 'Eyes Wide Shut: The Curious Silence of The Law of Peoples on Questions of Immigration and Citizenship' (2011) 14 *Eidos* 10-49.

<sup>388</sup> Ibid.

<sup>389</sup> Rawls, *The Law of Peoples* (n 360).

<sup>390</sup> Pogge (n 381).

of the characteristics that define asylum seekers; they are outsiders and often from a different racial or ethnic background. Pateman highlights that, whilst the person in the original position is essentially sexless and race-less, as they know nothing of their defining characteristics, Rawls inadvertently places real beings (with these characteristics) into his argument.<sup>391</sup> He iterates that they will have descendants, and will usually be 'heads of families'; notoriously male characteristics.<sup>392</sup> Whilst Rawls has engaged in debates with feminist scholars,<sup>393</sup> race is neglected.

Rawls does not consider race as a contentious issue, as those in the original position do not know to which race they belong, and so would theoretically choose the position which would benefit the least advantaged. The failure to theorise race may in part be explained due to Rawls' preoccupation with ideal theory rather than partial compliance or non-ideal theory and so does not often consider how individuals should rectify or respond to injustice. In ideal theory, all individuals of a well-ordered society would follow the principles of justice in full; different racial groups would not be seen or treated as second-class citizens. The ideal society has no past or history; race or immigration status does not influence or determine social status, and everyone is an equal citizen. There is no racism, or disadvantages of race which need to be corrected. However, Ai-Thu Dang argues that Rawls' theory of justice is incomplete as it fails to take the non-ideal society into account.<sup>394</sup> There are no measures given to compensate for or remedy past injustice as those in the original position are ignorant to past injustices. It can be said then, that whilst the theory has the potential to address distributive racial injustice, it does not engage with rectificatory racial injustice, and in turn fails to engage with the "outsider"; the "non-citizen", who is often defined in racial terms.<sup>395</sup>

### **3.1.5 Ideal v non-ideal theory**

Rawls' conception of justice as fairness is most often used in relation to ideal theory, which assumes strict compliance and formulates the principles that characterize a

---

<sup>391</sup> Carole Pateman and Charles Mills, *Contract and Domination* (Polity Press 2007).

<sup>392</sup> Ibid.

<sup>393</sup> See for example Susan Okin, "Forty acres and a mule' for women: Rawls and feminism' [2005] *Policy, Philosophy and Economics*.

<sup>394</sup> Ai-Thu Dang, 'Eyes Wide Shut: John Rawls's Silence on Racial Justice' [2015] *Sciences de l'Homme et de la Société*.

<sup>395</sup> Patricia Tuitt, *Race, Law, Resistance* (Routledge 2004).

well-ordered society under favourable circumstances.<sup>396</sup> It idealises away lawbreaking by individuals and societies, and assumes citizens and societies are able to live by the principles of political cooperation. Ideal theory has limitations as it is impossible to verify what people would actually do behind the veil of ignorance; they may still choose utilitarian values that have large gains for the majority and smaller rewards for the minority, for the simple reason that they have more chance of being part of the majority.<sup>397</sup> There is also a chance that multiple conflicting but just principles may arise from behind the veil, undermining the processes that Rawls believes lead to a perfectly just society. Sandel goes further in *Liberalism and the Limits of Justice*, arguing that Rawls encourages people to think about justice whilst separated from their defining values and that allows people to determine what justice is.<sup>398</sup> In ideal theory, no thought is given to the actual beliefs held by participants. Ideal theory applies to societies which are designed under two assumptions: all relevant agents comply with the demands of justice applying to them, and natural and historical conditions are favourable, that is to say, society is sufficiently economically and socially developed to realise justice.<sup>399</sup> The purpose of ideal theory is to identify the ideal that non-ideal theory should aim for.<sup>400</sup> This is necessary as it would be difficult to condemn something as unjust unless we have ideal principles with which to compare it to. Rawls appeal to justice as fairness is attractive in framing access to justice because the original position places everyone on equal footing, and everyone should have a similar expectation of what justice means. The concept is to be applied to ensure that the least advantaged members of society are considered.

However, there are issues with transforming this into a non-ideal theory, in particular its relationship to agency, considering race and borders for example. Amartya Sen indicates that ideas of a 'perfectly just world' do not in any way help redress existing inequality in actual societies.<sup>401</sup> Sen believes Rawls fails to adequately consider the difficulty in getting everyone in society to adhere to the norms of a just society.<sup>402</sup> Despite the difficulties in knowing what principles would be chosen

---

<sup>396</sup> Rawls, *A Theory of Justice* (n 30).

<sup>397</sup> Amartya Sen, *The Idea of Justice* (Penguin Books 2009).

<sup>398</sup> Michael Sandel, *Liberalism and the Limits of Justice* (2<sup>nd</sup> edn CUP 2010).

<sup>399</sup> Rawls, *The Law of Peoples* (n 360).

<sup>400</sup> A. John Simmons, 'Ideal and Non-Ideal Theory' (2010) 38(1) *Philosophy & Public Affairs* 5-36.

<sup>401</sup> Sen (n 398).

<sup>402</sup> *Ibid.*

behind the veil, Carens advocates the idea of the original position as it allows people to think about principles of justice in a context where, despite having deep, unresolvable disagreements, they still want to find a way to live together in peace and on fair terms.<sup>403</sup> He believes that people would choose the same two core principles put forward by Rawls and so the next task would be to design institutions which could implement these principles. He claims that, even in an ideal world, people may want to move from one state to another, for example if they fell in love with someone from abroad, or belonged to a religion with many followers in another state.<sup>404</sup> The right of free movement is therefore an important liberty. The person behind the veil would most likely adopt the least advantaged perspective (in this case the alien), as the right to move may be an essential part of their life plan. They may never actually exercise that right, but would prefer to have the freedom to do so if they wished.<sup>405</sup>

### **3.2 Justice as fairness for asylum seekers?**

As the ideal society has no past injustice, ideal theory cannot give guidance as to what policy measures are appropriate for a non-ideal society, wrought with injustice.<sup>406</sup> Rawls identifies non-ideal theory as 'less happy conditions' that 'depart from strict compliance' with his justice principles.<sup>407</sup> Refugees are not included in this 'just society', because people would have no reason to leave their country of origin. Given his relative disengagement with race, it is unsurprising that Rawls has very little to say about asylum seekers or immigration in general. Benhabib summarises the components of a theory of 'just membership', critiquing Rawls' approach to immigration.<sup>408</sup> She claims that there is a need to 'recognise the moral claim of refugees and asylees to first admittance', something which Rawls fails to consider.<sup>409</sup> It could be argued that Rawls conceives of the immigrant as a threat. They are alien, and likely to endanger the host country's culture and principles, yet there are numerous examples of immigrants benefitting the country and the culture within it.<sup>410</sup>

---

<sup>403</sup> Joseph Carens, 'Aliens and Citizens: The Case for Open Borders' (1987) 49(2) *The Review of Politics* 251-273.

<sup>404</sup> Ibid.

<sup>405</sup> Ibid.

<sup>406</sup> Thomas McCarthy, *Race, Empire, and the Idea of Human Development* (CUP 2009).

<sup>407</sup> Rawls, *A Theory of Justice* (n 30).

<sup>408</sup> Benhabib (n 362).

<sup>409</sup> Ibid.

<sup>410</sup> Ibid.

Marcus Arvan indicates that objective circumstances of justice may be difficult to obtain in a non-ideal society, especially where there are a significant number of refugees.<sup>411</sup> In a just world there would be no refugees as, discussed by Gibney, refugees are the product of injustice.<sup>412</sup> For this reason, we cannot apply the principles of justice as they appear in ideal theory to refugee studies, as any society which encompasses asylum seekers and refugees is necessarily non-ideal. In order to apply Rawls' theory to asylum seekers, it would need to be extended into non-ideal theory.

Dang suggests an extension of Rawls' theory by examining the causes of oppression, including the structures of power that create and sustain it.<sup>413</sup> He argues that the conception of justice put forward by Rawls is linked to a strong principle of equal citizenship, blind to race and ethnicity.<sup>414</sup> Therefore, his theory addresses the issue of legal race discrimination. This is an important critique, which may be applicable to access to justice for the asylum seeker due to the ethnic minority backgrounds of the majority of asylum seekers. As discussed in section 1.2, colour, or race is synonymous with otherness. Arvan adds to the debate on whether Rawls' theory can be extended to non-ideal conditions. He argues that it can be extended, if we first reconceive the original position into a 'non-ideal original position', and subsequently constructs this.<sup>415</sup> Parties must keep the principles of ideal justice as background aims, but they can weigh these against the benefits and hindrances they face under non-ideal conditions. For Arvan, if justice is fairness, and the original position is a perfectly fair way to find principles of justice, then a non-ideal original position is necessary to show what is fair and just under non-ideal conditions.<sup>416</sup> In adopting this position, he explains that we must assume that everyone under non-ideal conditions has an equal obligation to prefer a fully just society and to eliminate all injustice. However, it is also true that not all individuals live up to this obligation; they may be opposed to or ambivalent towards realising a just society.

The parties behind the veil should assume they are living under conditions of partial compliance, but not know which society they live in or why it is unjust, just that

---

<sup>411</sup> Marcus Arvan, 'First Steps Toward a Nonideal Theory of Justice' (2014) 7 *Ethics & Global Politics* 95–117.

<sup>412</sup> Gibney (n 84).

<sup>413</sup> Dang (n 395).

<sup>414</sup> Ibid.

<sup>415</sup> Arvan (n 412).

<sup>416</sup> Ibid.

it does not fully comply with Rawls first principle of justice. Next Arvan notes that parties should assume reasonably favourable conditions.<sup>417</sup> It is also important to consider past, present, and future injustices. Aside from these conditions, the veil of ignorance mirrors that of the original position. This non-ideal original position provides a fair procedure for weighing non-ideal costs against Rawlsian ideals, and for distributing non-ideal costs fairly.<sup>418</sup> Arvan maintains that it can be applied to specific issues within non-ideal theory. The position will be considered throughout this thesis as it considers agency and the application of Rawls' theory of justice in the context of asylum.

Helen Taylor's thesis also contributes to the debate as to whether Rawls theory can be applied practically, deducing that it can be applied to social situations.<sup>419</sup> This is relevant to the arguments proposed in this thesis; if Rawls' theory is to apply to asylum seekers, how can it be done practically? In applying justice as fairness to asylum appeal hearings, a key question to be asked is: do the procedures in place allow the least advantaged individuals (asylum seekers) to be effective agents?<sup>420</sup> This question encompasses Rawls' difference principle which states that social and economic inequalities are to be arranged so that they are to the greatest benefit of the least advantaged. The nature of the procedures needs to be justified through the positive (or lack of negative) impact that it has on the lives of the least advantaged. In order to be procedurally fair then, the asylum appeals process should, at the very minimum, increase effective agency for the worst off in society; the asylum-seeking appellants.

As the difference principle only allows inequality where it benefits the least advantaged party, it is difficult to justify some of the increasingly hostile asylum policies. Asylum seekers will usually be one of the most disadvantaged groups in society, but restrictions on entry, or on financial aid or legal representation, cannot be said to be to their advantage.<sup>421</sup> It could be argued that these policies contain matters of basic justice, yet are excluded from Rawls' ideal theory, as asylum seekers are not

---

<sup>417</sup> Ibid.

<sup>418</sup> Marcus Arvan, 'Nonideal Justice as Nonideal Fairness' (2019) 5(2) *Journal of the American Philosophical Association*.

<sup>419</sup> Helen Taylor, 'Rawls' Difference Principle: A test for social justice in contemporary social policy' (PhD Thesis, Cardiff University 2017).

<sup>420</sup> Ibid.

<sup>421</sup> See Chapter 2, section 2.3.5.

considered. As discussed in Chapter 2, when the Legal Services Commission cut the hours allocated to asylum cases in 2004, asylum seekers suffered disproportionately.<sup>422</sup> These cuts negatively impacted on their ability to put forward a coherent appeal. These policies have the potential to constrain asylum seekers, becoming structures that can limit individual agency. Whilst it will be argued subsequently that asylum seekers have agency, it may not always be effective, where structures constrain their ability to pursue their conception of the good. The next part of this chapter discusses whether asylum seekers have agency in their appeal hearings, attempting to apply Rawls' justice as fairness framework to a non-ideal society using Arvan's non-ideal original position.

### **3.3 The role of agency in justice as fairness**

Throughout Rawls' work, there is an emphasis on agent choice and responsibility. Agency is generally accepted as the ability of an individual to make choices in society, guided by their interests and values.<sup>423</sup> However, some conceptions of agency stop at individual choice,<sup>424</sup> whilst others, such as Giddens' definition, argue that agency goes further than solely the intentions people have in doing things but extends to their capability or power. Action needs to involve a choice; it is only if an individual could have acted differently, that they have agency.<sup>425</sup> This level of agency is an important element of (non-ideal) fairness that can be difficult for asylum seekers to achieve. They may have intentions, for instance to live or work where they choose, yet they may not have the capability to see these intentions through.

Rawls argues that agency is related to the moral powers that individuals possess, often based on their conception of the good.<sup>426</sup> It therefore concerns the ability to make the decision that the individual wants to make. Practical and discursive consciousness inform these decisions. Discursive consciousness is defined as 'what actors are able to say, or to give verbal expression to, about social conditions, including especially the conditions of their own action'.<sup>427</sup> An example of this is an

---

<sup>422</sup> Asylum Aid and Bail for Immigration Detainees (BID), 'Justice Denied: Asylum and Immigration Legal Aid - a System in Crisis' (BID Research Reports 2005) [https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2\\_assets/files/208/Justice\\_Denied.pdf](https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/208/Justice_Denied.pdf) accessed 10 May 2019.

<sup>423</sup> James Moore, 'What Is the Sense of Agency and Why Does it Matter?' (2016) 7 *Frontiers in Psychology* 1272.

<sup>424</sup> Gary Becker, *A Treatise on the Family* (Harvard University Press 1981).

<sup>425</sup> Giddens, *The Constitution of Society* (n 73).

<sup>426</sup> Rawls, *A Theory of Justice* (n 30).

<sup>427</sup> Giddens, *The Constitution of Society* (n 73).

asylum seeker explaining at interview why they left their country of origin, or how they have begun to integrate themselves into a new society. Practical consciousness concerns the necessary knowledge that an actor has in order to complete the tasks of everyday life. This knowledge is integrated, and is often unnoticed by the actor. Absence of this knowledge, however, tends to be noticed by other parties. Asylum seekers often do not have the necessary knowledge of language or culture in order to complete certain tasks in the same way a citizen can, an idea which is discussed in more depth in chapters 5, 6 and 7.

Definitions of agency also capture transformative action.<sup>428</sup> This is the ability of an agent to change society in some way. This may be regarded as the highest form of agency, as it goes further than simply having a choice, as defined above. Rather, this choice has a tangible effect on society. Different social positions such as class, wealth, ethnicity, and education, open up different possibilities for transformative action.<sup>429</sup> Transforming society is the highest level of agency, but this is limited to very few groups. This is problematic as there are certain aspects of society that asylum seekers cannot change, regardless of whether they want to as they do not have the capacity. For the purpose of this thesis, the focus of agency will be similar to Giddens' definition; the importance of intention, power and choice, and the asylum seekers' ability to communicate effectively and influence their case.

### **3.3.1 Are asylum seekers effective agents?**

Although the definition of agency is relatively straightforward, the question of whether every individual possesses it is highly contested, especially with regards to asylum seekers.<sup>430</sup> Giddens attributes a great deal of weight to the knowledge possessed by actors in assigning agency.<sup>431</sup> Agency comes from knowledge of schemas and a level of control over resources where actors can apply the knowledge and communicate it in new situations.<sup>432</sup> William Sewell equates this knowledge with culture; a culture that

---

<sup>428</sup> William Sewell, 'A Theory of Structure: Duality, Agency, and Transformation' (1992) 98(1) *American Journal of Sociology* 1.

<sup>429</sup> Ibid.

<sup>430</sup> Oliver Bakewell, 'Some Reflections on Structure and Agency in Migration Theory' (2010) 36(10) *Journal of Ethnic and Migration Studies* 1689-1708.

<sup>431</sup> Giddens, *The Constitution of Society* (n 73).

<sup>432</sup> Ibid.



asylum seekers are not a part of, as he argues that, “agency is formed by a specific range of cultural schemas and resources”.<sup>433</sup>

Neither Giddens nor Rawls consider the agency of aliens in any depth and so it is difficult to determine how much agency they would suggest asylum seekers possess. Culture varies across countries, and so an asylum seeker’s culture, and therefore their knowledge, resources, and ability to communicate effectively, are different from that of a UK citizen. They have no choice on where to live, they cannot work, and have little knowledge of the language or legal system. It is difficult then, for them to participate fully in society. As will be discussed in the following chapters, barriers such as limited access to interpreters or legal representation may result in agency being undermined when they reach the host country. Asylum seekers have been compared to ghosts by Cabot, in that they are both present and absent, as their agency is heavily constrained.<sup>434</sup>

However, whilst asylum seekers cannot make choices regarding housing or work,<sup>435</sup> and so cannot always pursue their fundamental interests including their conception of the good, there are several definitions of individualist action under which asylum seekers do fall. This means that they have the ability or capacity for self-initiated action, whether or not they use it. Goffman suggests that individuals always have some form of agency to transform a situation.<sup>436</sup> Whilst citizens and policy makers may have far more available resources than asylum seekers, asylum seekers always have *some* power and resources at their disposal.<sup>437</sup> An example of asylum seekers asserting agency is the first stage in an asylum claim; they make the decision to leave their country of origin and enter the UK.

It is difficult however, to argue that asylum seekers are true agents in the same way as citizens, especially with regards to transformative action. Asylum seekers are outsiders, with little knowledge of the language. Add to this the different (fewer) rights an asylum seeker has compared to a citizen, and it seems unlikely that they can have

---

<sup>433</sup> Sewell (n 429).

<sup>434</sup> Heath Cabot, “‘Refugee Voices’: Tragedy, Ghosts and the Anthropology of Not Knowing’ (2016) 45(6) *Journal of Contemporary Ethnography* 645-672.

<sup>435</sup> See Chapter 2, section 2.3.

<sup>436</sup> Erving Goffman, *The Presentation of Self in Everyday Life* (Doubleday 1959) and Erving Goffman, *Interaction Ritual: Essays on Face to Face Behaviour* (Pantheon 1967).

<sup>437</sup> Derek Layder, ‘Structuration Theory: Anthony Giddens and the Constitution of Social Life’ (1990) 19(6) *Contemporary Sociology* 909.

much of a discernible effect on transforming society.<sup>438</sup> According to Giddens, 'immersion in a form of life is the necessary and only means whereby an observer is able to generate such characterisations'.<sup>439</sup> This relates to agency as it indicates what is necessary for a person to use their agency effectively. This does not mean asylum seekers would need to become a full member of the society, but they would need to understand the citizens' way of life in order to be able to participate in it.

Asylum seekers are also limited in their ability to contribute to the reproduction of society due to their (lack of) collective agency. Actors coordinate actions with one another, which brings about social change. As asylum seekers are vastly outnumbered in society, they, as a collective, are unlikely to be able to change society in the way that citizens can, for instance, when public opinion contributes to harsher asylum policies. Asylum seekers are also constrained by a lack of capacity to reinterpret and mobilise an array of resources and are therefore limited to the interpretation they are given.<sup>440</sup> An example of this is housing, where asylum seekers are far more constrained than the average citizen. Whilst citizens cannot move wherever they want, due to financial, work, or family constraints, they have more freedom to choose where to live than asylum seekers, who are dispersed on a no-choice basis. However, it is important to note that whilst asylum seekers may not be able to transform society in the same way as a large group of citizens, they are able to play a transformative part in the outcome of their asylum appeal, and life after the claim, through utilising the resources available to them. They also assert agency through volunteering (for example refugee support groups or other charities) and education (some are able to study in higher education for instance). This links back to the idea that justice as fairness can be applied to this context (if it is extended to a non-ideal society, with a non-ideal original position, as per Dang and Arvan above) as asylum seekers have the capacity for effective agency, and therefore the ability to have an effect on institutions or other structures. This is discussed in Chapter 5, where it is argued that asylum seekers draw on the available resources to effectively communicate their story in their appeal.

---

<sup>438</sup> There are, however, instances whereby small groups can effect significant change, such as political movements and activism.

<sup>439</sup> Anthony Giddens, *New Rules of Sociological Method: a Positive Critique of Interpretative Sociologies* (Hutchinson 1976).

<sup>440</sup> Sewell (n 429).

It is important to note here that, according to Giddens, agency cannot be considered alone. An individual's behaviour may be determined by human agency, or through societal structures, or a combination of both. Before considering the relationship between structure and agency in any depth, the concept of structure will be discussed, considering how it ties in with a non-ideal theory of justice as fairness.

### **3.4 Competing definitions of structure**

The definition of structure has been contested far more than that of agency. The term is widely used but never adequately defined.<sup>441</sup> For Barker, structure and agency are intimately related with structure as simply the repeated patterned circumstances, which influence the opportunities available for agents.<sup>442</sup> Lopez and Scott, however, indicate simple definitions such as this are insufficient as they fail to cover all aspects of structure. They argue that structure must be broken down further, into institutional and relational structure. Institutional structure is similar to Barker's account; as it is seen as 'the cultural or normative patterns' which 'organise the enduring relationships' of actors<sup>443</sup> whereas relational structure relates to the relationships themselves, and their causal interconnections. Saussure<sup>444</sup> goes further as he models structure on language, claiming that it is distinct both from reality and ideas. Assiter reiterates this, arguing that structures are 'the real things that lie beneath the surface or the appearance of meaning',<sup>445</sup> whilst Giddens, as analysed below, thinks that structure is the 'rules and resources' of society, and that these are virtual and thus distinct from reality.<sup>446</sup> For structuralists such as Durkheim, structures are a basic, non-reducible feature of the world.<sup>447</sup> Agency, for structuralists, is in fact made by such structures. Sewell argues that it is impossible to pin down a definition for structure as it is a 'founding epistemic metaphor'<sup>448</sup> but problems arise with this unexamined metaphor. There is a need for a standard, accepted definition in order to facilitate common understandings. In the absence of an accepted definition, this study will use the

---

<sup>441</sup> Sewell (n 429).

<sup>442</sup> Chris Barker, *Cultural Studies: Theory and Practice* (SAGE 2005) 448.

<sup>443</sup> Jose Lopez and John Scott, *Social Structure* (OUP 2000).

<sup>444</sup> Ferdinand de Saussure, *Course in General Linguistics* (English Translation Bloomsbury 2013).

<sup>445</sup> Alison Assiter, 'Althusser and structuralism' (1984) 35(2) *British Journal of Sociology* 272-296.

<sup>446</sup> Giddens, *The Constitution of Society* (n 73).

<sup>447</sup> Emile Durkheim, *The Division of Labor in Society* (Free Press 1964); Emile Durkheim, *The Elementary Forms of the Religious Life* (Free Press 1965); Emile Durkheim, *Moral Education* (Free Press 1965); Emile Durkheim, *Suicide* (Free Press 1966).

<sup>448</sup> Sewell (n 429).

definitions outlined below as these best encapsulate ideas of structures and how they relate to asylum seekers.

Put simply, structures can be defined as the external forces that have an effect on our decisions.<sup>449</sup> In this sense, they have more of an influence on us than we have on them. They constrain (and enable, according to Giddens) the choices we are able to make. Giddens believes that structures relate to the hegemonic discourses and culture of a society.<sup>450</sup> They influence the behaviour of individuals, through creating explicit rules and laws as to how people should act and behave, and implicit understandings of how different types of behaviour will be accepted within that society. Giddens claims that the term 'social structure' thus tends to include two elements, not clearly distinguished from one another: the patterning of interaction, as implying relations between actors or groups; and the continuity of interaction in time. Structure then, is the rules and resources that form the basis of social systems and specifically, the 'structuring properties allowing the binding of time-space in social systems'.<sup>451</sup> These structuring properties allow similar social practices to exist across time and space. According to Giddens, structures do not actually exist.<sup>452</sup> He claims that they only exist virtually, that is, as structural properties, and may be related to traditions, cultures, and ideologies. However, Sewell claims that whilst some structures may only exist virtually, others have a physical presence, and both constrain and enable agency.<sup>453</sup>

For Rawls, the two principles of justice apply to the basic structure of society as he states that, 'the institutions of the basic structure have deep and long-term social effects and in fundamental ways shape citizens' characters and aims, the kinds of persons they aspire to be'.<sup>454</sup> These institutions within the basic structure are aligned with Giddens' social structures in that they can affect individual agency. As the principles of justice can be applied to these structures, it may also be the case that structures can influence justice. From a structure/agency standpoint then, justice as fairness is not achieved when an asylum seeker's agency is limited.

---

<sup>449</sup> Giddens, *The Constitution of Society* (n 73).

<sup>450</sup> Giddens, *New Rules* (n 440).

<sup>451</sup> Ibid.

<sup>452</sup> Ibid.

<sup>453</sup> Sewell (n 429).

<sup>454</sup> Rawls, *Political Liberalism* (n 376).

### 3.4.1 Giddens' virtual rules

Rules, one of the concepts behind Giddens' definition of structure, are similar to Bourdieu's habitus,<sup>455</sup> defined as ingrained habits, skills, and dispositions. Habitus is the way that individuals perceive the social world around them and react to it. However, Giddens argues that rules and habits are different, as there are no sanctions imposed on habits, whereas rules, or laws, often have sanctions attached. For Giddens, rules are defined as 'generalizable procedures applied in the enactment/reproduction of social life'.<sup>456</sup> Giddens' rules can correctly be thought of as virtual. They guide our behaviour, and allow us to understand new situations by reference to the knowledge we already have. Sewell agrees that rules, or "schemas" as he defines them, are virtual, as they can be transposed or extended to new situations.<sup>457</sup> They are a cultural kit of general principles and strategies of action informed by past experience and applied to current circumstances which are actualised when they are applied to real situations. David Held and John Thompson applaud Giddens in his attempt to give structure a clear definition but criticises the ambiguities of his 'rules' and the generality of the proposal as it neglects specific features of the social structure.<sup>458</sup> Giddens needs to be clearer on what counts as a relevant rule as Held and Thompson argue that whilst rules and resources are important parts of social life, they are distinct from the analysis of social structure.<sup>459</sup> However, it is difficult to more adequately define these concepts whilst leaving the theory open and abstract enough to be as far reaching as Giddens intended. This can be seen as an advantage of the theory, as the concepts are (broadly) useful to the widest possible set of circumstances as they capture the general characteristics of all structures and agents.<sup>460</sup>

### 3.4.2 Human and non- human resources- virtual or actual?

Sewell attempts to clarify Giddens' concepts with his version of resources, the second aspect of Giddens' 'structures'. Resources are defined as 'anything that can serve as a source of power in social interactions'.<sup>461</sup> These resources are further broken down

---

<sup>455</sup> Pierre Bourdieu, *Distinction: A Social Critique of the Judgement of Taste* (Routledge 1984).

<sup>456</sup> Giddens, *The Constitution of Society* (n 73) 21.

<sup>457</sup> Sewell (n 429).

<sup>458</sup> David Held and John Thompson, *Social Theory of Modern Societies Anthony Giddens and his Critics* (CUP 1989).

<sup>459</sup> Ibid.

<sup>460</sup> Rob Stones, *Structuration Theory* (Palgrave Macmillan 2005).

<sup>461</sup> Sewell (n 429).

into allocative and authoritative,<sup>462</sup> or human and non-human.<sup>463</sup> Non-human resources are objects that can be used to enhance or maintain power, such as court buildings and financial resources. This thesis will depart slightly from Giddens at this point, as it aims to investigate both virtual and physical structures. In the context of asylum, physical structures such as detention centres and courts work to constrain or enable asylum seekers. It could be argued that it is not the physical structure of these buildings that constrain, but what they represent. For instance, the courtroom itself may not matter, rather the constraint or empowerment stems from the hearing process, the judge, and lawyers. However, factors such as the comfort of the room, or in the case of detention centres, high walls, fences, and bars, serve as physical constraints against the intentions or agency of asylum seekers.<sup>464</sup> From this, it could be argued that whilst rules can be described as virtual, non-human resources can be either virtual or actual. They are resources which facilitate the use of power, but which also exist in time and space.

Stones questions whether material objects employed by the agent should be seen as part of their embodied capability or external to the individual. He asks whether the power is in the agent's hand or dependent on the compliance of others. This thesis investigates which explanation is more feasible when applied to the asylum seeker. They are certainly dependent on the compliance of others when food vouchers are considered. Though these are material objects (resources) possessed by the individual, the asylum seeker is constrained as the vouchers can only be spent in certain places, they cannot dictate how much they receive, and they are never certain that the shopkeeper will accept them. They are dependent on the issuance and acceptance of the vouchers in order to use the resource. Sewell claims that resources can also be interpreted in different ways, empowering some actors whilst constraining others. This can be seen in practice by hostile asylum policies as they empower the citizen; their voices have been heard, and they are protected from the 'asylum problem'. At the same time, asylum seekers are increasingly constrained; they are

---

<sup>462</sup> Giddens, *The Constitution of Society* (n 73).

<sup>463</sup> Sewell (n 429).

<sup>464</sup> Nick Gill, Dominique Moran and Deidre Conlon, *Carceral Spaces: Mobility and Agency in Imprisonment and Migrant Detention* (Routledge 2013).

already disadvantaged through lack of knowledge of the language and legal system, and the law adds an additional barrier.

Human resources are those possessed by the individual, such as strength, knowledge, and emotion. For example, judges, lawyers, and citizens can all use their superior knowledge to constrain (or enable) the agency of an asylum seeker. Unless they can communicate effectively with these other actors, asylum seekers are less capable of enhancing or maintaining power as they possess fewer resources.<sup>465</sup> That is not to say however, that they have no agency, as Sewell claims that all individuals have both human and non-human resources, regardless of how destitute or oppressed.<sup>466</sup> As will be discussed in Chapter 5, appellants use demeanour, and physical evidence to help communicate their story in order to be effective agents.

For the purposes of this thesis, structure is defined in a similar way to Giddens in *The Constitution of Society*;<sup>467</sup> rules and resources, organised as properties of social systems. I also adopt Sewell's idea of conceiving of structures as having a dual character; virtual schemas and actual resources, with schemas as the effect of resources and vice versa.<sup>468</sup> This definition of structure, when used in conjunction with the other aspects of structuration theory, is best suited for this study into access to justice for asylum seekers as it encompasses different aspects of the structures which constrain and enable asylum seekers' agency. Having outlined the definitions of structure and agency which will be taken forward, this chapter now moves on to discuss the relationship between the two.

### **3.5 Conceptualising the relationship between structure and agency.**

The previous section considered the range of definitions for the concepts of structure and agency. The relationship between the two concepts is no less contested. According to Colin Hay, structures are the creation of human beings as well as the mould they fit; without individual participation, they would not exist.<sup>469</sup> There is a need then, to consider theories which explain the nature of this two-sided relationship.

---

<sup>465</sup> See Chapter 5 for a discussion on resources used by asylum seekers in the appeal hearing.

<sup>466</sup> Sewell (n 429).

<sup>467</sup> Giddens, *The Constitution of Society* (n 73).

<sup>468</sup> Sewell (n 429).

<sup>469</sup> Colin Hay, *Political Analysis* (Red Globe Press 2002) 94.

As outlined in section 3.4, structuralists such as Durkheim propose that human behaviour is the product of the social structures within which they find themselves and therefore agency is secondary to structures.<sup>470</sup> An individual human agent simply plays their role and has values based on the structures in which they live their life.<sup>471</sup> Individuals are the bearers of social relations, rather than the agents. It could be argued then, that once an asylum seeker has entered the receiving state, what happens to them is a result of structures, as opposed to their own choices and actions. However, structuralism fails to consider the very real effects that agents can have in creating social relations. It often completely ignores the activity of individuals; denying they have an effect and explaining away their real autonomy. Even if, as research suggests,<sup>472</sup> structures largely constrain the agency of asylum seekers, it still cannot be said that structures have complete control as they do enjoy some agency. An individual is never absolutely compelled as there is always some degree of choice.<sup>473</sup> Asylum literature suggests that, although asylum seekers are constrained and enabled by structures, they show clear displays of agency.

At the other end of the spectrum are methodological individualism and interactionism. Proponents of these theories believe that structures are the product of human agency, or intentional action.<sup>474</sup> Embedded in this is the notion of pluralism and transformative action, that each individual has the capacity to change society. In this view, it could be said that the agency of citizens and government or policy-makers work to produce the structures that constrain the agency of asylum seekers. As with structuralism, these approaches are not without limitations, as they fail to consider the effect of structures on the realisation of actors' intentions. Theories in which either structure or agency have primacy are hindered by these limitations as both people and structures are important influences; they interact to bring about social change.

### **3.5.1 Giddens' attempt at clarifying the relationship; Structuration theory.**

This section highlights the importance of considering the relationship between structure and agency, and its convoluted nature. As emphasised thus far, many

---

<sup>470</sup> Durkheim, *The Division of Labor in Society* (n 448).

<sup>471</sup> Ibid.

<sup>472</sup> See for example Simon Behrman, 'Accidents, Agency and Asylum: Constructing the Refugee Subject' (2014) 25 *Law and Critique* 249-270.

<sup>473</sup> Layder (n 438).

<sup>474</sup> Ronald Weitzer, 'Review: Meaning, Intentional Action, and Social Structure' (1977) 22 *Berkeley Journal of Sociology* 199-206.



theorists only consider the macro (structure) or micro (agency) but, as argued by Hay, it is necessary to consider the role played by both structure and agency in shaping society and behaviour as considering one alone is inadequate.<sup>475</sup> Giddens began to bridge the gap between the two by developing structuration theory.<sup>476</sup> In this theory, structure and agency have a dialectical relationship. They are seen as two sides of the same coin as they depend upon each other. In structuration theory, everything an actor does reproduces structures within society. An example of this is speaking a sentence, which reproduces the English language. This shows the tendency of social relations to be reproduced, even when the actors engaging with the processes are unaware of the patterns.<sup>477</sup> These reproductions then, are often unintended consequences, but stress the importance of agency as something impossible to overlook.

The concept of 'unintended consequences' of an agents' decision is an important aspect of Giddens' theory with regards to asylum studies.<sup>478</sup> It is unlikely that an asylum seeker will have acknowledged and planned for every consequence that will arise from their decision to flee for example. Julian Wolpert asserts that people often make hurried or irrational decisions during stressful or strained times.<sup>479</sup> By definition, when asylum seekers flee, the conditions in their country of origin are conducive to stress and strain. The decision to leave could be made hastily, and their destination may not have been adequately planned. Unintended consequences are more likely in this situation.

Structuration theory seeks to examine how society and human action is 'neither the experience of the individual actor, nor the existence of any form of societal totality, but social practices ordered across space and time'.<sup>480</sup> The theory looks at the relationship and interactions between the structure of society and the agency of humans within that social structure. It allows us to move away from viewing asylum seekers as entirely independent actors, or as puppets whose actions are determined by structural mechanisms. This comes within the framework for developing a non-ideal theory of justice as fairness as the person in the modified original position is modified

---

<sup>475</sup> Hay (n 466).

<sup>476</sup> Giddens, *The Constitution of Society* (n 73).

<sup>477</sup> Sewell (n 429).

<sup>478</sup> Giddens, *New Rules* (n 440).

<sup>479</sup> Julian Wolpert, 'Migration as an Adjustment to Environmental Stress' (1966) 22(4) *Journal of Social Issues*.

<sup>480</sup> Giddens, *The Constitution of Society* (n 73).

by structuration theory. They are both constrained and enabled by structures, and are able to assert agency in deciding their conception of the good.

### **3.5.2 The importance of duality of structure.**

Central to structuration theory is the duality of structure. Giddens suggests that human agency and social structure have a relationship with each other, and it is the repetition of the acts of individual agents which reproduces the structure.<sup>481</sup> This means that there is a social structure, with traditions, institutions, moral codes, and established ways of doing things; but that these can be challenged or changed when people start to ignore them, replace them, or reproduce them. Here, structure is at the same time both constraining and enabling. However, conversely, structure is also an 'absent' discourse, present only in moments of interaction through which it is reproduced or changed.<sup>482</sup> Structure is both the medium and outcome of the reproduction of practices. In *New Rules of Sociological Method*, Giddens argues that the social world needs to be seen as dualistic, as a 'skilled accomplishment of active human subjects'.<sup>483</sup> Society is produced by the actions of its members, but the members draw upon resources (dependent upon conditions) that they are unaware of or not aware of in detail.

Giddens purports that agents may have knowledge of structure, but they cannot exist or be analysed separately from it. In the same vein, structure has rules that can be manipulated or changed by agents. There is a mutual dependence on structure and agency, as rules and resources are used by the actor to produce interaction. This interaction then reproduces or transforms the rules and resources. This perspective claims that social structures do not exist apart from our collective actions, and so structure and agency presuppose each other.<sup>484</sup> This theoretical framework was selected in order to focus on the effect of structures on the agency of asylum seekers and their ability to communicate effectively in their appeal. Whilst agency is highlighted, structuration theory also emphasises the importance of structures in constraining and enabling agency, and this is taken forward throughout the following

---

<sup>481</sup> Ibid.

<sup>482</sup> Giddens, *New Rules* (n 440).

<sup>483</sup> Ibid.

<sup>484</sup> Ibid.

chapters. This thesis argues that agency is constrained and enabled through knowledge and power, and the disparities between these in asylum appeal hearings.

### **3.6 The effect of knowledge, power, and control on agency.**

Ideas of structure and agency are involved in any notion of power; if agents have an effect on structures, they have power; if structure has a constraining effect on the individual, then that power is taken away. Hay states that “one person’s agency is another person’s structure”.<sup>485</sup> Attributing agency then, is attributing power. Structures are laden with differences in power and empower agents differently.<sup>486</sup> This is especially true when looking at the relationship between citizen and the ‘other’. In the host country, citizens have more agency and control over their actions than asylum seekers. but, as reinforced by Layder, subordinates always have *some* power and resources at their disposal.<sup>487</sup> He gives examples of this ‘dialectic of control’, illustrating that babies cry, and prisoners partake in dirty protests. It may not be a big gesture, but the available resources are utilised in an attempt to change their situation. This thesis will argue that agency is a spectrum, where different agents stand at different points in terms of how much agency, knowledge, and power they possess. Actors need to know what their power source is and how to use it. For individuals, this power source is often knowledge. Giddens claims that every social actor knows a great deal about the conditions of reproduction of society of which he is a member, and every individual has some power to influence the structuration of society.<sup>488</sup> However, this may not be the case for asylum seekers. They may not be able to understand the language, or be able to apply the limited knowledge they possess to new and unfamiliar situations and are thus less likely than citizens to be able to ‘follow the rules’, indicating that it may be more difficult for them to be enabled by the ‘rules’ concept of structures.<sup>489</sup> This lack of knowledge contributes to a lack of agency for asylum seekers; indicating that they can be at the mercy of structures. This lack of knowledge and constrained agency is exacerbated in the event of an asylum appeal where, in addition to navigating linguistic and cultural barriers, asylum seekers also face a complex legal system. Knowledge and power can therefore affect procedural fairness and access to justice. This is one of the key issues the theoretical framework of this

---

<sup>485</sup> Hay (n 466).

<sup>486</sup> Sewell (n 429).

<sup>487</sup> Layder (n 438).

<sup>488</sup> Giddens, *The Constitution of Society* (n 73).

<sup>489</sup> Sewell (n 429).

thesis needs to encompass. It needs to be able to assist in understanding the effect that different cultures, languages, and legal systems can have on the agency of asylum seekers, and be applicable to empirical studies. This chapter now moves on to discuss the applicability of structuration theory to empirical studies.

### **3.7 Using structuration theory in practice; the applicability of the theory to empirical studies.**

Using structuration theory in practice introduces a variability that is not considered in depth by Giddens. Giddens considers knowledge, but not how much, or what type. Actions are different; some are more important, and some have more significance to certain actors. An asylum decision will have far less of an impact on the judge than the asylum seeker for example. As noted in section 3.5.1, for Giddens, society is reproduced coherently because the individual action that reproduces or changes it is always already patterned by the structure. However, he is unsure whether structuration theory as he imagines it can be fully applied to specific empirical research as he claims “I would not seek to insert the idea of structuration as directly into a research context as [this researcher] tries to do... the theory of structuration... is not a magical key that unlocks the mysteries of empirical research.”<sup>490</sup> Oliver Bakewell is also critical of the use of structuration theory in empirical research as it has failed to offer any significant advances for migration theory.<sup>491</sup> Unlike Giddens, he does not blame the researchers for failing to properly apply the theory but rather claims that there are theoretical weaknesses within the concept.<sup>492</sup> This may cause difficulties in applying structuration theory in this thesis as a key requirement is its applicability as a research tool. The framework will be used to understand the facets of the asylum system that limit and enable the appellants and so must be able to assist in understanding the effect that different cultures, languages, legal systems, and ways of communicating can have on the agency of asylum seekers. It must be applicable to empirical studies to examine how the duality of structure operates to constrain and enable asylum seekers and their access to justice.

Even within theories of migration as a whole, Bakewell argues that the issue of structure and agency has often been avoided. In those studies that do engage with structure and agency, some authors lean towards a structuralist approach, whilst

---

<sup>490</sup> Giddens, *The Constitution of Society* (n 73).

<sup>491</sup> Bakewell (n 431).

<sup>492</sup> *Ibid.*

others focus on the agency of individuals, and fail to sufficiently acknowledge the role of structures. Research which has attempted to adopt Giddens' structuration theory has tended to do so without full engagement with the many criticisms given by social theorists.<sup>493</sup> This thesis aims to fill this gap, through engaging with structuration theory and its critics in order to assess the role of structure and agency in asylum appeal hearings.

Asylum seeking activity cannot be explained as the product of structures or agency but of the dialectics of *power over* and *power to* as the actors pursue their ambitions; their actions cannot be explained by structures or agency alone.<sup>494</sup> Practical consciousness may play a larger role than discursive consciousness in this situation, as Giddens emphasises how individuals are influenced by structural factors, and contribute to their reproduction without consciously recognising them.<sup>495</sup> He argues that, often, actors are not aware of their agency; they make decisions and take responsibility without thinking explicitly about agency. Whilst agents need knowledge in order to reproduce social structures, this knowledge is unconscious, as actors can only give a 'fragmented account' of what it is that they know when pressed.

From this, it appears that structuration theory is appropriate to answer the research questions in this thesis, as Giddens is concerned with the (abstract) characteristics of social life. He aimed to build a broad social theory, emphasising that the reproduction of social systems is an active process by the agent. Unlike structuralism, post structuralism, and critical realism, it sees structures and systems as different concepts, and agents as active participants. The next section considers promising attempts to apply structuration theory to refugee studies, in order to situate the research contained within the following chapters.

### **3.7.1 Applying structuration theory to Refugee Studies.**

Many previous studies of asylum seekers and refugees have been atheoretical.<sup>496</sup> Wahlbeck argues that 'there is an abundance of literature on refugees, but only a

---

<sup>493</sup> Ibid.

<sup>494</sup> Ewa Morawska, 'Structuring Migration: The Case of Polish Income-Seeking Travelers to the West' (2001) 30(1) *Theory and Society* 47-80.

<sup>495</sup> Giddens, *The Constitution of Society* (n 73); see section 3.5.1.

<sup>496</sup> With a few exceptions, such as Anthony Richmond, 'Reactive Migration: Sociological Perspectives on Refugee Movements' (1993) 6(1) *Journal of Refugee Studies* 7-24.

fraction makes an effort to discuss conceptual or theoretical questions'.<sup>497</sup> However, the following studies have utilised structuration theory in their analyses of asylum seekers. Ruth Healey uses ideas from Giddens' structuration theory as a conceptual framework to analyse the voices of a group of asylum seekers and refugees.<sup>498</sup> She looks at the experiences of asylum seekers in relation to structure and agency, arguing that structures within the UK (such as the media and public opinion) imply that asylum seekers are not welcome, which can affect their agency.<sup>499</sup> The study found that specific experiences of asylum seekers and refugees vary from individual to individual, but that there are major structural similarities between them. The nature of the coping strategies outlined in the research suggest that structural factors have a major impact upon their experiences. One of the limits of Healey's study is that she attempts to apply some of the concepts drawn from this theory rather than attempting a full exemplification. This study is relevant to the choice of theoretical framework as it is a promising attempt at applying structuration theory to an empirical analysis relating to refugees.

Bakewell's work is useful for this thesis, as he acknowledges the limitations of studies into the structure and agency relationship. In placing the limited agency of the refugees at the centre of the study, they fail to find an answer to how the balance of structure and agency might play out in that context.<sup>500</sup> Whilst Bakewell found himself suggesting that refugees had more autonomy than they really had (hyperactivity), there is a danger that the research undertaken and presented throughout this thesis may underestimate any agency the participants display, as there is a focus on the structural constraints and limiting agency of others. However, Bakewell's research shows that it is possible to use structuration theory whilst engaging with the limitations of the theoretical framework.

Goss and Lindquist also follow Giddens' approach, conducting an institutional analysis examining the operation of rules and distribution of resources.<sup>501</sup> This study

---

<sup>497</sup> Östen Wahlbeck, 'The concept of diaspora as an analytical tool in the study of refugee communities' (2002) 28(2) *Journal of Ethnic and Migration Studies* 221-238.

<sup>498</sup> Ruth Healey, 'Asylum-seekers and refugees: A structuration theory analysis of their experiences in the UK' (2006) 12(4) *Population, Space and Place* 257.

<sup>499</sup> Ibid.

<sup>500</sup> Bakewell (n 431).

<sup>501</sup> Jon Goss and Bruce Lindquist, 'Conceptualizing International Labor Migration: A Structuration Perspective' (1995) 29(2) *International Migration Review*.

indicates the applicability of structuration theory to specific phenomena. They present the complexity of the relationship between individual action and social structure in facilitating labour migration concluding that knowledgeable actors act strategically within social structures which have recognisable rules. Labour migration is very different from asylum seeking as migrants have more agency. They draw on knowledge, myths or hearsay about the destination country before making a decision, a luxury which asylum seekers are less likely to enjoy.<sup>502</sup> They may have more choices than the asylum seeker, for whom the only feasible option is to flee. However, it may be that the same approach to structuration can be used in research into the asylum process, as it too has complexities, recognisable rules and (arguably) knowledgeable actors. This ties in with non-ideal theory as the complex structures in place within the asylum appeal system can hinder the ability of asylum seekers to be effective agents and pursue their conception of the good.

Alice Bloch also uses concepts of structure and agency to illustrate that when structural forces, for example immigration status ('asylum seeker', 'refugee') are applied to an individual, they can have a marked impact on the experiences of people in the host country.<sup>503</sup> This indicates that structures such as language can work to constrain the agency of asylum seekers, and impact on procedural fairness and their access to justice. Tess Hellgren acknowledges these constraints but argues that, despite structural impediments, such as legality, migrants (and asylum seekers) still have agency in the face of legal restrictions. These structures do not completely impede their livelihood although they can be very constraining and affect day to day decision making.<sup>504</sup> This emphasis on the relationship between structure and agency is important for this thesis as it suggests the possibility of using structuration theory as a conceptual framework to investigate procedural fairness and access to justice in asylum appeal hearings. Having shown that structuration theory can be applied to refugee studies, this chapter will now introduce two structures which can constrain and

---

<sup>502</sup> Antje Missbach, 'Asylum Seekers' and Refugees' Decision-Making in Transit in Indonesia: The Need for In-depth and Longitudinal Research' (2019) *Journal of the Humanities and Social Sciences of Southeast Asia*.

<sup>503</sup> Alice Bloch, 'Refugee settlement in Britain: The impact of policy on participation' (2000) 26(1) *Journal of Ethnic and Migration Studies* 75-88.

<sup>504</sup> Tess Hellgren, 'At the Crossroads of Structure and Agency: Investigating the Importance of 'Legality' for International Migrants' (2012) 2(1) *Oxford Monitor of Forced Migration* 34.

enable the agency of asylum seekers in their appeal; language and access to legal representation. The arguments made here are advanced in Chapters 6 and 7.

### **3.8 Language as a structural constraint.**

Language is a powerful structure which impacts on the agency of asylum seekers both within and outside the asylum appeals process as linguistic structures underlie every sentence. Access to justice is affected where the asylum seeker cannot understand what is happening to them, and where they are unable to put their case properly to a judge. In these situations, procedural fairness is undermined. This is an example of a non-ideal society to which this thesis will attempt to apply the modified model of fairness. According to Sewell, linguistic structures are unusually deep, yet their power is slight.<sup>505</sup> However, this is not the case for asylum seekers as language confirms the speaker's membership of a particular community. There is a power disparity as the lack of understanding of the languages denies the speaker membership of this community. Sewell claims that these linguistic structures allow for equality, but for asylum seekers, it is an additional barrier they face in asserting their agency.<sup>506</sup> Chapter 6 considers the role of language and communication, indicating that interpreters can constrain and enable the agency of asylum seekers and their ability to communicate, thus influencing procedural fairness and access to justice in a non-ideal society.

### **3.9 The role of legal representation in enabling appellants to be effective agents.**

Legal representation is also a necessary facet of access to justice, which can both constrain and enable the agency of asylum seekers. In addition to the language barrier, asylum seekers are silenced by a lack of understanding over what is happening to them and an inability to communicate effectively as the process is highly complex.<sup>507</sup> Access to legal representation can affect access to justice and impact on the modified model of fairness in a non-ideal society. Empirical research shows that unrepresented asylum seekers are placed at a disadvantage, and are prevented from communicating their case effectively to the judge.<sup>508</sup> Despite claims that the tribunal procedure is more relaxed than the typical adversarial court case, the judge still plays

---

<sup>505</sup> Sewell (n 429).

<sup>506</sup> Ibid.

<sup>507</sup> Nick Gill, Rebecca Rotter, Andrew Burridge and Jennifer Allsopp, 'The limits of procedural discretion: Unequal treatment and vulnerability in Britain's asylum appeals' (2017) 27(1) *Social & Legal Studies* 49-78.

<sup>508</sup> Thomas, 'Evaluating Tribunal Adjudication' (n 38).



an adversarial (rather than inquisitive) role in the case. The judge and Home Office Presenting Officer understand the law, yet the asylum seeker is silenced by a lack of understanding.<sup>509</sup> As will be advanced in Chapter 7, access to legal representation is not enough; it needs to be competent, otherwise there is no access to justice.

### **3.10 Conclusion.**

This thesis is concerned with procedural fairness and access to justice for asylum seekers and so this chapter has examined the origins of justice, and justice as fairness. As it has been shown that asylum seekers exist in a non-ideal society, Rawls' theory of justice as fairness has been adapted to consider whether the structures in place in the asylum appeals system hinder the capacity for asylum seekers to be effective agents. The relationship between structure and agency has also been discussed, alongside problems with the definition of structure and the limitations of theories which give primacy to either structure or agency. It was proposed that Giddens' structuration theory was most appropriate to use for studies into access to justice for asylum seekers, as both structure and agency play an important role in reproducing society. Relevant literature was then examined; investigating whether it is possible to use structuration theory to examine access to justice in a non-ideal society. Despite Giddens himself expressing doubt as to whether it can be used in empirical research; authors such as Healey show that useful and original data can be generated using this approach.

Whilst it has been argued by migration scholars that asylum seekers do not have agency, this chapter has attempted to show that asylum seekers demonstrate agency using the resources available to them. Moving forward, the framework will be used to assess how structures constrain and enable agency in asylum appeals, and whether this inhibits access to justice. I argue that asylum seekers in the appeal system cannot be deemed effective agents without access to a fair hearing, including the right to representation and interpretation. It will be suggested that effective communication is key to enhancing procedural fairness and enabling asylum seekers to have the capacity to be effective agents. The following chapters will examine some of the structures which affect the agency of asylum seekers in the UK asylum appeals system. The focus will be on the duality of structure; the ways in which structures such

---

<sup>509</sup> Gill *et al*, 'Experiencing Asylum Appeal Hearings' (n 35).

as language and legal representation can both constrain and enable the ability of the asylum seeker to assert agency and play an active role in their appeal. The next chapter outlines the methods used to collect empirical data relating to procedural fairness, structure, and agency in asylum appeal hearings.

## Chapter 4- Methods and Methodology

### 4.1 Overview.

In the previous chapter, Rawls' theory of justice as fairness was adapted to consider whether the structures in place in the asylum appeals system hinder the capacity for asylum seekers to be effective agents. It was then proposed that Giddens' structuration theory was appropriate to use for studies into access to justice for asylum seekers, as both structure and agency play an important role in reproducing society. This thesis will draw on these theoretical frameworks to examine the duality of structure and agency in ensuring fairness for asylum seekers in a non-ideal society. To examine these factors, the thesis will adopt an empirical approach. This chapter moves on to describe the methods chosen for the empirical aspect of this thesis, and the rationale behind them. The research is situated within socio-legal studies which, in contrast to doctrinal or black letter law, which focusses on legal doctrine, looks beyond doctrines, positioning legal analysis in a societal context. It can be viewed as the 'law in action' as opposed to 'law on (or in) the books'.<sup>510</sup> This type of research moves beyond the text of statute and precedent to examine the lived experience of law and is appropriate for this thesis as it permits a broader analysis of the law, allowing a consideration of alternative theories and perspectives on the issue of fairness in asylum appeal hearings. Empirical methods are often drawn upon in sociolegal studies because they supplement legal analysis by giving context which would traditionally be outside the scope of legal studies. Empirical research involves the systematic collection of information and its analysis according to some generally accepted method(s).<sup>511</sup>

This thesis considers access to justice for asylum seekers by empirically analysing the interplay between indicators of structure and agency and procedural fairness in the asylum appeals system. By gathering and analysing empirical data, this

---

<sup>510</sup> Mark Van Hoecke, *Methodologies of Legal Research: which kind of method for what kind of discipline?* (Hart 2011).

<sup>511</sup> Carrie Menkel-Meadow, 'Uses and Abuses of Socio-Legal Studies' in Naomi Creutzfeldt, Marc Mason and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge 2019).

research aims to develop a deeper understanding of the ways in which asylum seekers assert agency and communicate effectively in their hearing, and the structural forces which hinder and enable this ability, thus establishing an awareness of reality as experienced by asylum seekers through their behaviour and knowledge. It is difficult to use quantitative methodologies to understand participant experiences,<sup>512</sup> whereas qualitative approaches enable the exploration of personal experiences and meaning of experiences for participants.<sup>513</sup>

As the research goal is exploratory, a mixed method qualitative approach to data analysis was used to address the research questions, including courtroom observations and semi-structured interviews with legal representatives and asylum seekers. Justifications for using these methods are presented within this chapter, including a consideration of ethical issues and a discussion of trustworthiness of the methods used as a way of evaluating the quality of research, as well as a brief analysis of the limitations of the research.

As discussed in Chapter 3, this thesis views access to justice through a structuration lens, and this theoretical approach influenced the choice of methods. According to O'Reilly, one of the problems when applying structuration theory to empirical research is that researchers tend to examine the process as it unravels on the ground, leading to methodological individualism, or they continue to separate the macro and micro levels rather than exploring their relationship and how they interact.<sup>514</sup> Research which has attempted to adopt Giddens' structuration theory has also tended to do so without full engagement with the many criticisms given by social theorists.<sup>515</sup> This thesis aims to fill this gap, through engaging with structuration theory and its critics in order to assess the role of both structure and agency in asylum appeal hearings. This is discussed in more depth in Chapter 3 section 3.7.

Structuration theory is appropriate to answer the research questions in this thesis, as Giddens is concerned with the (abstract) characteristics of social life. Unlike

---

<sup>512</sup> Hoare (n 202).

<sup>513</sup> Carla Willig, *Introducing Qualitative Research in Psychology: Adventures in Theory and Method* (2<sup>nd</sup> edn Open University Press 2008).

<sup>514</sup> Karen O'Reilly, 'Structuration, Practice Theory, Ethnography and Migration: Bringing It All Together' [2012] International Migration Institute Working Papers, University of Oxford.

<sup>515</sup> Bakewell (n 431).

structuralism, post structuralism, and critical realism, it sees structures and systems as different concepts, and agents as active participants. Structuration theory leaves room for social transformation as structures are the result of agents trying to further their interests. This emphasis on the relationship between structure and agency is important for this thesis as it suggests the possibility of using structuration theory as a conceptual framework to investigate asylum appeal hearings.

#### **4.2 Key questions and hypotheses.**

The thesis contributes to a better understanding of the role of structure and agency in access to justice for asylum seekers using a detailed, intensive empirical socio-legal analysis.<sup>516</sup> The central question underpinning the research considers whether procedural fairness is linked to agency and effective communication. The thesis investigates whether there is space for asylum seekers to assert agency in their appeal, highlighting some of the structures which hinder or facilitate this ability.

Three overarching arguments run through this thesis, which mirror these aims:

- **Hostile policies and procedures (legal structures) have the potential to constrain the agency of asylum seekers in the appeals system.**
- **Asylum seekers are able to draw on tactics and resources to assert agency and create space for effective communication.**
- **Legal representation and effective interpretation are necessary for asylum seekers to have a fair hearing.**

Some key questions necessary for answering the research question were formulated from an extensive review of relevant literature:

- **What structural factors influence access to justice for asylum seekers?**
- **How do asylum seekers assert agency in appeal hearings?**
- **What role do legal representatives play in asylum appeals?**
- **How does language constrain and enable the agency of asylum seekers?**
- **Do constraining structures feature more prominently in asylum appeals than episodes of agency?**

---

<sup>516</sup> Alan Bryman, *Social Research Methods* (5<sup>th</sup> edn OUP 2016).

These questions helped to shape the methodological approach and choice of methods of this research. Much of the work in this field focusses on the outcomes of asylum cases; and whether these are 'fair'. The aim of this thesis is to move away from outcome and substantive fairness, to investigate whether the procedures followed in appeals are fair. It is fitting, therefore, to adopt a multi- or mixed- method approach to understanding procedural fairness and access to justice for asylum seekers in order to address the concerns of the affected parties and also the wider societal or structural issues that influence this access to justice. As qualitative research can help understand the motives that asylum seekers and refugees can frame discursively,<sup>517</sup> I decided to use a multi-method qualitative approach of court observations and semi-structured interviews to consider how structuration theory affects procedural fairness and access to justice in asylum appeal hearings. The aim is to understand the lived experiences of asylum seekers with a focus on the experiences and perceptions of the actors within the legal process.

#### **4.3 A reflexive approach to methodology, epistemology, and ontology.**

Qualitative research generally does not regard the truth as objective, but as a subjective reality that is experienced differently by each individual, and the methods adopted in this thesis explore individuals' experiences to understand agency in the asylum appeal hearing.<sup>518</sup> In order to fully explore the research questions set out in the preceding section, I adopted a social constructionism viewpoint.<sup>519</sup> Proponents of social constructionism view social reality with a focus on interpersonal interaction and the exchange of ideas.<sup>520</sup> This approach recognises that social actors play a role in shaping society, and that social entities and their meanings exist subjectively.<sup>521</sup> This methodological position encourages the researcher to consider the role that asylum seekers play in constructing their own narratives and asserting agency, and the interplay between the asylum seekers and other key actors within the appeals process.

---

<sup>517</sup> John Richardson (ed), *Handbook of Qualitative Research Methods for Psychology and the Social Sciences* (BPS 1996).

<sup>518</sup> Tanya Vishnevsky and Heather Beanlands, 'Qualitative Research' (2004) 31(2) *Nephrology Nursing Journal* 234-8.

<sup>519</sup> Mats Alvesson and Kaj Skoldberg, *Reflexive Methodology: New Vistas for Qualitative Research* (2<sup>nd</sup> edn SAGE 2009).

<sup>520</sup> Peter Berger and Thomas Luckmann, *The social construction of reality* (Penguin Books 1966).

<sup>521</sup> Vivien Burr, *An Introduction to Social Constructionism* (Routledge 1995).

Gathering qualitative data allowed me to collect rich accounts that went beyond description; they also encompassed participants' perceptions, emotions, and understandings, expressed in their own words.<sup>522</sup> As I also observed appellants within their hearings, the data provided an opportunity to recognise the subjectivity of these experiences. In doing so, I acknowledge that social phenomena are not objective, but subjective experiences which structure how individuals understand and engage in the world.<sup>523</sup> As different contexts and actors indicate variable constructions of social reality, I decided that courtroom observations and interviews with legal representatives and asylum seekers would give an original insight into procedural fairness and access to justice for asylum seekers. This approach also provided a unique insight into the lived experiences of the participants which will inform my analysis.

This thesis aims to develop an understanding of reality as experienced by asylum seekers through their behaviour and knowledge. I recognised that whilst the accounts the participants shared may or may not reflect the facts of their experiences, they reflected their own constructions of reality and the ways in which they had perceived events from their own standpoint.<sup>524</sup> In this way, I understood the participants' narrative accounts as being representative of the subjective truth of their experience.<sup>525</sup> Taking an approach to research that is more closely aligned with constructionism acknowledges that the research is pluralistic, interpretive, open-ended and contextualised.<sup>526</sup> Thus in writing this thesis the account and analysis reflects my situated and subjective understanding of the context. Asylum hearings contain a multiplicity of interacting and often conflicting realities, including that of the researcher.<sup>527</sup> I am aware that qualitative research is heavily reliant on the subjectivity of the researcher and so my personal background and experiences will inform my view

---

<sup>522</sup> Rebecca Mavin, 'Producing and Contesting Precarity: The Politics of the Body in the British Asylum System' (PhD Thesis, University of Exeter 2019); Egon Guba and Yvonna Lincoln, *Fourth Generation Evaluation* (SAGE 1989).

<sup>523</sup> Kenneth Gergen, *Social Construction in Context* (SAGE 2001).

<sup>524</sup> Bryman (n 517).

<sup>525</sup> Ibid.

<sup>526</sup> Ibid.

<sup>527</sup> Jessica Anderson, Jeannine Hollaus, Annelisa Lindsay and Colin Williamson, *The Culture of Disbelief: An Ethnographic Approach to Understanding an Under-theorised Concept in the UK Asylum System* (Refugee Studies Centre 2014).

of the world which could potentially lead to biased interpretations of my data.<sup>528</sup> In order to limit this, I tried to ensure that I remained critical and open-minded to the results of the data, and that my analysis was objective. This included ensuring that my interview questions were not leading.<sup>529</sup>

To further test the rigour of the research, I regularly engaged in periods of self-reflection, continually assessing actions and perceptions. This is known as reflexivity.<sup>530</sup> Having studied Discrimination, Public, and European Union law at undergraduate level and reading broadly around the topic; my knowledge of asylum law is considerable. However, I have never worked in the sector, nor have I had any experience of seeking asylum, or access to the reasoning behind policy decisions. These factors allowed me to remain somewhat objective throughout the study, mitigating the problem of transposing my own experiences and perceptions on to the study but as mentioned above, like with any research project, it was impossible to remain completely neutral as there was a choice of what information to include and which to omit. Everyone has different opinions, especially with regards to social debates such as those surrounding asylum.<sup>531</sup> In engaging in periods of self-reflection, I aimed to uncover and mitigate any such perceptions which may have biased the study. I identify as white, Welsh, and in my third year of PhD research. I have beliefs around human rights, including access to justice and social justice. Politically, I identify as left-wing, and endorse state provision of support where necessary. Throughout the research process, I was conscious of this and considered how these underlying cognitive views moulded the process of inquiry.<sup>532</sup>

During data collection, I kept a reflection journal which included events I had seen, and conversations I had, alongside my feelings towards these, in order to remain as reflexive as possible. I spent time reflecting on my observations, including how my own position might be impacting upon those interpretations. This enabled me to understand how my position and life experiences influenced my interpretation of the

---

<sup>528</sup> Michael Patton, *Qualitative Research & Evaluation Methods: Integrating Theory and Practice* (4th edn SAGE 2014).

<sup>529</sup> Kendall (n 4).

<sup>530</sup> Wesam Darawsheh, 'Reflexivity in research: Promoting rigour, reliability, and validity in qualitative research' (2014) 21(12) *International Journal of Therapy and Rehabilitation* 260-68.

<sup>531</sup> Canetti *et al* (n 264).

<sup>532</sup> Luigina Mortari, 'Reflectivity in Research Practice: An Overview of Different Perspectives' (2015) 14(5) *International Journal of Qualitative Methods* 1-9.



data, allowing for an exploration of alternative understandings and to gather a richer data set.<sup>533</sup> The process of reflection was also important during interviews as it allowed emerging themes in initial interviews to be explored in subsequent interviews.<sup>534</sup> The research presented includes stories told by asylum seekers about their experience in the asylum appeals system. This should allow readers to form their own opinion. The next section situates the research undertaken, giving an overview of the procedures employed in asylum appeal hearings in Wales.

#### **4.4 Asylum appeal hearings in Wales- Situating the research.**

The empirical data presented in this thesis were gathered during eighteen months of fieldwork, from January 2018 to June 2019, in South Wales. During this fieldwork, I engaged with one organisation that works with asylum seekers and refugees<sup>535</sup> and one Immigration Court<sup>536</sup>. In Wales, asylum appeals are only heard at Columbus House, situated in Newport, Wales' third largest city.<sup>537</sup> Columbus House was chosen as the site of this observational research as it is the sole immigration court in Wales. This allowed me to gain an insight into the entire asylum appeals process for the country, regardless of dispersal location, nationality, and route of entry. Although the focus of my research was the appeals process and the interactions between key actors within it, I found that the location of the site presented significant hurdles to the appellants. Columbus House is situated on the outskirts of Newport, a small, satellite city in South Wales with limited public transport access. This can make it difficult to reach in time for a 10am start, and often serves as a barrier to witnesses and family members attending the hearings. I witnessed four asylum seekers arriving late and out of breath, claiming public transport delays. I also witnessed two asylum seekers tell their representative that finding the court had made them feel anxious. Two others explained that family members were unable to attend, as they could not afford the bus or train fare. This served to constrain the agency of asylum seekers before they even entered the courtroom.

---

<sup>533</sup> Eugenie Georgaca and Evrinomy Avdi, 'Discourse Analysis' in David Harper and Andrew Thompson (eds), *Qualitative Research Methods in mental health and psychotherapy: A guide for students and practitioners* (John Wiley and Sons 2012) 481-503.

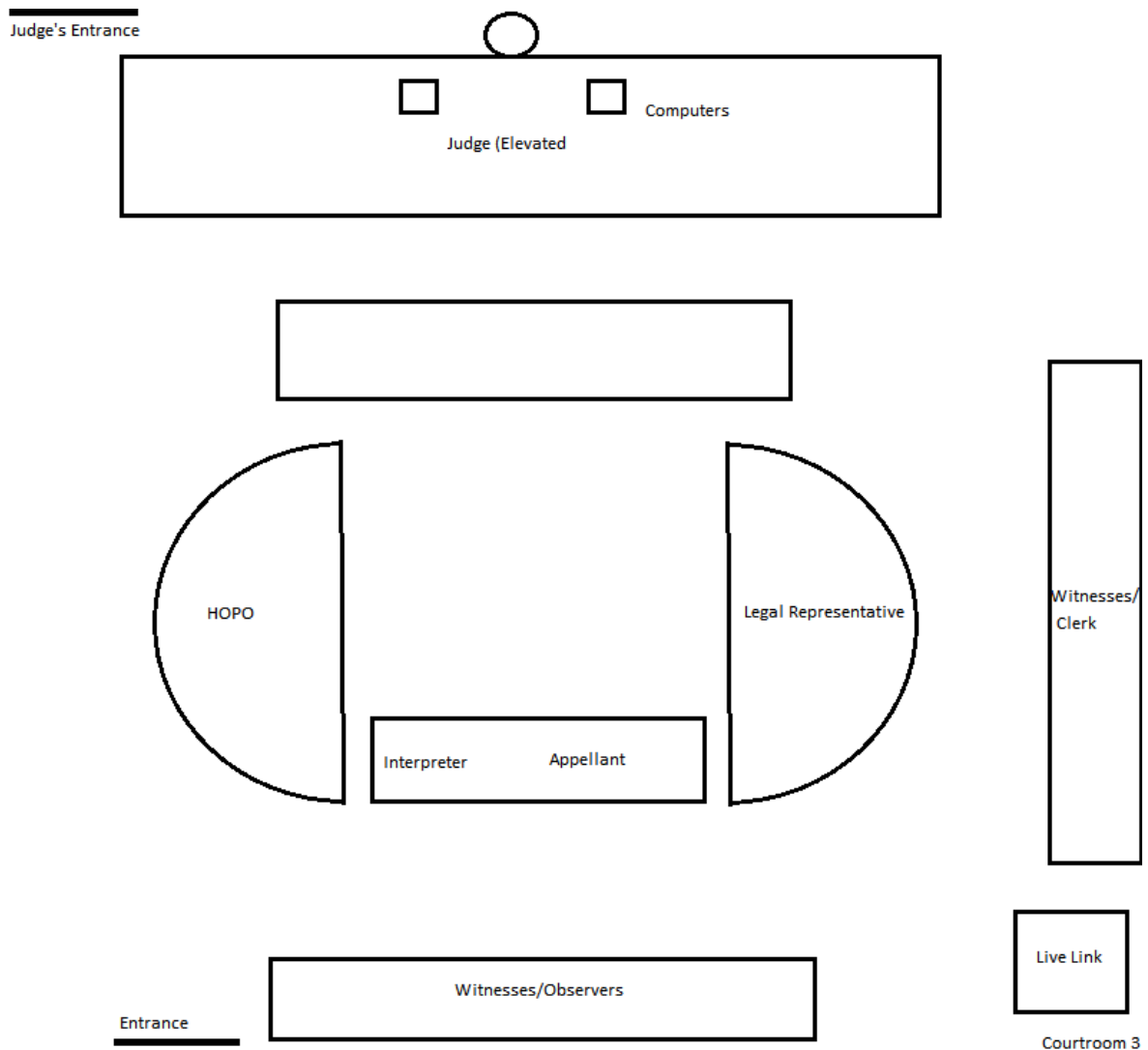
<sup>534</sup> Hoare (n 202).

<sup>535</sup> Asylum Justice- see below for a description of the organisation.

<sup>536</sup> Columbus House, Newport, South Wales.

<sup>537</sup> Population 155,000. Following Cardiff and Swansea.

The building is tall, imposing, and in some disrepair. For my first 15 visits, scaffolding obscured the sign which told visitors they were in the right place, and the main entrance was blocked on my first visit. Once inside, the layout and procedures may have been seen as very court-like to lay users, as visitors are searched by security guards upon arrival and sent to one of two waiting rooms. Whilst there are no wigs or gowns, there are strict rules on who speaks when, and one asylum seeker told me that they felt intimidated by the formality of their hearing experience. Each courtroom is set up so that the judge and appellant can both see all of the other parties (with the exception of observers, who tended to be seated behind the appellant). A field sketch of a typical Columbus House courtroom is included below. All of the courtrooms observed were laid out similarly to this, with an elevated judge sat opposite the appellant, a legal representative (if present) to the appellant's right, an interpreter (if present) at their immediate left, and a Home Office Presenting Officer (HOPO) opposite the legal representative.



(Author's field sketch, Courtroom 3, 19<sup>th</sup> January 2018.)

The substantive hearing constitutes the main hearing for the purposes of an appeal of a UK Border Agency (UKBA) decision.<sup>538</sup> During this research, the appellant, the appellant's legal representative, and a HOPO usually attended the hearing, alongside an immigration judge and interpreter (where necessary). The hearings are, for the most part, open to members of the public who may wish to attend,<sup>539</sup> and occasionally, witnesses also attended. As discussed in Chapter 2, the burden of proof at the hearing lies with the appellant. The standard of proof is lower than in civil and criminal cases as the judge must decide whether there is 'a reasonable degree of likelihood' that the

<sup>538</sup> Catherine Farrell, 'Asylum narratives and credibility assessments: an ethnographic study of the asylum appeal process in Scotland' (PhD Thesis, University of Glasgow 2012).

<sup>539</sup> Ibid.

appellant would face persecution on their return.<sup>540</sup> The asylum appeal hearing has a standard structure, where the judge (often-not always) introduces themselves, the case, and the other parties present. The witness statement is then formally adopted, and the appellant is then cross-examined by the HOPO, who tests the evidence, highlighting inconsistencies, and clarifying uncertainties, usually using the points in the refusal letter.<sup>541</sup> The appellant's legal representative can then clarify or respond to any matters raised during this questioning. Following this, closing submissions are heard. The judge reserves their judgement, which the appellant receives in writing up to two weeks later.

I also worked with Asylum Justice, primarily to find interview participants. Asylum Justice is the only organisation in Wales to provide free legal advice to asylum seekers.<sup>542</sup> They were first established in 2005, but were forced to suspend operations in 2013 due to a lack of charitable funds and legally qualified volunteers. A new board of trustees was formed in August 2013, and with funding from the Tudor Trust, Asylum Justice were able to reopen. Asylum Justice is situated in a large building in Cardiff Bay. On average, they advise 110 asylum seekers at a drop-in clinic every month. Many of their clients have been refused asylum and wish to appeal and many have used their five hours of free legal advice and seek help with their case. Asylum Justice also receives referrals from agencies within Wales dealing with asylum seekers and refugees.<sup>543</sup> Support from Asylum Justice is associated with an increase in success rates, in contrast to the overall success rate in asylum appeals (41%), the success rate for Asylum Justice is 77%.<sup>544</sup> Working in conjunction with Asylum Justice allowed me to gain a deeper understanding of the barriers to justice faced by asylum seekers, including language difficulties and the importance of legal representation.

---

<sup>540</sup> See Chapter 2, section 2.6.

<sup>541</sup> Farrell (n 539).

<sup>542</sup> Asylum Justice, 'What We Do' (*Asylum Justice*) <https://www.asylumjustice.org.uk/what-we-do/> accessed 4 February 2018.

<sup>543</sup> The COVID pandemic has meant that these drop ins have been suspended since March 2020, with a new telephone and online service in place as of December 2021.

<sup>544</sup> Asylum Justice, 'Statistics' (*Asylum Justice*) <https://www.asylumjustice.org.uk/annual-statistics-2019/> accessed 4 July 2020.

#### 4.5 Research design

As discussed above, I decided that a qualitative approach was most appropriate for this study, as I am interested in the meaning and practice of procedural fairness within the appeals process, and 'qualitative research enquires into, documents, and interprets the meaning-making process'.<sup>545</sup> I used a Case-Based Research design to 'understand the richness, complexity and nuances of social life.'<sup>546</sup> These designs use qualitative methods to allow an in-depth study of a particular situation. They are prevalent in sociolegal studies, as they help shape understandings of a culture through investigating the topic in far more detail than would be possible in research projects with large numbers of participants.<sup>547</sup>

As is typical of Case-Based Research, my approach was inductive and exploratory, guided by the theoretical framework discussed in the previous chapter. Conducting courtroom observations and semi-structured interviews allowed for a detailed exploration of individual perspectives and experiences, which permitted a deeper and richer investigation of procedural fairness and how structure and agency operate in appeal hearings than would be possible with a quantitative approach. This approach is similar to that of Crawley, who interviewed 43 refugees and asylum seekers, In Crawley's study, research participants were asked about the decisions that led them to the UK, investigating whether these were a reflection of chance or choice.<sup>548</sup> Those interviewed talked not only about their own experiences, but those of a wide network of friends and contacts, providing an overall picture of the experience of hundreds of asylum seekers in the UK.<sup>549</sup> This study influenced the methods chosen for my thesis as Crawley considers the role of human agency and decision making, highlighting the opportunities that asylum seekers do and do not have to influence the future direction of their lives.<sup>550</sup>

---

<sup>545</sup> Patton (n 529).

<sup>546</sup> Perri 6, and Christine Bellamy, *Principles of Methodology: Research Design in Social Science* (SAGE 2012) 104.

<sup>547</sup> Kendall (n 4).

<sup>548</sup> Heaven Crawley, *Chance or choice? Understanding why asylum seekers come to the UK* (Refugee Council 2010)

<sup>549</sup> Ibid.

<sup>550</sup> Ibid.

The role of agency is important in the context of my research, however, Crawley's aim differed from mine in that there is no consideration of the role of the asylum seeker in the legal process. Because of this, I also drew inspiration from Hazel Genn and Yvette Genn's seminal study on legal representation in tribunals when designing my research.<sup>551</sup> The authors conducted an expansive empirical study of informal tribunals, focussing on the procedures, decision making and outcomes in cases relating to welfare benefits, immigration, employment, and mental health.<sup>552</sup> This is similar to my research in that the focus on procedures employed in tribunals. Similarly to Genn and Genn I elected, where possible, to undertake interviews before appellants had received a decision on their appeal. As the focus of my study is on procedural fairness, I did not want outcome to bias the respondent's answers in any way. The thesis intends to analyse the operation of rules, the resources given to asylum seekers and other constraining and enabling structures and agencies, and how these all have an effect on access to justice.

In designing my research, I learned that gatekeepers can 'facilitate or deny access to researchers', especially when protecting vulnerable groups.<sup>553</sup> Court staff, and Asylum Justice staff could serve as gatekeepers in this study. To facilitate co-operation, I built relationships with these key gatekeepers. I made them aware of the aims and purpose of the project in advance of the study. I discussed the research aims and questions with them, and answered any questions they had, bringing them on board with the project, and seeking permission to undertake the research. Prior to data collection, I met with the Director of Asylum Justice to familiarise myself with the research setting. Working in conjunction with Asylum Justice facilitated the interviews with clients in a safe, secure environment, which helped the participants feel at ease. Having decided to use qualitative methods, and speaking to gatekeepers, I began researching how best to present valid and reliable results.

---

<sup>551</sup> Hazel Genn and Yvette Genn, *The Effectiveness of Representation at Tribunals* (Lord Chancellor's Department 1989).

<sup>552</sup> *Ibid.*

<sup>553</sup> Susan Groundwater-Smith, Sue Dockitt, and Dorothy Bottrell, *Participatory Research with Children and Young People* (SAGE 2015).

#### 4.6 Enhancing validity and reliability through trustworthiness.

With regards to qualitative research, validity can be said to encapsulate the integrity and application of methods and how precisely the findings reflect the data used, whilst reliability relates to procedural consistency.<sup>554</sup> The validity of the data presented in the following chapters is enhanced through the use of a multi-method approach, interview themes were kept consistent throughout, and I interviewed to the point of saturation, to ensure that I had covered the topic in sufficient breadth and depth, thus providing me with an opportunity to interrogate a range of views on this specific area. However, it is difficult to know whether this ensures valid, reproduceable results.<sup>555</sup> There was a chance of participant error or bias, as information was drawn from face-to-face meetings and observations. It may be the case that some of the asylum seekers were not entirely truthful when bringing a claim. Upon arrival in the UK, they may have been scared and confused, or may have been told by smugglers or traffickers to lie on their asylum application form.<sup>556</sup> This could affect the reliability of results. However, this is of little consequence to this research, as I asked about their experiences of the system, rather than the facts of the case. Their experiences were valid, regardless of the truthfulness of their claim. The sample size of both observations and interviews is relatively small, which restricts generalisability and so the conclusions presented in the next chapters are tentative.

There is a debate as to whether validity and reliability should be applied to qualitative research,<sup>557</sup> and the concepts become increasingly complex when conducting ethnographic or observational research.<sup>558</sup> This is mainly because the subjective nature of such research means that these terms become inapplicable. Researchers should instead demonstrate that their research is credible or

---

<sup>554</sup> Helen Noble and Joanna Smith, 'Issues of Validity and Reliability in Qualitative Research' (2015) 18(2) *Evidence Based Nursing* 34-5.

<sup>555</sup> Kendall (n 4).

<sup>556</sup> Khalid Koser, 'Asylum Policies, Trafficking and Vulnerability' (2000) 38 *International Migration*, 91-111, Abigail Stepnitz, 'A Lie More Disastrous than the Truth: Asylum and the identification of trafficked women in the UK' (2012) 1 *Anti-Trafficking Review*.

<sup>557</sup> Noble and Smith (n 555).

<sup>558</sup> John Creswell and Dana Miller, 'Determining Validity in Qualitative Inquiry' (2000) 39(3) *Theory into Practice*.

trustworthy.<sup>559</sup> This refers to how accurately the account represents participants' realities of social phenomena and whether these accounts are credible to them.<sup>560</sup> The focus is on the inferences drawn from the data.<sup>561</sup> Therefore, for this study, trustworthiness and authenticity are important aspects in assessing the quality of the research.<sup>562</sup>

Qualitative research does not allow for a 'single, absolute account of social reality'.<sup>563</sup> I interviewed participants from different countries, with different accounts of their experiences, and social reality may have differed for these participants. This thesis provides a more flexible account of these experiences, allowing for uncertainty and contradictions in the data.<sup>564</sup> Each stage of the research was reported in a transparent way to allow others to judge the results or replicate the study. I made written transcripts of recorded interviews which will be kept in case of inspection and have used direct quotes in my analysis to increase transparency.<sup>565</sup> This allowed me to highlight unusual or unique positions, and differences of opinion.

#### **4.7 Ethics and anonymity.**

The nature of asylum research can also lead to ethical issues, especially with regards to the vulnerability of participants,<sup>566</sup> thus presenting risks to these parties.<sup>567</sup> When designing this study, I made sure to fully engage with these issues, consulting the guidelines offered by the Social Research Association.<sup>568</sup> These included obligations to society, such as working responsibly and morally, and obligations to subjects, protecting them from undue harm. In adhering to these guidelines, I designed questions which did not presume or determine an outcome.

---

<sup>559</sup> Lincoln and Guba (n 523); Joseph Maxwell, *Qualitative Research Design: An Interactive Approach* (3<sup>rd</sup> edn SAGE 2012); Sharan Merriam, *Qualitative Research and Case Study Applications in Education. Revised and Expanded from "Case Study Research in Education"* (Jossey Bass 1998).

<sup>560</sup> Thomas Schwandt, *Qualitative Inquiry: A Dictionary of Terms* (SAGE 1997).

<sup>561</sup> Martyn Hammersley and Paul Atkinson, *Ethnography: Principles in practice* (Tavistock 1983).

<sup>562</sup> Lincoln and Guba (n 523).

<sup>563</sup> Bryman (n 517).

<sup>564</sup> Maggie Maclure, 'The Wonder of Data' (2013) 12(4) *Cultural Studies Critical Methodologies*.

<sup>565</sup> Kendall (n 4).

<sup>566</sup> John Clements, Mark Rapley and Robert Cummins, 'On, to, for, with- vulnerable people and the practices of the research community' (1999) 27 *Behavioural and Cognitive Psychotherapy* 103-115.

<sup>567</sup> Claire Renezzi and Raymond Lee, *Researching Sensitive Topics* (SAGE 1993).

<sup>568</sup> RESPECT (Professional and Ethical Codes for Technology-related Socio-Economic Research) (2003) [http://www.respectproject.org/code/respect\\_code.pdf](http://www.respectproject.org/code/respect_code.pdf). Accessed 28 October 2019.



Prior to undertaking observations, I contacted the court, and explained my research aims over the phone. I was told that there were no restrictions on observers in asylum appeal hearings, but I sought permission from individual clerks and judges for my first five visits. With regards to interviews, informed consent was sought from participants. In attaining consent, I went beyond a standard consent form as many asylum seekers have little proficiency in the English language and so special sensitivity was required.<sup>569</sup> To overcome this, I outlined the interaction, rules, and implications in simplistic and accessible language.<sup>570</sup> Forms were also translated by an interpreter where necessary. I adopted an opt-out approach, providing full information where it was made clear to participants that they had the right to withdraw at any time.<sup>571</sup> All data used was anonymised, in line with the Data Protection Act 1998;<sup>572</sup> omitting anything which could identify the participant. The data was password protected and stored on the university's H drive. When transcribing, I was careful to avoid revealing too much context. Prior ethical approval was also obtained from the Law and Politics School's ethical committee at Cardiff University.

The most sensitive part of the research concerned participant interviews, as this brought me into direct, often one-to-one contact with vulnerable parties. Working in partnership with Asylum Justice allowed me to gain access to refugees (successful asylum seekers) and failed asylum seekers. This, alongside talking to appellants at Columbus House, ensured that I could identify suitable participants. I found it difficult to gain the trust of asylum seekers in some cases; some were fearful of deportation and were wary of anyone who wanted to speak to them about their case. To build a relationship with potential participants, I clearly explained the research, confirming anonymity and confidentiality should they partake in the research, and ensured that any personalised data was omitted. As the interviews were conducted either in Columbus House or Asylum Justice, the asylum seekers were already familiar with the

---

<sup>569</sup> Michelle McCarthy, 'Interviewing People with Learning Disabilities about Sensitive Topics: A Discourse of Ethical Issues' (1998) 26 *British Journal of Learning Disabilities* 140-145.

<sup>570</sup> Ezekiel Emanuel, David Wendler and Christine Grady, 'What Makes Clinical Research Ethical?' (2000) 283(20) *Journal of American Medical Association* 2701-2711.

<sup>571</sup> Martin Bulmer, 'The Ethics of Social Research' in Nigel Gilbert (ed), *Researching Social Life* (SAGE 2001).

<sup>572</sup> Data Protection Act 1998.

building, which may have encouraged participants to be more open and receptive to questions.

Ethical issues were considered in every aspect of the research design including the ethical concerns surrounding language barriers which sometimes necessitated the use of interpreters. The use of interpreters adds an additional person in authority to the interview, which may have had the effect of stopping participants from fully disclosing their circumstances. However, interpreters also had the potential to facilitate better responses, as the interviewee was free to speak in their own language, to someone who could understand; they may therefore have been more open to discussing their stories. I decided to include interpreters where necessary and was conscious of the limitations that this may impose.<sup>573</sup>

Concern for participant welfare was at the centre of the research design. Due to the context of the claims, cultural misunderstandings, and discussing difficulties with the asylum process, it was difficult to avoid upsetting people. It was important therefore, to ensure the asylum seeker did not believe that I was stigmatising them or questioning their beliefs. The presence of interpreters mitigated against this, as did a thorough explanation of the interview questions to the interpreters before asking participants, in order to limit the impact and offence phrasing may cause a participant. With regards to ethical issues that could not be foreseen, Gilligan's Ethics of Care were followed, acts were based upon emotion rather than strict principles on a case-by-case basis, and I remained compassionate and maintained strong relationships throughout.<sup>574</sup> This allowed me to make decisions based on specific circumstances, where the right thing to do may differ in similar situations.<sup>575</sup> Having discussed the rationale behind the research design, reflexivity in both planning and executing the research, and ethical issues, the chapter now moves on to discuss the data collection itself.

---

<sup>573</sup> See section 4.10.

<sup>574</sup> Carol Gilligan, 'In a different voice: Women's conceptions of self and of morality' (1977) 47(4) *Harvard Educational Review* 481-503.

<sup>575</sup> Natasha Whiteman, *Undoing ethics: Rethinking practice in online research* (Springer 2012).

#### **4.8 Using ethnography as a starting point to capture the everyday realities of asylum appeal hearings.**

In order to answer the research questions, I needed to adopt a method that was able to capture the everyday reality of the practices operating in asylum appeals, including the actual interaction that takes place between judges, lawyers, HOPO's and asylum seekers. It was fitting, therefore, to adopt a multi- or mixed- method approach to data collection. Ethnography is the recording and analysis of a culture or society, usually based on participant observation and resulting in a written account of a people, place or institution.<sup>576</sup> This seemed appropriate in aiding an understanding of access to justice for asylum seekers as it addresses the concerns of the affected parties and also the wider societal or structural issues that influence this access to justice. This allows for engagement with communities, observation of interactions, and facilitates social constructionist understandings. Whilst a wide range of data is collected, the focus is on observation and informal conversation. Watson emphasises several virtues of ethnographic research which include bringing the complex nuances of organisational and social life to the forefront, and allowing the researcher to situate data in the wider context in which they came into being. Ethnographic research will provide data to understand the lived experiences of asylum seekers with a focus on the experiences and perceptions of the actors within the legal process.

However, the term ethnography has been subject to controversy.<sup>577</sup> It can refer to a philosophical paradigm to which the researcher makes a total commitment, or something closer to a method used as and when appropriate. It is widely claimed that the researcher must fully immerse themselves in the community that they are researching, a standard that I was unable to reach during this research. It is also argued that impartiality can be lost during ethnographic research, as the mere presence of an observer may change the outcomes being observed. Researchers should also be very careful about claiming to access and represent the voices and experiences of research participants, especially marginalized subjects, irrespective of the depth and care of fieldwork and the sensitivity of our writing.<sup>578</sup> For these reasons,

---

<sup>576</sup> Bob Simpson and Simon Coleman, 'Ethnography. Glossary of Terms' (*Royal Anthropological Institute* 2017) [www.discoveranthropology.org.uk](http://www.discoveranthropology.org.uk) accessed 28 July 2018.

<sup>577</sup> Hammersley and Atkinson (n 562).

<sup>578</sup> Cabot (n 435).

the research design used throughout this thesis is referred to as observations rather than a full ethnography. Given the focus on procedural fairness, agency, and effective communication in this thesis, observation was deemed appropriate it meant that I was able to actually observe certain embodied experiences as they happened, experiencing and witnessing the field, thus capturing behaviour less likely to be revealed during interviews. This method is increasingly used in socio-legal studies, to give insight into the richness of social life.<sup>579</sup> However, with the exception of Gill *et al*'s extensive studies within the adjudication of asylum appeals,<sup>580</sup> few asylum studies utilise observations and so this thesis aims to extend the literature on observations in asylum appeals. The fieldwork allowed an observation of what actually happens in asylum appeal hearings, generating a meaningful description of the procedures employed, and an investigation into whether these are fair.

#### **4.9 Observations on observation.**

As discussed in the previous section, observations were appropriate as they allowed for engagement with participants, and to experience a situation first-hand.<sup>581</sup> They allowed me to see both parties simultaneously and to collect the many incidental interactions that often go unnoticed in interview research. The research strategy aimed to identify practices present in the court which either constrained or enabled the ability of the asylum seeker to assert agency within their appeal. The only inclusion criterium was that the asylum appeal hearing occurred at Columbus House. This was deliberately broad so that I could observe a wide range of cases. I contacted the court, and explained my research aims over the phone. I was told that there were no restrictions on observers in asylum appeal hearings, and so in January 2018, I conducted a pilot study to test my research methods.

This was an organisational challenge. I observed two cases, during which several difficulties were revealed. It was difficult to get to the venue, then to take notes, follow the case, transcribe what was being said, and pick up on non-verbal cues simultaneously. This stage was exploratory, and following this pilot stage I adopted a chronological structure to note taking, which soon evolved into a thematic structure.

---

<sup>579</sup> Paddy Hillyard, 'Invoking Indignation: Reflections on Future Directions of Socio-legal Studies' (2002) 29(4) *Journal of Law and Society* 645-656.

<sup>580</sup> See for example Gill *et al*, 'Experiencing Asylum Appeal Hearings' (n 35).

<sup>581</sup> Kathleen Musantet and Billie DeWalt, *Participant Observation: A Guide for Fieldworkers* (AltaMira Press 2011).

However, I also made note of any interesting issues that spoke to my research questions, but which did not ultimately form part of my themes. Developing themes enabled me to reduce the amount of notes made during appeals, identify specific issues, and analyse these in more depth. From this, I learned that it was necessary to devise prompts as a reminder of what to identify in order to be able to compare observations. These prompts included the key procedures set out in judicial guidelines<sup>582</sup> and extended to the behaviour of asylum seekers, legal representatives, interpreters and HOPO's. This was also useful as, over time, it became difficult to maintain an explicit awareness as I became more familiar with the process and courtroom itself. The prompts allowed for a sharper focus on emerging themes. Although this may have limited the analysis somewhat, the detail generated from the issues of interest meant that the benefits outweighed the disadvantages. Although not a verbatim transcript, the fieldnotes gathered provided a full account of the hearing. Appeal proceedings are not officially recorded or transcribed. Observations were therefore highly important to explore procedural fairness and episodes of agency, and how these are challenged by the various participants during the appeal hearing. I learned that, whilst the asylum appeals were open to the public and so informed consent was not necessary, the subject matter of the cases was always highly sensitive, and as a consequence I ensured that all observations were anonymised, omitting names and other identifying information from my field notes.

#### **4.9.1 Observations during the hearing.**

Ethical considerations were at the forefront throughout these observations. Although there are no restrictions on the presence of observers in asylum appeals, there are reporting restrictions, and I felt pressure to account for my presence in Columbus House. The clerk at my first visit looked dubious when told that I had called ahead to confirm that I could observe, but she indicated that she would speak to the judge and see what she could do. When she reappeared, I was told 'You're lucky, the judge is lovely, he has no problem with you sitting in; follow me'. I sat at the back of hearing rooms and remained as inconspicuous as possible, apart from explaining my presence to the judge and appellant where necessary. My presence was largely unobtrusive

---

<sup>582</sup> Judicial College, *Equal Treatment Bench Book* (February 2021) <https://www.judiciary.uk/wp-content/uploads/2021/02/Equal-Treatment-Bench-Book-February-2021-1.pdf> accessed 17 March 2021.

(aside from observation 5, where the clerk interrupted the case at 10:30 so that I could observe), and no details were disclosed to relevant parties about the topic of the research before the case took place. I had basic knowledge of the court culture and procedure, but was unfamiliar with the facts of the cases, and had never met the appellants. However, their behaviour may have changed simply by the presence of a researcher.<sup>583</sup> Although I was usually ignored, and the practices varied even between the same judges, it is impossible to know if anything would have changed had I not been present. However, as judges and legal representatives are frequently observed by the public in this context, it is unlikely they significantly altered their actions. The same may not be true for asylum seekers.

I completed 90 direct observations of parties over 18 months. I observed 90 different asylum seekers, 51 males and 39 females. Half of the appellants observed came from Iran (24), Iraq (18) or Pakistan (15). However, appellants originated from 18 different countries including Mongolia, the Democratic Republic of the Congo, Egypt, Nepal and Spain, reflecting the diverse population of asylum seekers in the UK. The ages of participants ranged from 14 to 58, with 62 (69%) aged between 25-40. I observed 46 different legal representatives, 20 females (44%) and 26 males (56%). The vast majority (78%) were white. Eight appellants were unrepresented (9%). 81 cases (90%) had an interpreter present. I observed seven of the nine salaried judges at Columbus House, and eight different fee paid judges. Of these, all 15 were white. Four were female and 11 were male. 11 cases (12%) were adjourned, some after a lengthy hearing. Five cases were adjourned due to the absence or inadequacy of interpretation, and four due to a lack of legal representation. The remaining two adjournments were due to new evidence that the Home Office had not seen nor considered. Appeals lasted between 15 minutes (adjournment) and 3 hours and 10 minutes with the average case lasting just over two hours. Drawing on the key procedures proposed by judicial guidelines, I considered whether fairness was ensured in all of the cases.<sup>584</sup>

---

<sup>583</sup> Kevin Mullane and Michael Williams, 'Bias in research: the rule rather than the exception?' [2013] *Biochemical Pharmacology*.

<sup>584</sup> Judicial College (n 583); Drawing on Gill *et al* 'Inconsistency in asylum appeal adjudication' (n 39). These included whether the judge introduced themselves and stated their independence from the Home Office, whether they checked the correct pronunciation of names and informed the appellant that they could request

Whilst the judge introduced themselves and stated their independence from the Home Office, only 2 appellants (and one injured interpreter) were informed that they could take a break during the hearing. Of the appellants, one was underage and the other had a mental illness. Where applicable, all of the judges observed checked whether the interpreter and appellant could understand each other, but only one instructed the appellant on how to use their interpreter. Almost a third of the cases (27) observed were heard by a female judge. This was significant as previous research indicates an underrepresentation of female judges in Columbus House.<sup>585</sup> There was a startling disparity in the ways in which male and female judges followed the standard structure. On average, the female judges spoke for 2 minutes longer at the start of the case than male judges. They were more likely to explain in detail the purpose of the hearing, how it would proceed, and whether the appellant understood. Each judge also gave a different time frame on when the asylum seeker would receive a decision-ranging from one to three weeks. These inconsistencies could have the effect of undermining procedural fairness, and perceptions of fairness, in the appeal process.

#### **4.9.2 Handling the data after observing proceedings.**

As the court heard multiple hearings per day, data was transcribed and collated immediately after returning from the field, in order to preserve as much detail as possible.<sup>586</sup> One possible limitation of this approach was that, as a single researcher, I may have lost the benefit of another opinion to strengthen understandings of each case, and to fill in any gaps I had overlooked. Once the data had been transcribed, observations were coded line-by-line and organised according to the themes that emerged which would help answer the hypotheses.<sup>587</sup> In order to produce 'as full a record as possible', I adopted a holistic approach to note taking; capturing as many details as possible whilst remaining focussed on the parties involved.<sup>588</sup> This is a

---

a break, and where an interpreter was present, whether the judge instructed the appellant on how to use the interpreter, and check understanding between the two.

<sup>585</sup> Gill *et al*, 'Inconsistency in asylum appeal adjudication' (n 39).

<sup>586</sup> Alan Bryman and Robert Burgess, *Analysing Qualitative Data* (Routledge 1989).

<sup>587</sup> Daniel Oliver, Julianne Serovich and Tina Mason, 'Constraints and Opportunities with Interview Transcription: Towards Reflection in Qualitative Research' (2005) 84 (2) *Social Forces* 1273. See section 4.2 for hypotheses.

<sup>588</sup> Good, *Anthropology and Expertise in the Asylum Courts* (n 344).

commonly used technique in ethnographic research.<sup>589</sup> Conducting these observations allowed me to personally experience the field over an extended period, which in turn granted a deeper understanding of procedural fairness in asylum appeals.

Much of the work in this field focusses on the outcomes of asylum cases; and whether these are 'fair'. This fieldwork allowed me to observe what actually happens in asylum appeal hearings, generating a meaningful description of the procedures employed, and to investigate whether these are fair. Through this inductive reasoning, it became apparent that different structures, and the agency of others were influencing the agency that an asylum seeker was able to assert over their own case. By focussing on significant aspects of interaction between parties, and the situations they found themselves in, I was able to analyse the role of structure, agency and procedural fairness in these cases. The ability to record non-verbal behaviour was a particular strength of observation. I was able to focus on behaviour that individuals do not verbalise, such as facial expressions, hand gestures, and silence. Whilst observations allowed me to observe behaviour directly, they were not without limitations.

As noted above, I may have been limited as a social researcher, as I could only observe those events which took place in front of me. These observations only show a part of the phenomena of procedural fairness in asylum appeal hearings. My personal beliefs may also have influenced the details recorded, although I actively sought out evidence of alternative perspectives to lessen this.<sup>590</sup> One final limitation is that I was unable to explore meanings with participants during observations. To explore some of these meanings, and thus enhance the validity of the observation data, I also conducted semi structured interviews with legal representatives and asylum-seeking appellants. This approach was different from the observational stage, as I attempted to explain attitudes and behaviours by interviewing relevant actors. This data was then triangulated with observation data as verbal responses are often

---

<sup>589</sup> Margaret LeCompte, 'Bias in the Biography: Bias and Subjectivity in Ethnographic Research' (1987) 18(1) *Anthropology & Education Quarterly*.

<sup>590</sup> Peter Foster, Roger Gomm and Martyn Hammersley, 'Case Studies as Spurious Evaluations: The Example of Research on Educational Inequalities' (2000) 48(3) *British Journal of Educational Studies* 215-230.



inconsistent or unrelated to actors' observed behaviour.<sup>591</sup> This triangulation helped assess the reliability of information provided in interviews by cross-checking with material gathered through observations, and vice versa.<sup>592</sup>

#### **4.10 Using interviews to explore the espoused experiences of key actors in the asylum setting.**

Interviews are often described as a form of conversation.<sup>593</sup> However, there are some differences between interviews and normal conversation. These differences include the roles of researcher and participant, and their objectives.<sup>594</sup> Knowledge can either be seen as created and negotiated in interviews, where the interviewer plays an active role,<sup>595</sup> or as pre-existing the interview, which acts as an interaction to access this pre-existing knowledge. Whilst interview data does not demonstrate causal connections, it does allow for a case study with rich detail. Interviews are particularly useful for exploring individual accounts that may not be captured with less personal observations.<sup>596</sup>

I began by preparing an interview schedule based on my observations to explore themes which emerged. The schedule was then modified based on the individual I was interviewing. I then conducted two pilot interviews, one with an asylum-seeking appellant, and one with a legal representative. This enabled me to modify any ineffective or unclear questions. During these pilot interviews, it became apparent that certain terms (justice, fairness, agency) needed to be dissected early on in the interview, to avoid later confusion. I interviewed nine asylum-seeking appellants and 12 legal representatives. The inclusion criteria were any asylum seeker or refugee with

---

<sup>591</sup> Colin Jerolmack and Shamus Khan, 'Talk Is Cheap: Ethnography and the Attitudinal Fallacy' (2014) 43(2) *Sociological Methods & Research* 178-209.

<sup>592</sup> Tony Bush, 'Authenticity in Research: Reliability, Validity and Triangulation' in Ann Briggs, Marianne Coleman and Marlene Morrison (eds) *Research Methods in Educational Leadership and Management* (SAGE 2012).

<sup>593</sup> Steinar Kvale and Svend Brinkmann, *Interviews- Learning the Craft of Qualitative Research Interviewing* (SAGE 2009).

<sup>594</sup> Alice Yeo, Robin Legard, Jill Keegan, Kit Ward, Carol McNaughton Nicholls and Jane Lewis, 'In-depth Interviews' in Jane Ritchie, Jane Lewis, Carol McNaughton Nicholls and Rachel Ormston (eds) *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (2<sup>nd</sup> edn, SAGE 2013).

<sup>595</sup> Kvale and Brinkmann (n 594).

<sup>596</sup> Brad Blitz and Miguel Otero-Iglesias, 'Stateless by Any Other Name: Refused Asylum-Seekers in the United Kingdom' (2011) 37(4) *Journal of Ethnic and Migration Studies* 657-73.

an initial refusal and appeal in Wales, aged 18 or over and able to consent, or a qualified legal representative working in Wales, with experience in representing asylum seekers at appeal.

To avoid a possible selection bias, having interviewed four Asylum Justice service users, I attempted to recruit a diverse sample of participants from Columbus House by utilizing community gatekeepers. I asked appellants at Columbus House if they would be happy to participate in this research only if I had built up a rapport with them first. I also asked legal representatives if they thought it would be inappropriate for me to interview their clients. This strategy ensured I interviewed a range of appellants, before they obtained a decision on their case, without causing undue stress or anxiety to vulnerable appellants. I had direct contact with legal representatives in hearings, and I asked if they would consider being interviewed where logistically viable. I recruited four representatives from Columbus House. I also sent direct emails to 28 legal representatives from five firms, where they had provided email addresses in their public profiles online. Of these, eight were interviewed.

The asylum-seeking appellants originated from Iran (3), Sudan (2), Iraq (1), Pakistan (1), Egypt (1) and the DRC (1). I interviewed three females and six males. The age range was between 18 and 46, and time in the UK ranged from one to six years. It is difficult to know whether the respondents constitute a representative sample of all asylum seekers in Wales, and as the sample is so small, the research does not claim to be representative. Whilst I attempted to generate a sample that contained a wide variety of asylum-seeking appellants with different experiences and circumstances, the small sample size means that many nationalities are unrepresented or underrepresented, and so the conclusions within this thesis are not designed to be generalisable to asylum-seeking appellants as a whole. Of the representatives interviewed, seven were females and five were males. All identified as British and four had knowledge of a language other than English (Arabic, Farsi, Spanish, Kurdish and Urdu). Ages ranged from 23 to 43. I had observed five of these appellants and nine representatives in the asylum appeal hearing, either pre- or post-interview. Although a small sample, the interviews provided an opportunity to explore facets of the observations in detail adding context and opinion. These interviews considered the role of the asylum seeker in the appeal hearing.

In exploring the role of structure and agency in asylum appeal hearings, I adopted a neutral, detached approach to the interaction. Interviews were conducted face-to-face, to observe physical cues such as body language and facial expressions.<sup>597</sup> These cues are important as they indicate different points of view, and encourage the researcher to ask follow-up questions. I chose to use a semi-structured approach to interviews. This allowed for a combination of structure and much-needed flexibility, which was important as I was able to explore unforeseen answers, and take the interview in another direction where necessary.<sup>598</sup> I created an interview schedule, with a list of topics I wanted to discuss. The structure was flexible enough to enable the participants to elaborate on themes they found most important. This allowed me to lead with open-ended, general questions, before progressing to deeper, more personal questions, following up interesting elements with further inquiries.<sup>599</sup> Interviewees were able to express their opinions with minimal external influence, which maximised the data. This structure aimed to empower interviewees to articulate their position on the fairness of the system.<sup>600</sup> As far as possible, the schedules covered broadly the same topics for asylum-seeking appellants and legal representatives.

Language is an important facet of interviews as they focus on how participants express themselves.<sup>601</sup> This was an especially important consideration for some of the participants in this thesis, as English was not their first language. Where possible, all of the interviews were conducted without an interpreter, so as not to bias the respondents' answers. This decision was also impacted by costs; I was somewhat limited to interviewing asylum seekers who had a command of English. Two interviews (Asylum seekers 2 and 5) were conducted partly in English and partly in Sudanese. The interpreter was a friend of the asylum seekers who had been present in both appeals. Although, this choice limited the sample, it did offer an opportunity to discuss the process in the absence of individuals who may be viewed as an authority figure and as part of the institution.<sup>602</sup> However, conducting the interviews through the

---

<sup>597</sup> Yeo *et al* (n 595).

<sup>598</sup> *Ibid.*

<sup>599</sup> Merriam (n 560).

<sup>600</sup> Khan (n 32).

<sup>601</sup> Yeo *et al* (n 595).

<sup>602</sup> Sonja Pöllabauer, 'Interpreting in asylum hearings: Issues of role, responsibility and power' (2004) 6(2) *Interpreting* 143.

medium of English may have enhanced my power, adding to the vulnerability or lack of agency that the asylum seekers had. To mitigate against this, questions were phrased as simply as possible to facilitate detailed, accurate responses, and my position as a neutral researcher was explained in depth. In order to capture the meaning within the language used by participants, interviews were audio recorded.

During the interview, I took conscious steps to create an atmosphere of trust and openness. In some cases, I was able to build rapport with participants. I chatted to four asylum-seeking appellants before their hearing, then interviewed them afterwards. In order to ensure respondents were making informed decisions on participation, I gained informed consent, clarified that participation was voluntary, set out how I would ensure confidentiality and anonymity,<sup>603</sup> and explained that I wanted to hear their experiences and views in their own words. One specific ethical issue that needed to be considered during interviews with asylum-seeking appellants was the unrealistic expectations of some of the participants on the benefits of the research, believing that researchers may have the power to influence their claim for asylum.<sup>604</sup> I spent time introducing myself and the project, clarifying my position as a neutral researcher, not a legal representative or HOPO, and explaining that I was unable give them advice or influence their case in any way.

During interviews, four appellants described experiencing long and exhausting interviews with the Home Office, and their legal representation, and so they may have viewed these research interviews with suspicion. Additionally, even in cases where participants could speak English, understanding the underlying nuances of interview questions may have affected the accuracy of responses.<sup>605</sup> This is especially true when participants were asked to explain complex concepts such as 'justice'. 'Justice' meant something different to five of the interviewed asylum seekers, and where there was an interpreter present, I was told that the word does not translate easily into certain languages. In these cases, I followed up by asking participants to describe

---

<sup>603</sup> See section 4.7.

<sup>604</sup> Catriona Mackenzie, Christopher McDowell and Eileen Pittaway, 'Beyond 'Do No Harm': The Challenge of Constructing Ethical Relationships in Refugee Research' (2007) 20(2) *Journal of Refugee Studies* 299–319.

<sup>605</sup> Fenna van Nes, Tineke Abma, Hans Jonsson and Dorly Deeg, 'Language differences in qualitative research: is meaning lost in translation?' (2010) 7 *European Journal of Ageing* 313-316.

fairness and, where necessary, giving a dictionary definition of the words to allow further questions.

I began the interviews with 'easy' opening questions, such as 'how did you travel to this interview?' 'How long have you been in the UK/working in this role?' I ensured that questions were open where possible, to facilitate responses longer than one word. Questions were clear and short, to limit misunderstandings. One question was asked at a time, and more details were subsequently sought if necessary. In Asylum Justice, the room was private, quiet and comfortable, which was conducive to concentration. The same can be said for private rooms in Columbus House, where I conducted four interviews. The rooms were laid out in an informal manner, where the researcher, participant (and interpreter) sat side by side and the tape recorder was placed discreetly. Whilst notes were taken in some interviews, I maintained eye contact and made encouraging gestures throughout. However, two interviews were conducted in the waiting room where it was often louder, with people walking by and distracting participants. I asked participants to put their phones on silent, so as not to be disturbed, and with the exception of one interview which took place in Columbus House, interviews with representatives always took place in their office.

It was important for me to remain culturally sensitive throughout interviews, as I did not share all of the same characteristics as the respondents.<sup>606</sup> As shown by Stewart, the gender of the researcher is an important consideration when undertaking interviews.<sup>607</sup> Being a woman may have facilitated certain answers, as vulnerable women may have felt more relaxed in talking to me. However, in some cultures, it is unacceptable for a man to be in the company of a lone woman. To mitigate against this, interviews were conducted in a neutral venue (Asylum Justice or Columbus House), with a chaperone if necessary. Good listening skills were integral to successful interviews. Some questions elicited more than one topic within answers. I needed to make mental (and sometimes physical) notes to follow up on each of these topics, whilst still listening to the participant's response. Throughout the interview I adopted body language that was open and trusting, and gave a great deal of

---

<sup>606</sup> Herbert Rubin and Irene Rubin, *Qualitative Interviewing: the Art of Hearing Data* (3<sup>rd</sup> edn SAGE 2012).

<sup>607</sup> Dafina Stewart, 'Researcher as Instrument: Understanding "Shifting" Findings in Constructivist Research' (2010) 47(3) *Journal of Student Affairs Research and Practice* 291-306.

enthusiastic and confirmatory feedback to respondents. I provided tissues when participants became upset by recounting their experiences, and the interview was halted (and tape recorder turned off) until the respondents were ready to continue so that the research did not intrude on the respondent's distress. These measures helped create a rapport between the interviewer and the respondent, which is a key skill in intercultural communicative situations.<sup>608</sup>

Interviews lasted between 30-90 minutes and were audio recorded. I transcribed the interviews as soon as possible after recording, and conducted a thematic analysis on the data. I coded the data using NVIVO, allowing me to focus on identifiable themes and patterns. Transcription allowed me to familiarise myself with the data. It is also an important stage of analysis.<sup>609</sup> Whilst a transcript can never be a full representation of the audio recording (which itself is not a full representation of the interaction recorded),<sup>610</sup> I reproduced as faithfully as possible the answers given by respondents. The interview transcripts were analysed thematically, focussing on the particular experiences of the interviewees within the asylum appeals process. I used line-by-line coding, using a short code to summarise each segment.<sup>611</sup> These codes were based on the participants' own words, and stayed as close to the data as possible. Codes were then illustrated with data excerpts. I then used the most significant and frequent initial codes to create focussed codes.<sup>612</sup> Engaging with the data in this way allowed me to produce interpretations for each participant, and to form links across the group as a whole. The interviews allowed me to access information that could not be observed, including the thoughts, feelings, and previous experiences of the participants, expressed in their own words.<sup>613</sup> However, as with the observational data, using semi-structured interviews was not without limitations.

---

<sup>608</sup> Helen Spencer-Oatey and Peter Franklin, *Intercultural interaction: A multidisciplinary approach to intercultural interaction* (Palgrave Macmillan 2009).

<sup>609</sup> Mary Bucholtz, 'The politics of transcription' (2000) 32(10) *Journal of Pragmatics* 1439–1465; Martyn Hammersley, 'Reproducing or constructing? Some questions about transcription in social research' (2010) 10(5) *Qualitative Research* 553–569.

<sup>610</sup> Judith Reynolds, 'Multilingual and intercultural communication in and beyond the UK asylum process: a linguistic ethnographic case study of legal advice-giving across cultural and linguistic borders' (PhD thesis, Durham University 2018).

<sup>611</sup> Kathy Charmaz, *Constructing Grounded Theory: A Practical Guide Through Qualitative Analysis* (SAGE 2006).

<sup>612</sup> Barney Glaser, *Theoretical Sensitivity* (Sociology Press 1978).

<sup>613</sup> Mavin (n 523).

#### **4.11 Limitations of the data collection, and variations to the original project.**

One of the principal limitations of this research was a lack of engagement with two key actor cohorts; the Home Office and Judiciary. I made a request to the Judicial Research Office to interview a sample of judges from the Immigration and Asylum Chamber on 28<sup>th</sup> September 2018. Although a response seeking further information was received on 12<sup>th</sup> November 2018, a decision was never communicated despite three follow up emails. As a result, there is an absence of judicial perspective in this research. Similar difficulties were faced in attempting to interview HOPOs, none of the eight HOPO's asked at Columbus House were willing to speak 'on the record'. In contrast, informal conversations were had frequently with judiciary and HOPOs, typically at the conclusion of hearings or during breaks. Two judges said that they would be willing to be interviewed if I could obtain permission from the senior Judiciary. I also sent two Freedom of Information requests on 28<sup>th</sup> February 2018 and 20<sup>th</sup> May 2019 to gather information on legal aid for asylum claims and a breakdown of information held on judges at Columbus House. Although some of the relevant information was held, cost issues meant that it was not released (it would have taken more than 3.5 days to collect the information). This limitation means that this research may not show the whole picture, judges and HOPOs were unable to defend their observed behaviour, and the results may be biased towards the views of asylum seekers and legal representatives.

Another challenge concerned finding participants. I began the research with the idea of interviewing solely Asylum Justice clients. I did not want to approach appellants for interviews at Columbus House, as I recognised the inappropriate timing given the stressful nature of the appeal. However, I was only able to interview four Asylum Justice clients. I wanted to ensure I had a balance of participants, and I did not want them to be influenced by the outcome of their case. Once I had found participants, I faced further challenges, including finding a suitable time and in two cases, arranging an interpreter.

As discussed in section 4.9.2, another possible limitation of this research was that, as a single researcher, the benefit of another opinion to consolidate understandings of each case was lost, and it became difficult to maintain an explicit awareness as I became more familiar with the process and courtroom itself. To

mitigate against this, I included prompts in my observation notes. I am also aware that the interview participants may have had their own agenda in participating in this research which could affect the validity of their contribution. For example, the role of the legal representative is to help their client to succeed, so they may be biased as to the fairness of procedures, based on the outcome of cases. It is therefore necessary to remain critical of their perspectives.<sup>614</sup> Finally, this research has been impacted somewhat by the global pandemic; Covid19. I had expected to conduct more observations at Columbus House, but this was impossible as most hearings were cancelled. Whilst I believe I had reached a point of saturation, I would also have liked to have conducted more interviews, to be sure. I elected not to conduct interviews via Zoom or Microsoft Teams, as I would have been unable to observe some non-verbal, physical cues such as body language which, as noted in section 4.10, are important as they indicate different points of view, and encourage the researcher to ask follow-up questions.

#### **4.12 Conclusion.**

This chapter set out the epistemology and research design for the study, including the justifications for these choices and the consideration of others. Ethical issues and issues of reliability and validity were also discussed, along with limitations and changes to the project. In summary, this research addresses a number of key issues in relation to understanding the role of structure and agency in procedural fairness. The thesis takes the form of a case study into the role of structure, agency, and procedural fairness in the asylum appeal hearing. Using a qualitative multi- method approach of courtroom observations and semi-structured interviews with asylum seekers and legal representatives, I focussed on experiences of procedural fairness and episodes of agency in the appeal setting. The next chapter begins to present and analyse the findings of this research, focussing on the strategies employed by asylum seekers themselves in order to assert agency and communicate effectively in their appeal hearing.

---

<sup>614</sup> Kendall (n 4).



## **Chapter 5- 'Telling the judge my story'. Strategies used by appellants to communicate effectively and assert agency in their asylum appeal hearing.**

*'I'd never really thought about it, them being agents. I've always focussed on coaching them through the appeal, and to answer the questions given, rather than give the full story. I guess that makes me a constraint.'* (Legal Representative 9)

The previous chapter presented and justified the methods used to conduct empirical analysis into the procedural fairness of asylum appeal hearings. Chapter 2 highlighted the pervasiveness of governmental processes, how they structure asylum seekers' experiences, and can determine how they are understood. However, the hostile policies and legal structures identified within the chapter cannot entirely determine how asylum seekers identify or behave, as they are capable of opposing governmental practices and of living in ways that elude its demands.<sup>615</sup> This chapter investigates the tactics and resources used by asylum seekers to put forward their case in a way that is meaningful to them, and to assert their own agency. The chapter begins with a recap of the structure/agency debate, focussing on the dialectical relationship between the two, along with an outline of the methods used to gather empirical data. The data is then presented and analysed, considering in depth the ways in which asylum seekers engage with the asylum appeals process. Data from both courtroom ethnographies, and interviews with legal representatives and asylum seekers is presented in order to investigate any discrepancies between espoused and lived experiences. Much of the literature in this area focusses on the question of whether asylum seekers possess any agency at all. This chapter will contribute to the thesis by providing a partial answer to the research questions:

**Do asylum seekers play an active role in their appeal?**

**How do asylum seekers assert agency within the asylum appeal system?**

---

<sup>615</sup> Mavin (n 523).

It will be argued that, whilst heavily constrained within the asylum appeals process, asylum seekers are able to demonstrate agency, through discourse, demeanour, trust, external evidence, and informal support networks.

### **5.1 The relationship between structure and agency**

As discussed in depth in Chapter 3, the structure/agency debate is borne from the question: what primarily determines an individual's behaviour; societal structures or human agency? It is difficult to fully understand the relationship between structure and agency as there are a multitude of different definitions of each element in the debate which reflect different positions.<sup>616</sup> For the purposes of this thesis, a modified version of Giddens' structuration theory is used. In this theory, structure and agency have a dialectical relationship; they are seen as two sides of the same coin as they depend upon each other.<sup>617</sup> For Giddens, structure is the virtual 'rules and resources' of a society, whilst agency is the ability of an individual to make choices in society, guided by their interests and values.<sup>618</sup> Giddens also argues that agency goes further than solely to the intentions people have in doing things, but their capability or power. That is to say, if an individual could have acted differently; they had agency.

#### **5.1.1 The role of the individual- are asylum seekers effective agents?**

Although the definition of agency is relatively straightforward, the question of whether every individual can assert it is less clear cut. This is especially so with regards to asylum seekers. However, despite the numerous hardships and structural constraints they face, research has shown asylum seekers to be highly motivated and aspirational.<sup>619</sup> They employ different techniques in order to attain security and to create a better life.<sup>620</sup> Hellgren argues that asylum seekers possess agency as they cross borders, often illegally, undeterred by legal structures.<sup>621</sup> Legal restrictions can be seen as one of the structural forces that react with the agency of the asylum seeker to constrain or enable their actions. When they flee, asylum seekers know what they

---

<sup>616</sup> Barker (n 443).

<sup>617</sup> Giddens, *The Constitution of Society* (n 73).

<sup>618</sup> Ibid.

<sup>619</sup> R Student, Kathleen Kendall and Lawrence Day, 'Being a Refugee University Student: A Collaborative Auto-ethnography' (2017) 30(4) *Journal of Refugee Studies* 580.

<sup>620</sup> Jacqueline Stevenson and John Willott, 'The aspiration and access to higher education of teenage refugees in the UK' (2007) 37(5) *Compare: A Journal of Comparative and International Education*.

<sup>621</sup> Hellgren (n 505).

are doing, and why; they show initiative (by fleeing and taking unofficial routes) demonstrating the use of agency. Whilst it cannot be said that the decision is entirely voluntary, as they are usually coerced in some way, the choice still remains; they made the decision to leave the country of origin. It is still a conscious decision, often based on a cost-benefit analysis. This thesis argues that agency is a spectrum, where different agents stand at different points in terms of how much agency they possess.

It can be said then that asylum seekers have the ability and capacity for some form of self-initiated action. They have individual autonomy, despite the limitations of ideal or material conditions.<sup>622</sup> Whilst it cannot be said that all British citizens can fully exercise their agency at all times, for the typical asylum seeker, this agency is more constrained than that of many British citizens in the UK. As discussed in Chapter 3, section 3.3.1, they have little or no choice on where to live, they cannot legally work, and many have limited knowledge of the language or legal system. Asylum seekers also have restricted resources, and are forced to rely on government benefits. They have been compared to ghosts by Cabot, in that they are both present and absent, as their agency is constrained.<sup>623</sup> It is difficult then, for them to participate fully in society. Chapters 6 and 7 also show that barriers such as language, and access to interpreters and legal representation may result in their agency being undermined.

Agency is also constrained and undermined in the very research that purports to discuss it.<sup>624</sup> In reality, few authors discuss how asylum seekers can assert their limited agency, especially in the appeal hearing. Dan Bousfield argues that many discussions of refugees reproduce discourses which foreclose instances of refugee agency, and limit possibilities for change.<sup>625</sup> Coffey, for example, discusses the role of credibility evidence in the asylum system in depth, from the perspectives of the judge, but fails to include concrete examples of asylum seekers asserting agency in order to satisfy credibility requirements.<sup>626</sup> Another structural constraint faced by an asylum

---

<sup>622</sup> David Sciulli, 'Voluntaristic Action as a Distinct Concept: Theoretical Foundations of Societal Constitutionalism' (1986) 51(6) *American Sociological Review* 743-766.

<sup>623</sup> Cabot (n 435).

<sup>624</sup> See Chapter 3, section 3.7.

<sup>625</sup> Dan Bousfield, 'The Logic of Sovereignty and the Agency of the Refugee: Recovering the Political from 'Bare Life'' (2005) TCIS Working Paper Number 36 <https://core.ac.uk/download/pdf/10971817.pdf> accessed 10 March 2020.

<sup>626</sup> Coffey (n 345).

seeker is that of ontological security, as this can have a huge impact on their ability to assert agency.

### **5.1.2 Agency in the face of ontological security.**

According to Healey, ontological security is a person's understanding of their place within the world, which they feel comfortable with.<sup>627</sup> Forced movement to another country is likely to disturb this, which can result in the loss of the (relative) stability asylum seekers have in their known world. This manifests itself in the amount of agency the asylum seeker can exert. Whilst asylum seekers probably feel safer in the UK than their country of origin, they are still unlikely to easily trust others and they may not feel 'safe' here.<sup>628</sup> This basic trust is necessary to maintain a sense of psychological well-being.<sup>629</sup> The process is often cyclical; the lack of ontological security distinguishes asylum seekers from citizens, reinforcing the feeling of otherness, which prevents them from integrating and understanding their new life, thus reinforcing the ontological insecurity. The asylum appeals process may also contribute to a lack of ontological security, as the process can be long and complex. Those within the process have already had their claim dismissed, and may feel as though they are in a state of limbo. It is unlikely that those facing the process will feel as though their lives are safe and stable. Ontological security then, can affect access to justice as it impacts on the modified model of fairness in a non-ideal society.<sup>630</sup> It is argued throughout this chapter however, that there are instances of asylum seekers using their (often limited) available resources to assert agency and participate in their asylum appeal. This chapter highlights the different strategies adopted by asylum seekers in order to communicate effectively with the judge and thus assert agency.

In Giddens' structuration theory, the individual plays an important role. The agent is a 'knowledgeable and capable subject'<sup>631</sup> meaning that they know what they are doing and why they are doing it. According to Giddens, all actions are 'intentional or purposeful'.<sup>632</sup> The next section discusses the role of knowledge and

---

<sup>627</sup> Healey (n 499).

<sup>628</sup> Layder (n 438).

<sup>629</sup> David Whittaker, *Asylum Seekers and Refugees in the Contemporary World (The Making of the Contemporary World)* (Routledge 2005).

<sup>630</sup> See Chapter 3.

<sup>631</sup> Giddens, *The Constitution of Society* (n 73).

<sup>632</sup> Anthony Giddens, *Central problems in Social Theory- Action, Structure and Contradiction in Social Analysis* (Macmillan 1979) 56.

understanding in asserting agency, as it applies to asylum seekers in the appeal hearing.

### **5.1.3 Knowledge and power in the asylum appeal.**

Ideas of structure and agency are involved in any notion of power; if agents have an effect on structures, they have power; if structure has a constraining effect on the individual, then that power is taken away. Agency is equated with power, as the human agent always has the possibility to act otherwise.<sup>633</sup> The role of power is an essential concept in structuration theory and so it is important to understand the power possessed and demonstrated by asylum seekers in their appeal hearing. Power is treated differently in Giddensian thought than in other social theories, because, in structuration theory, all agents possess power.<sup>634</sup> However, structures empower agents differently, and agents are laden with differences in power.<sup>635</sup> This is especially true when looking at the relationship between citizen and other. In the host country, the average citizen typically has more agency and control over their actions than most asylum seekers. One reason for this is the idea of knowledge, as Hay argues that agency is often informed by some “knowledge” of the structures involved.<sup>636</sup>

As Sewell argues, ‘agency is formed by a specific range of cultural schemas and resources’.<sup>637</sup> Culture varies across countries, and so an asylum seeker’s culture, and therefore their knowledge and resources, is different from that of a citizen. If their knowledge and understanding of the English language and legal system is more limited than the average British citizen, their agency may be undermined when they reach the UK.<sup>638</sup> As discussed in Chapter 3, asylum seekers are not usually considered members of the society they find themselves in and have far less knowledge of the institutions and process within our law. They are unfamiliar with the asylum process, housing, and dispersal system, and they do not possess the knowledge necessary for successful integration. This lack of knowledge contributes to

---

<sup>633</sup> Giddens, *The Constitution of Society* (n 73).

<sup>634</sup> Ibid.

<sup>635</sup> Sewell (n 429).

<sup>636</sup> Hay (n 466).

<sup>637</sup> Sewell (n 429).

<sup>638</sup> This is not to suggest that UK citizens are a homogenous group, as there is diversity amongst citizens; it merely highlights the arguments of Sewell and Hay that culture, knowledge, and resources may be different for asylum seekers who may not have experienced the cultures, language, or legal system of the UK prior to claiming asylum.

a reduction in agency for asylum seekers; indicating that they can be at the mercy of structures.

However, Goffman suggests that individuals always have some form of agency to transform a situation, even slaves. Whilst citizens and policy makers may have far more available resources than asylum seekers, subordinates always have *some* knowledge, power, and resources at their disposal.<sup>639</sup> The first stage in an asylum claim is making the decision to leave their country of origin and enter the UK. This decision involves knowledge of their current situation, and the ability to do something about it, and so is an example of asylum seekers asserting agency.

#### **5.1.4 Asylum seekers can assert agency through using the resources available to them.**

Hunt goes further than previous researchers in asserting the agency that asylum seekers enjoy.<sup>640</sup> Her research concerned the experiences and actions of female asylum seekers in West Yorkshire. She found that, whilst there were constraints on the agency of these women, some were also able to draw on available resources. This reinforces the idea that asylum seekers do possess some (limited) agency, allowing them to engage in activities which advance both their lives and the development of social structures, thus reproducing society. Gill *et al* also uncover strategies employed by asylum seekers in response to structural unfairness and precarity.<sup>641</sup> Their research showed that asylum seekers insisted legal representatives read the case properly, found contacts to signpost good advice, dropped poor representatives and researched their own case. However, a level of structural unfairness remained, even when asylum seekers employed tactics to assert agency. The literature in Chapter 3 reflects the proportion of studies focussed on the structures that asylum seekers experience, compared to the studies detailing the agency they possess. The balance is very much in favour of structural constraints.

---

<sup>639</sup> Layder (n 438).

<sup>640</sup> Lisa Hunt, 'Women Asylum Seekers and Refugees: Opportunities, Constraints and the Role of Agency' (2008) 7 *Social Policy and Society*.

<sup>641</sup> Gill *et al*, 'Inconsistency in asylum appeal adjudication' (n 39).

The ability of asylum seekers to assert agency in their appeal is important as, largely due to the paucity of supporting evidence, asylum decisions regularly rest on a judgement of whether or not the claimant and their story are credible. There is evidence to suggest the assumption that the most credible witnesses (genuine asylum seekers) will know which details are relevant to the claim, and be able to communicate these details effectively to a judge.<sup>642</sup> In order to do this, asylum seekers need to be able to assert agency. Asserting agency is also important in terms of procedural fairness; asylum seekers who cannot engage with the process of their claim will not feel that it is fair.<sup>643</sup>

### **5.1.5 Truthfulness or believability- assessing credibility in the asylum appeal hearing.**

As noted in Chapter 2, the standard of proof in asylum claims is on the asylum seeker to demonstrate they meet the definition of a refugee under the Convention and the standard of proof has been interpreted by the domestic courts.<sup>644</sup> Asylum seekers must demonstrate that there is ‘a reasonable degree of likelihood’ that they will face persecution if returned to their country of origin.<sup>645</sup> Any supporting evidence must meet this standard. By adopting the lower standard of proof, asylum law seeks to compensate for the evidential difficulties associated with proving an asylum claim. However, in order to be afforded the ‘benefit of the doubt’, an asylum-seeker must first be seen as ‘credible’,<sup>646</sup> and many claims are decided on the basis of narrative evidence alone, highlighting the importance of the individual.

Thomas writes extensively on assessing the credibility of asylum claims, arguing that despite a large amount of legal analysis into the legal tests which determine refugee status, the majority of claims are decided on individual factual circumstances; asylum seekers must convince the decision maker that they are credible.<sup>647</sup> Credibility then, is arguably the most important facet of the claim as if the

---

<sup>642</sup> Kendall (n 4).

<sup>643</sup> Bridget Anderson and Sue Conlan, ‘Providing Protection. Access to Early Legal Advice for Asylum Seekers’ (*Compas.ox.ac.uk*, 2014) <[www.compas.ox.ac.uk/2014/pr-2014-early\\_legal\\_advice/](http://www.compas.ox.ac.uk/2014/pr-2014-early_legal_advice/)> accessed 20 February 2021.

<sup>644</sup> Refugee Convention (n 3), a1(2).

<sup>645</sup> *Sivakumaran* (n 45).

<sup>646</sup> UNHCR ‘Beyond proof’ (n 56).

<sup>647</sup> Thomas, ‘Assessing the Credibility of Asylum Claims’ (n 10).

claimant's story is disbelieved, the adjudicator can lawfully reject the claim. Unfortunately, there are many factors which may influence their ability to communicate a convincing narrative which fulfils the criteria of credibility. The UNHCR Handbook describes the asylum process as 'fact-finding', advocating a more positive approach to the asylum seekers' narrative on the part of the decision-maker.<sup>648</sup> They are supposed to listen to the individual's version of events and decide whether they are worthy of protection.<sup>649</sup> However, assessing credibility can be difficult, in part due to the linguistic and cultural barriers to communication.<sup>650</sup> It is necessary to have flexible tests for determining credibility, due to the magnitude of an erroneous decision and the difficulties arising from the process of giving evidence. Linguistic barriers are discussed, in Chapters 3 and 6, indicating that there are issues with obtaining evidence and problems with the reliability of memory, especially for trauma victims. It can be difficult for appellants to remember everything, especially the order in which events happened, and memories may not always be entirely rational and consistent. A truthful witness may also make mistakes because of nerves or forgetfulness or because of their past experiences.<sup>651</sup> Crawley argues that the UK approach to ascertaining credibility does not consider a variety of legitimate reasons why asylum seekers may not claim immediately, including anxiety, shame, or a lack of knowledge about procedures.<sup>652</sup>

According to Thomas, nongenuine claimants may embellish their account with apparently credible evidence while genuine claimants may present confused or inconsistent evidence.<sup>653</sup> It is even more challenging for a decision-maker in cases where there are discrepancies in the asylum seeker's story. Discrepancies may be caused by the fallibility of human memory, especially during times of high stress and fear. However, discrepancies could indicate a false claim, and so decision-makers are left to consider all of their evidence and make a judgement.

---

<sup>648</sup> UNHCR 'Beyond proof' (n 56).

<sup>649</sup> Ibid.

<sup>650</sup> See Chapter 6.

<sup>651</sup> Thomas, 'Assessing the Credibility of Asylum Claims' (n 10).

<sup>652</sup> Crawley, *Refugees and Gender* (n 320).

<sup>653</sup> Thomas, 'Assessing the Credibility of Asylum Claims' (n 10).



Decision-makers also face difficulties in assessing credibility as even honest narratives can be inconsistent and unpredictable when opened to criticisms such as Home Office questioning, making it easier to claim that an individual is lying. Claimants who have been victims of torture or rape may also be reluctant to disclose experiences,<sup>654</sup> and late disclosure may then seem manufactured. Alternatively, disclosing such information quickly may be doubted as the reasonable person who had suffered these experiences may be unwilling to disclose them.<sup>655</sup> Decision-makers may also fail to find credibility due to an assessment of the plausibility and truthfulness of a claim. Misunderstandings across cultural divides are common in the process, especially with regards to plausibility, that is, the likelihood of their story actually happening.<sup>656</sup> Asylum-seekers' stories are often unusual, and are frequently judged as implausible in relation to normative or Western notions of common sense.<sup>657</sup>

Decision-makers sometimes try to 'catch out' asylum seekers if they think something is unreasonable.<sup>658</sup> In these cases, the individual is refused asylum because the decision-maker thinks their story is untrue.<sup>659</sup> Decision-makers tend to put great emphasis on 'truth' when deciding whether to grant protection. This approach is flawed as credibility and truth are not the same thing.<sup>660</sup> Credibility can be defined as 'could have happened', whilst truth is something which 'did happen'. Credibility is an alternative to being true.<sup>661</sup> As the standard of proof is whether persecution is 'likely', believability may be a better standard than truth. Asylum seekers are said to lack credibility where their narratives include 'unreasonable behaviour'.<sup>662</sup> Often, this behaviour can be explained through differences in culture (see section 5.1.3). Home Office guidance on credibility is therefore being misapplied as decision-makers look for 'truth'.<sup>663</sup> This contradicts the principles of procedural fairness, as decision-makers are not applying the correct standards when deciding the outcome of cases. This

---

<sup>654</sup> Baillot, Cowan and Munro (n 71).

<sup>655</sup> Thomas, 'Assessing the Credibility of Asylum Claims' (n 10).

<sup>656</sup> Ibid.

<sup>657</sup> Kendall (n 4).

<sup>658</sup> Baillot, Cowan and Munro (n 71).

<sup>659</sup> Ibid.

<sup>660</sup> See Chapter 2, section 2.7 and Khan (n 32).

<sup>661</sup> UNHCR 'Note on Burden and Standard of Proof in Refugee Claims' (1998) <https://www.refworld.org/docid/3ae6b3338.html>. accessed 30 March 2018.

<sup>662</sup> Khan (n 32).

<sup>663</sup> Home Office, *Assessing credibility and refugee status* (n 303).

shows a lack of empathy and cultural knowledge, emphasising the culture of disbelief around narrative evidence and constraining the agency of asylum seekers.<sup>664</sup>

Griffiths' work reflects the importance of truth-telling in asylum cases, through the lens of asylum seekers,<sup>665</sup> focussing on their common experience of being disbelieved. Her research shows that asylum seekers and refused refugees are some of the most mistrusted persons in British society. The majority of the asylum seekers interviewed by Griffiths were accused of providing untrue information about who they were and what had happened to them, or requesting asylum when they had no valid claim under the Refugee Convention. Robinson also discusses cultures of ignorance, disbelief, and denial in the Welsh context, arguing that service providers were operating within a 'culture of ignorance', enforced by the government's unwillingness to collect or disseminate appropriate data.<sup>666</sup>

The correct standard should be believability, not whether the decision-maker themselves think it is true. As discussed in Chapter 2, it seems as though credibility assessments operate in a 'culture of disbelief'. Credibility judgements can therefore be said to be based around adjudicators' personal sense of belief. This raises the standard of proof by expecting asylum-seekers to effectively prove their credibility rather than being afforded the benefit of the doubt.<sup>667</sup> Lucy Mayblin<sup>668</sup> and Robert Thomas<sup>669</sup> call for further empirical evidence on how credibility is being assessed in the UK to establish whether the system is functioning effectively; this chapter aims to contribute to this research gap by highlighting strategies used by asylum seekers in order to establish credibility. After a brief outline of the methods used to conduct this research, the rest of this chapter is dedicated to analysing incidents of asylum seekers using agency to transcend this culture of disbelief, and communicate their story effectively to the judge.

---

<sup>664</sup> See Chapter 2, section 2.7.3.

<sup>665</sup> Griffiths (n 337).

<sup>666</sup> Vaughan Robinson, 'Cultures of Ignorance, Disbelief and Denial: Refugees in Wales' (1999) 12(1) *Journal of Refugee Studies* 78.

<sup>667</sup> James Sweeney, 'Credibility, Proof and Refugee Law' (2009) 21(4) *International Journal of Refugee Law* 700; Good, *Anthropology and Expertise in the Asylum Courts* (n 344); Kendall (n 4).

<sup>668</sup> Lucy Mayblin, 'Imagining asylum, governing asylum seekers: Complexity reduction and policy making in the UK Home Office' (2019) 7(1) *Migration Studies* 1.

<sup>669</sup> Thomas, 'Assessing the Credibility of Asylum Claims' (n 10).

## **5.2 Methods.**

In order to investigate this topic in depth, it was necessary to adopt a method that was able to capture the everyday reality of the practices operating in asylum appeals, including the actual interaction that takes place between interpreters and judges, lawyers, HOPO's and asylum seekers, which can allow or hinder the ability of the asylum seeker to put their case forward. Courtroom observations allowed for engagement with participants, and first-hand experience of courtroom situations.<sup>670</sup> This fieldwork allowed an observation of the lived experience in asylum appeal hearings, generating a meaningful description of the procedures employed, and an investigation into whether these are fair. The observations aimed to identify examples of the asylum seeker attempting to assert agency and communicate effectively within their appeal. It became apparent that different tactics and resources were used to enable the asylum-seeking appellants to assert agency and put their case forward. I also conducted 21 interviews; nine with asylum seekers, 12 with legal representatives. These interviews considered the role of the asylum seeker in the appeal hearing. All 21 participants talked about the role of asylum seekers, prompted by the questions;

*(To asylum seekers)*

**Can you describe what happened in your appeal? What role did you play? /What did you do in your appeal?**

**Did you speak? Did the other parties listen?**

*(To representatives)*

**Within the asylum appeal process, do asylum seekers have a chance to put their story forward?**

**Are they effective agents?**

**Would the hearing proceed differently if they were not there?**

**Do you have any examples of asylum seekers displaying agency? Any tactics or resources they used?**

---

<sup>670</sup> Laurie Levenson, 'Courtroom Demeanour: The Theatre of the Courtroom' [2008] *Minnesota Law Review* 582.

Prior to asking these questions, I briefly explained to participants what I meant by 'agency'; whether the asylum seeking appellant played an active role, and whether they could tell their story in a way that was meaningful to them during the appeal. As discussed above, the majority of claims are decided on their individual factual circumstances. Many claimants will be compelled by circumstances to rely solely on their own evidence to prove their case in light of the difficulties for them in acquiring other evidence. From this, I hypothesised that there would be a heavy reliance on the narratives of the asylum seeker in the hearing and a dependence on the legal representatives and interpreters to help convey this. The following sections analyse both the observation and interview data.

### **5.3 Transcending cultural and linguistic barriers through discourse.**

Despite the structural constraints discussed in the previous (and following) chapters, observation data also shed light on the appellant's ability to assert their agency. Observations uncovered 57 examples of asylum seekers asserting agency in some way. According to Giddens, every individual has some power to influence society.<sup>671</sup> If they have no power, they cannot be considered an effective agent. In order to participate effectively in the asylum appeal hearing, asylum seekers need to know what their power source is and how to use it. Effective communication was a key theme which emerged during observations and interviews as an important facet of agency. Despite the inability to speak clear English for most asylum seekers (only eight out of 90 cases proceeded without an interpreter), observations and interviews uncovered 28 examples of asylum seekers speaking over other parties, or correcting them in some way. This often occurred where the appellant recognised an interpretation error, or where the HOPO repeated a point back to the appellant, which they then disagreed with. Other examples included raising their voice when another party tried to speak over them, ensuring their voice was heard.

*At one point he misinterprets a word, and the asylum seeker heatedly interrupts. 'Not SON, BROTHER'. He refutes the HOPO. (15 minutes later) \*HOPO\* 'You've now been*

---

<sup>671</sup> Giddens, *The Constitution of Society* (n 73).

*in the UK for 7 years-* ‘-4. I have lived here for 4 years’, ‘Sorry, yes, 4 years’. (Observation 8)

This extract shows the difficulties faced by asylum seekers in avoiding inconsistencies, providing a clear narrative, and asserting credibility. The HOPO in this case did not pause to allow the asylum seeker to respond in either instance, they were statements as opposed to questions. If the asylum seeker had strictly followed the question and answer format of the hearing, and waited for a question before answering, and had they not picked up on the use of ‘seven’ as opposed to ‘four’, or ‘son’ as opposed to ‘brother’, the HOPO could have claimed internal inconsistencies. Whilst there is a range of possible reasons for an inconsistency, or a delayed disclosure (see section 5.1.5), the assertion of inconsistencies may have been damaging to the appellant’s credibility. This highlights the importance of agency, as the asylum seeker was able to interrupt and get their point across. This also showed an engagement with the process and a desire to communicate their story (which they knew well) effectively to the judge. Clear, articulate points ensured adjudicators engaged with their view.

*She questions the HOPO, and refuses to adopt his version of events. She believes that there is no substantial difference between what she said in interview and what she is saying now, and tells him so. Asylum seeker: ‘They DID do a marriage interview’. Judge: ‘They had a little chat to you?’ ‘If you think an hour of asking every question about everything then yes, a little chat’. (Observation 42)*

Altering their volume or tone of voice was often an effective way of ensuring the asylum seekers were able to articulate their narrative in a way that was meaningful to them. When the HOPO in cases such as this attempted to interrupt their story, the appellant would speak louder and carry on. Several times during observation 42, the asylum seeker answered back to the HOPO, telling her that she was wrong, and that she had misread the facts. This appellant also asserted her agency by speaking directly to the judge, disagreeing with what the HOPO has said. In this case, the judge changed her mind, not allowing the withdrawal she had previously agreed to. This highlights the important role that agency plays in the procedural fairness of asylum appeals. Where asylum seekers are able to communicate effectively and assert agency, they are more likely to be heard. This theme is also explored in Chapters 6 and 7. The importance of

being able to put their story forward was reiterated in interview data. One asylum seeker spoke of the difficulty of getting the balance right.

*I think sometimes the Home Office stop me speaking. I try to speak louder. But not get angry. I know angry means bad man here, no asylum. I need to say my words, but not angry.* (Asylum seeker 4)

This shows an engagement with the process, and a desire to get their story heard by the judge. It also stresses the role of knowledge and power in the appeal setting. This asylum seeker overtly talked about what he knew of the asylum system, and how he used this knowledge to present his case in the way he thought would be most beneficial. Instances of knowledge as power were also recorded in observations and other interviews. Some asylum seekers recognised the importance of knowledge and understanding the appeals procedure.

*'I am not like them. Everything is so hard to understand here. I think, how do I say to the judge? How can I make him understand what happened? Not by myself, no. I need help, I need my representative. He knows. He is the same.'* (Asylum seeker 9)

There is an assumption in the asylum appeals hearing that appellants will know the extent of the information required of them but as will be shown in Chapters 6 and 7 this is rarely the case. The power of knowledge is influenced by context. Whilst this appellant did not believe that he had sufficient knowledge to self-represent, he showed an awareness of the procedure and the need for evidence. He may have expressed that he needed a representative in order to assert his agency but, as argued by Hay, since agency is often informed by some “knowledge” of the structures involved, the appellant’s knowledge may have allowed him more agency than he realised.<sup>672</sup> This indicates that attributing agency and knowledge through effective communication is attributing power. Such a position is exemplified by Joanna Thornborrow, who argues that power can be exercised both structurally, through allocation of speaking rights and through the exercise of agency in that space.<sup>673</sup>

---

<sup>672</sup> Hay (n 466).

<sup>673</sup> Joanna Thornborrow, *Power Talk: Language and Interaction in Institutional Discourse* (Routledge 2001).

Another example of using language and discourse as a resource to assert agency was demonstrated when an asylum seeker asked for her case to proceed without an interpreter (when he cancelled at the last minute). With the help of her representative, this asylum seeker was able to give evidence in English.

*The judge turns his attention to the smiling appellant and asks if she can understand him, and whether she is happy to continue without an interpreter. The asylum seeker nods vigorously and answers affirmatively. She disagrees with the HOPO on several occasions, pointing out where she believes the HOPO is mistaken. The judge double checks the information and agrees with the appellant, the HOPO has put forward the wrong information. (Observation 6)*

This appellant demonstrated her agency throughout her appeal. She showed a good knowledge of her case and was confident in relaying accurate information to the judge. According to Coffey, adjudicators often make judgements on the manner by which appellant's respond to questions during the hearing.<sup>674</sup> Answers which were deemed vague, lacking in detail, inconsistent or tentative were less likely to be judged as credible than answers which were direct, lacked hesitation and those which offered 'unrehearsed' and plausible information, such as the appellant's answers in Observation 6. During other observations, appellants recognised the importance of credibility and avoiding inconsistencies and asked judges whether they could answer a particular question in English. This most often occurred in response to a perceived misinterpretation from the interpreter. When appellants asked to speak in English, judges looked taken aback and took a few moments to respond. Several constrained the agency of the appellant, by confining them to speaking one language, others allowed the request. When this happened, the judges nodded throughout, and the asylum seekers spoke slowly and clearly. 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.<sup>675</sup> Research shows that keeping to the rules of

---

<sup>674</sup> Coffey (n 345)

<sup>675</sup> Jane Herlihy, Kate Gleeson and Stuart Turner, 'What Assumptions about Human Behaviour Underlie Asylum Judgments?' (2010) 22(3) *International Journal of Refugee Law* 351. Erna Bodström, 'Asylum Decisions as Performances: Intertextuality in Internal Credibility Assessment' (2020) 32(4) *International Journal of Refugee*

conversation meant that the appellant was judged as credible.<sup>676</sup> During observations, asylum seekers asserted agency through speaking the language of the judge and communicating effectively.

Asylum seekers tended to vocally assert agency more often as the case went on, or as the questions became more probing. Several appellants became agitated when the HOPO disbelieved them, and did everything in their power to show the judge they were telling the truth.

*'I am a human being; I am not supposed to be changed by others, but I can change myself. I may go out one day and find someone attractive and maybe I will change my mind. If a man accepts me for liking women, then maybe it could work'. She uses hand gestures as she becomes more agitated. Her passionate speech leaves her chest heaving; the HOPO has no further questions. (Observation 27)*

When followed explicitly, the procedures in place in asylum appeal hearings fail to provide space for the appellant to provide full oral testimony relating to their account of persecution and claim for asylum.<sup>677</sup> Appellants are effectively denied the opportunity to put their case across because they are made to adopt their written witness statement as their evidence-in-chief as opposed to having their solicitor question them about their claim in front of the judge. Some appellants, such as those detailed in this section are able to carve out space in the appeal for their narratives by communicating in whatever way is meaningful to them, asserting agency regardless of the questions asked. In 17 observations I identified a growing confidence throughout the appeal, which enabled appellants to put forward a more decisive account. It may be that the appellants could sense that this was their last chance to convince the judge, so tactics and resources were used more forcefully. In addition to discourse, the adjudicator's assessment of whether an asylum seeker is credible may be influenced by the appellant's manner and non-verbal behaviour.<sup>678</sup>

---

Law. Eeva Puumala, Riitta Ylikomi, Hanna-leena Ristimäki, 'Giving an Account of Persecution: The Dynamic Formation of Asylum Narratives' (2018) 31(2) *Journal of Refugee Studies*.

<sup>676</sup> Herlihy et al (n 676).

<sup>677</sup> Ibid.

<sup>678</sup> Coffey (n 345).



#### **5.4 The importance of demeanour and non-verbal agency- the role of eye contact and body language.**

Eye contact, hand gestures and body language are all examples of non-verbal cues which can go some way towards mitigating communication problems caused by the language barrier and difficulties with interpretation.<sup>679</sup> ‘Demeanour’ incorporates a wide range of behaviours, including body movements, facial expressions, manner and attitude, tone, volume and pace of speech (discussed above in relation to vocal agency), and the externally observable emotional state.<sup>680</sup> It has been defined as ‘every visible or audible form of self-expression manifested by a witness whether fixed or variable, voluntary or involuntary, simple or complex’ in relation to the criminal trial.<sup>681</sup> Relying on demeanour in decision-making is controversial, as research indicates that it can be a highly unreliable marker of credibility.<sup>682</sup> This is especially so in the asylum context, where there are cultural variances in the way appellants’ tell their story, particularly with regards to emotional presentation to the traumatic nature of the events alleged. Appellants and judges also contend with the presence of an interpreter, who may present answers differently than the asylum seeker intended.<sup>683</sup> These factors can all render demeanour even more ambiguous. Recent UNHCR guidance states:

*‘While an applicant’s demeanour may prompt or guide questioning, it is UNHCR’s view that it should not be relied upon as an indicator of credibility or non-credibility. Where it is used, UNHCR urges decision-makers to exercise extreme caution, to fully consider the individual and contextual circumstances of the applicant, and to ensure that demeanour is not determinative of non-credibility.’*<sup>684</sup>

Despite the guidelines advising against the use of demeanour evidence, the demeanour and non-verbal cues of appellants have been shown to affect decision-

---

<sup>679</sup> Sarah Bishop, “‘What does a torture survivor look like?’ Nonverbal communication in US asylum interviews and hearings’ [2021] *Journal of International and Intercultural Communication*. See also Chapter 6.

<sup>680</sup> Baillot, Cowan and Munro (n 71).

<sup>681</sup> Barry Morrison, Laura Porter and Ian Fraser, ‘The Role of Demeanour in Assessing the Credibility of Witnesses’ (2007) 33 *Advocates’ Quarterly* 170.

<sup>682</sup> See for example, Morrison, Porter and Fraser (n 682); Paul Ekman and Maureen O’Sullivan, ‘Who Can Catch a Liar?’ (1991) 46(9) *American Psychologist* 913.

<sup>683</sup> See Chapter 6.

<sup>684</sup> UNHCR ‘Beyond proof’ (n 56); Baillot, Cowan and Munro (n 71); Ekman and O’Sullivan (n 675); Morrison, Porter, and Fraser (n 682).

making in practice, even when it is recognised as unreliable as a means of determining credibility, particularly in traumatised individuals.<sup>685</sup> Evidence from an American criminal court indicated that when there is disagreement among witnesses, jurors often made their determinations based on witness demeanour, rather than on the substance of witness testimony.<sup>686</sup> This study showed the problematic nature of using demeanour evidence as a witness who gave evidence calmly, may have been seen either as calculated and unrepentant, or just as easily as someone who had practised their evidence repeatedly beforehand. It is important to note here, however, that asylum decisions are made by a judge with experience of the legal system and guidelines rather than a lay jury.

Whilst there may be problems with an over reliance on demeanour as evidence, I uncovered evidence to suggest that it can be considered a useful aspect of agency when considered alongside other evidence. During observations, body language and non-verbal signs were frequently relied upon by asylum seekers in order to assert agency and communicate effectively in their appeal. One of the principal ways they achieved this was through making eye contact with the other parties. The layout of the court facilitated this, as they were able to look at everyone. I expected some of the appellants to be nervous, and to look at the floor. However, the majority (78 of 90) of the appellants I observed made eye contact with at least one of the parties, although whether the other parties maintained this eye contact was another matter.

*The asylum seeker tries to make eye contact with him (HOPO), but he looks around the room and makes notes; she looks at the judge instead, who holds her gaze. (Observation 67)*

In such examples, the judges encouraged and facilitated eye contact, nodding encouragingly to the appellant. This eye contact is important as it may support the asylum seeker to engage with the process, feel listened to, trust, and encourage them to tell their story. However, as will be discussed in Chapter 6 in relation to dialect,

---

<sup>685</sup> Catriona Jarvis, 'The Judge as Juror Re-visited' [2003] *Immigration Law Digest* 7-23; Herlihy *et al*, 'What Assumptions about Human Behaviour Underlie Asylum Judgments?' (n 676).

<sup>686</sup> Jeremy Blumenthal, 'A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanour Evidence in Assessing Witness Credibility' (1993) 72 *Nebraska Law Review* 1157.

gestures may sometimes vary between cultures.<sup>687</sup> Prolonged eye contact suggests aggression in some cultures, whilst looking down at your feet shows respect to a person in authority. In British culture however, avoiding eye contact with the person you are speaking to is taken to show that you have something to hide or are not speaking the truth.<sup>688</sup> In an asylum appeal hearing, this may contribute to an adverse credibility finding. However, the same cannot be said for other cultures. Asylum appellants come from a range of cultures with unfamiliar norms of verbal and non-verbal expression. Whilst avoiding eye contact when talking to a person can be a sign of boredom, shiftiness, or deceit to most European and North American cultures, it is a sign of respect in Japanese and Mexican cultures.<sup>689</sup>

*She does not make any real eye contact with any of the parties as she gives her answers to the table. She does however answer all of the questions promptly, and gives long answers. (Observation 58)*

Whilst eye contact is a sign of truth telling in British cultures, newly arrived asylum seekers may not have sufficiently assimilated to western culture to understand this. This may result in a disinclination to look directly at the person to whom they are speaking, particularly if that person is HOPO or judge by whom they may feel intimidated. In some cases, asylum seekers may provoke disbelief by averting their eyes when they intended to show respect.<sup>690</sup> Studies have also shown that eye contact is reduced when a speaker faces a high status individual (such as a judge or HOPO) who appears to react negatively to a communication (such as accusing the appellant of lying during cross examination).<sup>691</sup> The asylum seeker in the above example remained engaged throughout the appeal, answering questions quickly and calmly, and always addressing the judge as 'sir'. This suggests that a lack of eye contact on her part may have been out of respect, rather than because she was lying. These extracts exemplify the notion that there are real risks to adjudicators relying on

---

<sup>687</sup> Ibid.

<sup>688</sup> Stuart Lustig, 'Symptoms of Trauma among Political Asylum Applicants: Don't Be Fooled' (2008) 31 *Hastings International and Comparative Law Review* 725.

<sup>689</sup> Morrison Porter and Fraser (n 682).

<sup>690</sup> Lustig (n 689).

<sup>691</sup> Stephen Fugita, 'Effects of Anxiety and Approval on Visual interaction' (1974) 29(4) *Journal of Personality and Social Psychology* 586.

demeanour and non-verbal cues to assess credibility in asylum appeal hearings.<sup>692</sup> Empirical evidence refutes the perception that judges can reliably assess the truthfulness of a claim based on this evidence alone,<sup>693</sup> and judges themselves have acknowledged the danger of relying on demeanour in the context of cross-cultural communication, especially where the appellant speaks through an interpreter.<sup>694</sup> In addition to making eye contact with other parties, appellants also used hand gestures to further assert agency and communicate effectively.

*'He turns his chair and whole body towards whichever party is talking and sits up straight and nods, remaining focussed on the case at all times. He uses hand gestures and objects around him to give examples and show the size of the items he is talking about'. (Observation 5)*

Both the judge and HOPO nodded in response to these gestures, which appeared to give the appellant confidence; he answered the remainder of the questions fully and quickly, with no pauses. This is an example of an appellant using the available resources to assert their agency; here, body language played an important role. Another appellant glanced at the bundle whenever the HOPO referred to it; playing an active role in proceedings. Studies into nonverbal communication indicate the importance of body language in showing honesty, trustworthiness, and sincerity.<sup>695</sup> This is especially important for asylum seekers, who are trying to convince the judge of the dire situation they have experienced in their country of origin. However, the non-verbal cues demonstrated by asylum seekers during observations were not always perceived as convincing by other parties.

*'He sobs loudly into his hands, neither the judge nor HOPO looks particularly moved. After a few moments, the interpreter offers him a pack of tissues. The HOPO resumes questioning. 'So, is it fair to say you have no other proof...'* (Observation 25)

---

<sup>692</sup> Coffey (n 345).

<sup>693</sup> Blumenthal (n 687).

<sup>694</sup> *Kathiresan v Minister for Immigration and Multicultural Affairs* (unreported, Federal Court of Australia, Gray J, 4 Mar. 1998, 6).

<sup>695</sup> Albert Mehrabian, *Nonverbal Communication* (3<sup>rd</sup> edn, Transaction Publishing 2009).

In this example, the appellant was unable to continue speaking, and continued to cry intermittently throughout the remainder of the hearing. To an outsider, this outward display of emotion seemed like a genuine response to a fear of being disbelieved. However, it seemed to have a different effect on the other parties; the HOPO rolled his eyes and crossed his arms, and the judge continued making notes, without looking up. This is similar to the findings of Morrison *et al*, who suggested 'the fear of being disbelieved looks the same as the fear of being caught'.<sup>696</sup>

Despite UNHCR guidance advising against using demeanour evidence, the literature and empirical accounts presented in this section highlight the importance of face-to-face communication in order to assert agency. Eye contact, body language, and other non-verbal cues allow asylum seekers to demonstrate agency and communicate their story in a way that is meaningful to them. Throughout observations instances of agency were also highlighted through asylum seekers forging relationships of trust with those around them.

### **5.5 Trust as a means of enabling agency.**

Although many researchers allude to the concept of trust, few have focused specifically on trust within the asylum appeal setting.<sup>697</sup> Evidence suggests that, throughout the asylum journey and beyond, asylum seekers demonstrate generalised social trust in strangers.<sup>698</sup> This can be defined as the individual propensity to view complete strangers as trustworthy, even where there is no incentive to validate that trust.<sup>699</sup> In order to realise their journey, help is needed. Asylum seekers rarely cross borders alone, and so there is a leap of faith on their part as they trust strangers to help them. Mistrust can also be a way in which asylum seekers assert their agency.<sup>700</sup> This has emerged as an increasing outcome of the study of trust with

---

<sup>696</sup> Morrison, Porter and Fraser (n 674). Thomas Spijkerboer, *Gender and Refugee Status* (Ashgate Publishing 2000). Geir Kaufmann, Guri Drevland, Ellen Wessel, Geir Overskeid and Svein Magnussen, 'The importance of being earnest: Displayed emotions and witness credibility' (2003) 17 *Applied Cognitive Psychology* 21; Herlihy *et al* (n 676).

<sup>697</sup> Muireann Ní Raghallaigh 'The Causes of Mistrust Amongst Asylum Seekers and Refugees: Insights for Research with Unaccompanied Asylum-Seeking Minors Living in the Republic of Ireland' (2014) 27(1) *Journal of Refugee Studies* 82.

<sup>698</sup> Michael Jasinski, *Social Trust, Anarchy, and International Conflict* (Palgrave Macmillan 2010).

<sup>699</sup> *Ibid.*

<sup>700</sup> Tricia Hynes, 'The issue of 'trust' or 'mistrust' in research with refugees: choices, caveats and considerations for researchers' [2003] *New Issues in Refugee Research* 98.

respect to refugees.<sup>701</sup> This is discussed by Eveliina Lyytinen as several participants in her study spoke of hiding as they crossed the border as they lacked trust in the administrative system.<sup>702</sup> Trust also extends to their asylum claim. As will be discussed in Chapter 6, asylum seekers can be constrained and silenced by language or cultural barriers, and some may wish to protect themselves in being selective about what they tell others.<sup>703</sup> During the appeal, the asylum seeker trusts that the interpreter will put their words forward, and that the legal representative will argue diligently in their favour. They trust that the system will be fair, and that the judge will believe them. During observations, one asylum seeker openly admitted to trusting the judge and the legal representative.

*'He makes the decision not to have submissions translated, 'I don't understand any of this, you're the professionals, I trust you'. (Observation 56)*

Trusting the expert actors within the system can mitigate against some of the difficulties surrounding their asylum claim and can facilitate some form of agency. Whilst the asylum seekers may not always know what is being said on their behalf, the presence of legal representatives, and an individual who speaks the same language can help them feel more relaxed and better able to tell their story. This point was reiterated by several asylum seekers during interviews.

*My solicitor? She is one of them, like the Home Office. She knows things. I think she will help me; I need to trust her. (Asylum seeker 2)*

*\*Did the interpreter help you?\* I think so. I don't know English, but he speaks to me and waits for me to finish. I trust him and the judge is nodding yes so I think maybe it must make sense. (Asylum seeker 4)*

In addition to trusting expert actors, the asylum seekers observed and interviewed during this research asserted agency through creating informal support networks and

---

<sup>701</sup> Raghallaigh (n 698).

<sup>702</sup> Eveliina Lyytinen, 'Refugees' 'Journeys of Trust': Creating an Analytical Framework to Examine Refugees' Exilic Journeys with a Focus on Trust' (2017) 30(4) *Journal of Refugee Studies* 489.

<sup>703</sup> Elaine Chase, 'Agency and Silence: Young People Seeking Asylum Alone in the UK' (2010) 40 *British Journal of Social Work* 2050.

trusting the actors within these. Several appellants told their representatives that they received information and evidence from friends they had made since arriving. British citizens attended six cases, and I observed the appellants asking them questions about the process. Two asylum seekers brought members of their church with them, not as witnesses, but as friends to help ease the anxiety. This is a further example of using their available resources to assert agency. During interviews, one asylum seeker described an instance where they relied on information given to them by someone they trusted.

*I don't know the meaning of asylum and somebody, my dad knows him, and he tells me what to do, to go and see a solicitor. So I do. And the solicitor he talks to me about everything, how can I stay here. This family he told me to go to interview in London and you need to tell him you have a problem and like I don't talk truth in the first interview (Asylum Seeker 3)*

Trusting other people who had been through similar situations is one of the principal ways in which asylum seekers managed their lack of understanding of both the English language and legal system.<sup>704</sup> These informal support networks can enable asylum seekers to find information and assistance which could bolster their asylum claim, and allow them to present their case in a coherent manner, thus allowing them some agency and control over their case. In these cases, appellants appeared more confident and informed as they relied on the knowledge of others. In addition to bringing knowledge to the appeal, many of the interviewed representatives highlighted the importance of asylum seekers bringing evidence. This was seen as a valuable way of asserting agency.

### **5.6 Agency through the eyes of legal representatives and asylum seekers- a common thread of evidence.**

In order to explore opportunities for asylum seekers to assert agency further, I questioned legal representatives on their perceptions of the agency of their clients (asylum seekers) within the appeal system. Having briefly defined agency as whether the asylum seeking appellant played an active role, and whether they could tell their

---

<sup>704</sup> Hynes (n 701).

story in a way that was meaningful to them during the appeal, I asked the question ‘*Do you have any examples of clients showing agency within their appeal?*’. Although several respondents paused for several seconds before responding, all 12 could eventually recall examples of clients asserting agency; despite having limited opportunities due to language constraints for example. A common theme discussed by eight of the representatives was the importance of evidence. As discussed in Chapter 2, to be recognised as a refugee it is necessary for the asylum seeker to demonstrate that they have a well-founded fear of persecution for one of the convention reasons. This test is usually broken down into two principal components: the subjective element of whether the claimant fears persecution and the objective element of whether there are reasonable grounds for believing that the subjective fear of persecution is objectively well-founded.<sup>705</sup> As outlined in section 5.1.5, credibility is often a contentious subject in asylum appeal hearings. This section focusses on ways in which representatives observed asylum seekers demonstrating credibility, often through procuring some sort of external evidence. Three representatives spoke about asylum seekers asserting agency in retaliation to allegations from the Home Office that they were not credible witnesses.

*‘So, it all comes down to credibility. And actually, if the person is a credible witness, they are the best agents possible. It doesn’t matter how good or bad the solicitor or barrister is, if they are extremely credible and the case has been prepared properly yeah, the HOPO can’t argue with that! Some clients, you just know they are telling the absolute truth. They answer quickly and confidently, and you can see the HOPO starting to look shifty. They try to catch them out, but the client just keeps on repeating the same, brilliant answers.’* (Representative 4).

For this representative, credibility was associated with agency. In cases like this, it is difficult for the other parties to claim that there are discrepancies, or that the witness is not credible. However, the same representative also gave evidence of other clients who attempted to assert agency, answering questions as best they could, but who fell short of being deemed credible.

---

<sup>705</sup> Refugee Convention (n 3), a1(2).



*'I can also think of clients who are telling the truth, they are really at risk, but they are what we call, bad witnesses. Who will talk about irrelevant things, who have been frightened by bad advice from within their community, who will be very defensive about any questions, all for very good reasons but no, who will have not given a very good account of themselves.'* (Representative 4)

In the view of this representative, these clients were as truthful as those above. However, the defensiveness, fear, and irrelevant answers all combined to damage their credibility, which can be highly detrimental to their case. If they were not deemed credible, this representative indicated that appellants ceased to be effective agents. The UK's stance on credibility is sufficiently clear; an applicant for asylum will not have to prove each fact with documentary or other evidence.<sup>706</sup> UNHCR guidance also states, 'cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule'.<sup>707</sup>

As discussed in section 5.1.5, decision-makers can and should use the 'benefit of the doubt' principle, giving protection to asylum seekers despite evidence/credibility issues. As long as the narratives are coherent and plausible as a whole, and as long as they do not contradict well-known facts, the 'benefit of the doubt' principle should be applied.<sup>708</sup> As this research focussed on the procedures in the hearing itself, rather than outcome, it is impossible to conclude as to whether this principle was applied in the cases observed. Credibility can be equated with believability, and this was recognised by representatives during interviews.

*'I think it's still the case that for some fair judges, a client that is telling the truth, it will shine a light and they will be believed, and I have had clients like that who have been disbelieved by the Home Office but have been so believable and so credible that they have won their case.'* (Representative 11)

This representative reiterated the idea that, if a claim is believed, it will be successful. As noted above, the standard to be reached is whether or not persecution is 'likely'

---

<sup>706</sup> UNHCR 'Beyond proof' (n 56).

<sup>707</sup> Ibid.

<sup>708</sup> Ibid.

and so the facts need to be 'coherent'. Several representatives equated being coherent, and knowing the facts of the case well, with being effective agents. Others spoke of asylum seekers 'needing something more'<sup>709</sup> than just their story, in order to be seen as asserting agency and communicating their case effectively.

According to Anthony Good, when someone flees their home country to seek asylum, they generally take with them little or nothing in terms of personal documentation, due to the haste and danger marking their departure, or the clandestine nature of their journey.<sup>710</sup> Consequently, when asked to demonstrate a 'well-founded fear' of persecution, their only evidence is their own personal story of suffering.<sup>711</sup> This story is then judged largely in terms of its credibility. In the cases observed, credibility was most often the reason for the initial refusal of asylum. It was also cited by most of the HOPOs during the appeals.

*The asylum seeker said 'summer', then 'June' then 'July'. The HOPO picked up on this and questioned the appellant profusely, telling the judge that the appellant was not a credible witness. Both appellant and interpreter looked blank, as though they failed to see the discrepancy. (Observation 75)*

James Sweeney argues there are many explanations for asylum seekers giving different accounts over time, especially in cases of torture and rape.<sup>712</sup> Trueman also argues that different cultures relate events in non-linear ways, and others are not as preoccupied with dates as the UK.<sup>713</sup> It is also important to note that countries such as Iran have different calendars, and that the dates do not always align perfectly with those in the UK. In the case above, the interpreter eventually responded that the Iranian calendar is different, and there may have been misinterpretations of dates rather than discrepancies on the asylum seeker's part. This highlights the difficulties faced by asylum seekers when they try to assert agency and communicate their case effectively to actors who do not share the same language or culture. Explanations can

---

<sup>709</sup> Representative 12, in interview.

<sup>710</sup> Good, *Anthropology and Expertise in the Asylum Courts* (n 344).

<sup>711</sup> Ibid.

<sup>712</sup> Sweeney (n 668).

<sup>713</sup> Trueman (n 234).

often be given for lapses in memory recall, especially after traumatic events,<sup>141</sup> yet the HOPO's often did not leave time for these explanations.

*The questions constrain the appellant, as he is not given chance to elaborate on his answers; once the HOPO thinks the question has been answered, he moves on, cutting the appellant off midsentence. (Observation 13)*

Appellants who relied solely upon their own narrative were more constrained and less able to assert agency than those who procured additional evidence. In the observations, there was a suggestion that the HOPO found the evidence given by the appellant was less credible than expert or medical reports.

*The HOPO begins questioning the appellant with an air of disbelief. He prioritises real, hard evidence, discounting the oral evidence of the appellant as he speaks over him and asks for documents. (Observation 53)*

Documentary evidence is often crucial to an asylum decision, yet decision-makers regularly fail to recognise some of the difficulties appellants face in obtaining it. The ability to provide external evidence varied greatly between those interviewed. This often depended on personal circumstances. Some participants had time to gather documents before leaving and others could access documents through contacts in their country of origin. It is argued that it can be difficult to get supporting evidence before a court. Sweeney claims that the ability of asylum seekers to provide 'new and interesting material', should not be underestimated by judges and HOPO's. They are able to contribute to a better understanding of the context through narrative alone; especially their personal situation.<sup>714</sup> A jailer is unlikely to admit to torture, and it may be dangerous to ask people in the country of origin. However, in interviews and observations, evidence was seen to be highly important to determining credibility and as a means of asserting agency. Representatives argued that external evidence must be put forward to corroborate the claim due to the growing practice of equating any lack of credibility with absence of subjective fear.

---

<sup>714</sup> Sweeney (n 668).

*'She (the asylum seeker) was so obviously scared, because of the massacre that caused her to flee. I believed her, but I mean, I've gotta ask right? What evidence is there? I mean actual evidence, like a video or an expert report or something. That's gonna show agency, that's gonna make the judge believe her'. (Representative 12)*

Similarly to Judith Reynolds' study,<sup>715</sup> there was a reliance on documentary or other external evidence to enhance communication in the observed cases. The representative above was eager to find some sort of 'actual' evidence which could replace parts of the cross examination and enhance credibility, highlighting the culture of disbelief that surrounds narrative evidence in the appeal system. Representative 6 gave anecdotal evidence of a client finding evidence to present at the hearing.

*'There was a client who found a really good piece of objective evidence that we could use, that we DID use umm and that is quite a big part. So for example, we have a client here that I met, he looked for media resources about this family that had been threatening him. That is one way they can assert agency, by getting evidence. Not even just objective evidence. It can be evidence from family, court document from home, anything like that, arrest warrants.'* (Representative 6)

This example shows the weight placed on any corroborating evidence that the asylum seeker can bring forward. Additional evidence, especially from reliable country experts, often makes it more difficult for the HOPO to undermine the asylum seeker's narrative; it is robust evidence which confirms the asylum seekers' version of events. In addition to asking legal representatives how asylum seekers asserted agency, I also asked asylum seekers to give examples of times during the hearing when they felt like they played an important role. Results showed a common desire to prove truthfulness and credibility and one of the most prominent ways of achieving this was through bringing objective evidence.

*'They try to make you a liar but I no liar, I give them all the evidence. Before, I talk my mouth my story they don't believe me, but the me and (solicitor) find lots of evidence, we point all the evidence and we work really hard. So I have medical evidence. I think that was important and made a difference to my case. I really wanted to show them*

---

<sup>715</sup> Reynolds (n 611).

*that I'm not a liar. We show them a report from the doctor saying yeah this guy has been tortured.'* (Asylum seeker 7)

For this asylum seeker, objective evidence made a substantial difference to his case. In his asylum interview, where he told his story in his own words, he was disbelieved. When he presented medical evidence as proof of torture in his appeal hearing, he was more confident that the judge had believed him. This shows the importance of objective evidence in determining credibility. Participants also spoke of the pressure they felt to provide evidence on the nature of their claim. This implies a knowledge or fear that their narrative alone is insufficient and exemplifies the impact of a culture of disbelief on asylum seekers. Some believe that the only way their claim will be taken seriously is through producing additional evidence. This can have the effect of constraining agency as for many, their narrative is often the only resource they have. If they believe that this is insufficient, it limits their engagement with the process, and they may feel as though the process is unfair. Asylum seeker 6 described the difficulties they encountered in providing evidence.

*'I thought my scars were enough. How can I get more evidence? I left the country. I ran. There is no one there for me now to ask for help. Am I supposed to tell (authorities in the country of origin) where I am, and ask them to tell the judge what happened?'* (Asylum seeker 6)

This quote is important as the participant had to flee with no advance warning or time to collect documents or other evidence. Due to a lack of contact with anyone in their country of origin, it was also difficult for them to obtain evidence once they had arrived in the UK. All of the participants quoted may have been at a disadvantage when trying to meet the evidentiary standard of proof. This perception emphasises the importance of documentary evidence in ascertaining credibility. Another way in which the agency of the asylum seeker and their ability to communicate effectively were constrained was through the undermining of the medical evidence that they had introduced.

*Interpreter- 'Sorry, I cannot properly translate these injuries as I do not understand.'*  
*Judge- 'I don't understand the medical terms either, just translate the gist of things.'*  
(Observation 22)

The judge was eager to move on, despite the difficult process the legal representative and appellant had experienced in obtaining a medical report. The judge made no apparent effort to understand the magnitude of the injuries, beyond accepting that the report was genuine. He did not require the complex terms to be explained, indeed, he stopped the interpreter interpreting them. This limited the appellant's ability to communicate; they were at a disadvantage, not having heard exactly what we had, and had not been given a chance to explain what the report showed. During observation 86, the judge could not understand the name of the disease to which the asylum seeker was referring. In this case the legal representative used the internet to find the disease, and to show the judge. The judge acknowledged this but as with observation 22 above, they were eager to move beyond the medical aspect of the case. These examples mirror those of Webber as she claims that medical evidence is often marginalised in asylum appeals.<sup>716</sup> Few other observed cases mentioned medical evidence, with the exception of observation 4 where the asylum seeker produced his medication to show the judge. The HOPO examined the box before passing it onto the judge, who was uninterested in seeing it; he waved his arms and asked the HOPO to continue questioning. A lack of understanding on both parts may lead to decisions that are based on incomplete information. This finding supports research such as Paaras Abbas *et al*, where behaviour deemed 'non-credible' by authorities was instead often seen to stem from a lack of understanding on the part of the asylum seeker, interpreter or judge themselves.<sup>717</sup> In addition to finding evidence, both legal representatives and asylum seekers alluded to the role of witness in proving credibility, enhancing communication and the telling of their story, and facilitating space for agency. Asylum seekers observed and interviewed used family, friends, and witnesses to help support their case.

---

<sup>716</sup> Frances Webber, 'Borderline Justice' (2012) 54(2) *Race and Class* 39.

<sup>717</sup> Paaras Abbas, Martha von Werthern, Cornelius Katona, Francesca Brady, and Yeree Woo, 'The texture of narrative dilemmas: Qualitative study in front-line professionals working with asylum seekers in the UK' (2010) 45(1) *BJPsych Bulletin*.

### 5.6.1 Bringing witnesses to the appeal hearing.

Witness testimony is another example of important corroborating evidence used by appellants as a strategy to assert agency in their appeal. Eight observed cases had witnesses who gave evidence on character, sexual orientation, and religion. Three representatives talked about clients who had brought witnesses to their hearing.

*'Well I think you see on some occasions when the asylum seeker will actively bring witnesses or certainly when religious disputes are the main reason for seeking asylum such as Christians from Muslim countries, they will quite often bring umm members of the church they have been attending regularly since arriving in this country as witnesses to support their version of events and to support their application.'*  
(Representative 1)

As this quote shows, having another (familiar) person present not only helps calm the appellant; they also act to further corroborate evidence in support of the appellant's version of events. This can make it more difficult for the HOPO to question their credibility. Another representative went into great detail on the importance of witnesses in establishing credibility. The case involved a client who attended court with eight witness statements and 50 family members and friends.

*'The usher came in and said to the judge, 'sorry, but we've just got no space outside, what do you want me to do with all these people?' and he [the judge] said 'I have no idea what you are referring to, what do you mean?', 'well all these people are here for this case here' and the judge looked at me, and the HOPO and asked how many witness statements were needed. The HOPO said she only needed to hear from maybe 3, the judge said, 'what about the other 5? And all of the people standing outside?' and they had to form a rotation, someone would give evidence then wait outside so someone else could come in, someone who wasn't even giving evidence and the courtroom was full. The judge said, 'wow this guy has so many ties here, how could we remove him?' and if you put that on paper, you're not going to get it.'* (Representative 5).

Like representative 1, representative 5 explained the importance of oral evidence from witnesses. Their account emphasised that there is a real difference between a paper

petition for example, and people giving up their time and other commitments to attend a court hearing.<sup>718</sup> This is one of the reasons why an oral hearing, and the presence of the asylum seeker and witnesses within it, is so important for procedural fairness. The appellants in these cases used the available resources (witnesses, and friends), to actively assert agency and further their case with corroborating evidence. Whilst witnesses were an important facet of agency for five interview participants in this research, it was not as important as the appellant putting their own case forward, through active participation in the preparation and appeal.

### **5.6.2 'The most effective example of agency? Turning up, answering questions.'**

The presence and participation levels of asylum seekers at their appeal and at preparation meetings beforehand influenced whether representatives deemed them to be effective agents. Representatives highlighted agency in their clients when they attended their appointments and hearing, and answered questions.

*'I'm thanking them for being an active participant, they've been to every appointment I've asked them to and participated fully you know, answering all the questions, not becoming defensive and saying 'it's in the document' or 'I've already answered that'; they understand that you're trying to help them.'* (Representative 5)

Appointments and hearings can last for hours at a time,<sup>719</sup> but four representatives noted that their client participated fully in the process and remained engaged throughout. Two representatives expanded on this, remembering how some clients answered particularly difficult questions.

*'It's just being good on the detail you know, not just giving vague answers you know when you (2) sometimes they surprise you, you know there's a weakness and you think that you don't know how you'd get out of it if it was put to me. You don't tell them that, you just wonder how they'll cope and then they suddenly just surprise you and*

---

<sup>718</sup> This can be difficult to achieve where accessibility is an issue. There is no funding available for witnesses to give up work to be present for example. There should be recognition that the absence of witnesses could reflect poverty, or personal circumstances, rather than a lack of veracity.

<sup>719</sup> Which can often be constrained by limited legal aid funding.



*you think 'of course!' It's in the level of detail they can provide in their claim. That's what makes a difference.'* (Representative 8)

Analysis of these interviews has shown that attending appointments and answering questions in sufficient depth can positively affect how credible the witness is perceived to be.<sup>720</sup> If the detail given in answers is thought to be believable, and corresponds to previous questions, the case becomes more coherent and thus more likely to meet the threshold of credibility. Two asylum seekers also commented on their presence in the appeal, and the effect on their case.

*'I'm there. I answered my questions. I try to make judge understand. I tell the truth, my story.'* (Asylum seeker 4)

Appellants noted that it was their story to tell, and that they were an important actor in the process. Whilst they may not have had many tactics or resources to use to assert agency, they remarked that they had a voice, and by attending the hearing and answering questions, they were able to communicate their story. However, there were discrepancies between individual asylum seekers in terms of how much of an impact they told me they thought their presence had. Three of the nine asylum seekers interviewed explained that they played an important role in the hearing, whilst two others described that they were less important than the other parties.

*'I feel I play the main role with the assistance of my solicitor.'* (Asylum seeker 3)

In contrast to;

*'I played a relatively minor role. Most of the work was done by the representatives, the lawyers. They don't listen to people like me they just listen to people like them. Lawyers are like them'* (Asylum seeker 8)

---

<sup>720</sup> Laura Smith-Khan, 'Telling stories: Credibility and the representation of social actors in Australian asylum appeals' [2017] *Discourse and Society* 28(5).

Both of these quotes highlight the influence that other parties can have on the asylum seeker's ability to assert agency; whilst one appellant was able to play an important part, with help from their representative, the other remarked that their 'otherness' kept them in a minor role during their appeal compared to other parties. These results show a similarity between how representatives perceive agency, and how asylum seekers view themselves. Both put an emphasis on effective communication, and answering questions during the hearing. Other examples of asylum seekers asserting agency include using shared understandings of religious ceremonies to transcend language and cultural barriers. After several failed attempts at interpretation, one appellant was able to explain a religious celebration without using the actual term. As he mimed eating and drinking, and spoke of bread and wine, the other parties were able to understand which service he meant. Another appellant asked the judge if she could leave the hearing to check on her disabled son in the waiting area, despite not being informed that she could take a break when required. Similarly, one appellant picked up her crying baby during cross-examination, asserting her agency, and conducting the hearing on her terms. Until this point, the chapter has focussed on ways in which asylum seekers are able to assert agency in the appeals process. Having analysed the data, however, there were also examples of representatives and asylum seekers indicating that they felt as though they possessed little or no agency.

### **5.7 Is there a lack of agency on part of the asylum seekers during the hearing?**

Whilst there were 63 examples of appellants asserting agency during their appeal, observations and interviews also highlighted instances of agency being constrained, by other parties or circumstances. It is notable that representatives found it more difficult to think of examples of asylum seekers asserting agency when compared with examples of being constrained.

I: *\*Following on from a discussion on constraints\* What about any examples of asylum seeker's playing an active role? 'This one is harder. Giving evidence I suppose. And giving their statement. I'd never really thought about it, them being agents. I've always focussed on coaching them through the appeal, and to answer the questions given, rather than give the full story. I guess I'm a constraint then \*laughs\*. But that's just*

*how the system works; I'm trying to do the best thing for my client.'* (Representative 9).

In this extract we see the importance of asserting agency in terms of procedural fairness; asylum seekers who cannot engage with the process of their claim may not feel that it is fair.<sup>721</sup> This response was similar to the other representatives in this sample. There were many pauses, fumbles, and nervous giggles as representatives attempted to recall episodes of agency that they had witnessed. This was repeated in interviews with asylum seekers. All of the participants described feeling as though they had no chance to tell their story the way they wanted to at some point during the appeal as they were constrained by the process of question/answer.

*'I said my answers, I answer all the questions. But mostly I sat there. My lawyer talked. The Home Office talked. Talked a lot. The judge sometimes talked but a lot of time he listen. The Home Office and my lawyer talk to each other. Sometimes they remember me.'* (Asylum seeker 9)

The asylum seekers described a feeling of unfairness. They did not have sufficient time to communicate their story, to sit, think, and expand in a way that is meaningful to them. When they attempted to elaborate in the appeal, three asylum seekers claimed that the HOPO interrupted, telling them they were not answering the question and moving on before the appellant had finished speaking.

*'No. In the court, you don't speak. Everything is question and answer, that's it. No telling my story, I just answer the question he says.'* (Asylum seeker 6)

This may have had an adverse effect on procedural fairness if the appellants felt as though they had not been listened to; that their case had not been heard. Although this may have been the most efficient way for the judge to hear the important facts of the case, the asylum seekers complained that the judge, HOPO and representative behaved as though the appellants' words, and the events that happened to them, were unimportant.

---

<sup>721</sup> Anderson and Conlan (n 644).

Procedural fairness requires that asylum decision-makers should allow appellants a chance to respond to doubts as to their credibility or discrepancies within their story. In recognition of this, the UKBA's 'Considering Asylum Claims and Assessing Credibility' Instruction specifically advises that decision-makers should give the asylum seeker the opportunity to clarify or address any apparent inconsistencies that arise during the substantive interview. None of the participants interviewed made any mention of judges allowing appellants to address inconsistencies outside of the rigid question and answer format of cross-examination. One appellant complained about the differences in the lives of asylum seekers and decision makers influencing their decision, and argued that they needed to make time to listen to the appellants' narratives and try to understand.

*'They don't see who is right or who is not right. None of the Home Office people have any problems in their life and don't understand anyone else's problems. They don't think of the consequences or give you time to explain. They need to look more carefully.'* (Asylum seeker 9)

This quote emphasises the divide between citizen and other. As discussed by Abbas *et al*, disbelief can often stem from a lack of understanding on the part of the decision maker.<sup>722</sup> Thomas agrees and argues that there is a risk that decision-makers will take decisions from their own western assumptions, and that they may be unaware of the importance of cultural differences between themselves and asylum seekers.<sup>723</sup> This research highlighted examples of HOPOs and judges applying the guidelines and standard of proof too restrictively. One appellant explained that she had to flee from her country of origin as townspeople had tried to burn her son as a witch,<sup>724</sup>

*'Judge: "But that's just preposterous! A witch?!"'*

---

<sup>722</sup> Abbas *et al* (n 718).

<sup>723</sup> Thomas, 'Assessing the Credibility of Asylum Claims' (n 10).

<sup>724</sup> There is a lack of knowledge and understanding of ASD in some African communities. Some still believe that ASD is caused by witchcraft. See for example: Hilda Shilubane and Nomfundo Mazibuko 'Understanding autism spectrum disorder and coping mechanism by parents: An explorative study' [2020] *International Journal of Nursing Sciences* 7.

*HOPO: "Medical evidence suggests that he is autistic, not a witch. You are a liar, aren't you? This did not happen; it just doesn't happen. Incredible"* (Observation 53)

The accounts presented throughout this section indicate that judges often assume credibility based on their own experiences. This can include the ways in which people behave following traumatic events, and whether they believe this to be an appropriate reaction. If the judge or HOPO cannot imagine something happening, they may not be able to understand how it could happen to someone else, in a different country. This culture of disbelief is unfair due to a lack of impartiality; it goes against the structural principles of the asylum system.<sup>725</sup> In cases such as this, even where decision makers adopt the lower standard of 'believability' as opposed to 'truth', procedural fairness is still undermined, and agency constrained where asylum narratives are forced into western assumption shaped boxes. Five representatives also admitted to finding some of the asylum narratives to be 'far-fetched', and gave anecdotal evidence of omitting certain details from the witness statement if it would 'go too far' to include it. One representative told me,

*'The judge doesn't need to hear it; they won't believe it and it could harm their case. They don't want that do they, the client? So I just go "uh huh, uh huh" but don't really write that part down.'* (Representative 11)

Similarly to the findings presented below in Chapter 7, and Helen Macintyre's work, this quote exemplifies the power legal representatives have over their client's case.<sup>726</sup> They have agency that should be held by the asylum seeker. As the written witness statement is often the only evidence the asylum seeker has, procedural fairness may be undermined where they do not have the chance to communicate their whole story to the judge. Whilst parts of the story may not seem important to the representative, they may be important to the asylum seeker. But the incomplete written statement could also lead to inconsistencies. If the appellant raises details in their appeal that do not form part of the witness statement, the HOPO may claim that there are discrepancies, or that the appellant has made it up. This could cause confusion and

---

<sup>725</sup> See Chapter 2, section 2.7.3 for more on the culture of disbelief.

<sup>726</sup> MacIntyre (n 63).

can have an adverse effect on both procedural and substantive fairness as the case is not communicated effectively to the judge. Whilst the representatives interviewed believed they were constraining agency 'for the greater good', this may not always have been the case.

### **5.7.1 Constraining agency for the good of the case?**

As shown above, some representatives describe feeling as though they are constraining the agency of their clients for 'the greater good'; to help further their case. As will be discussed in Chapter 7, section 7.7.4, I witnessed four representatives limiting their clients' participation in the process by talking over their client, silencing them before they could finish an answer, and constraining their agency by not allowing them to communicate fully with the adjudicator. I initially thought that this was unintentional. However, the intentional limitation of agency was confirmed in five interviews with representatives. When asked whether asylum seekers were always able to tell their story, five representatives admitted that they had stopped their client speaking during the appeal.

*They may not be able to tell the whole story the way they want, but our job is to convince them that the judge has their full statement and will read it, but that this is not what the appeal is about. I think it is probably more beneficial for the asylum seeker to sacrifice a bit of agency, to have a more effective appeal. (Representative 8)*

These representatives conceded that agency suffers at their hand during the appeal hearing, but maintain that it is for the greater good. Whilst they genuinely believe they are helping their client's case by keeping to the 'most important' facts, it could in fact be detrimental.<sup>727</sup> It is necessary therefore, for the representative to explain to their client beforehand (as evidenced by representative 8 above) that the judge already knows the full story through the written statement (as long as there are no substantial edits) which the appellant agrees to submit as evidence in the appeal.

---

<sup>727</sup> See Chapter 7, section 7.7.4.

## 5.8 Conclusion.

The literature and the preceding chapters within this thesis recognise that asylum seekers are constrained throughout the asylum process, and are seen to have little power to communicate freely, suggesting a lack of agency. This may be exacerbated by a lack of knowledge and understanding of the system and their role within it.<sup>728</sup> However, the results presented in this chapter have shown that this limitation is not complete as asylum seekers also employ tactics and resources that allow them to assert the limited agency that they have. Evidence has been analysed to show that, despite language barriers and difficulties regarding credibility, asylum seekers attempt to communicate effectively using whatever resources they have available. The theoretical position posited by Giddens that the agent is a 'knowledgeable and capable subject'<sup>729</sup> and plays an important role in society is evident in the assertion of agency by the asylum seekers in this chapter. According to Giddens, all actions are 'intentional or purposeful', and all agents possess power. The ability of asylum seekers to assert their limited power, and therefore agency in their appeal is of central importance as, discussed in sections 5.1.5, asylum decisions very often rest on a judgement of whether or not the claimant and their story are credible. During observations, agency was most often asserted through discourse and demeanour including body language, gestures, and eye contact. This bodily agency allowed the appellants to engage with the process and the actors within it, to ensure that they were being heard. Although guidance advises against relying on demeanour evidence, the literature and empirical accounts presented in section 5.4 highlight the importance of face-to-face communication in procedural fairness, as often it is the non-verbal cues that allow asylum seekers to demonstrate agency and communicate their story effectively. This chapter has highlighted that the procedures in place in asylum appeal hearings can fail to provide space for the appellant to provide full oral testimony relating to their account of persecution and claim for asylum.<sup>730</sup> Despite these limitations, some appellants, such as those detailed in section 5.3, are able to carve out space in the appeal for their narratives by communicating in whatever way feels meaningful to them, asserting agency regardless of the questions asked.

---

<sup>728</sup> See for example Kendall (n 4).

<sup>729</sup> Giddens, *Central problems in Social Theory* (n 633) 56.

<sup>730</sup> Herlihy *et al* (n 676).

Trust was shown to be one of the principal ways in which asylum seekers managed their lack of understanding of both the English language and legal system.<sup>731</sup> Informal support networks enabled asylum seekers to find information and assistance which could bolster their asylum claim, and allowed them to present their case in a coherent manner, thus allowing them some agency and control over their case. In these cases, appellants appeared more confident and informed as they relied on the knowledge of others. This enhanced communication, and facilitated space for agency. Many of the interviewed representatives also highlighted the importance of asylum seekers bringing evidence. Those appellants who relied solely upon their own narrative were more constrained and less able to assert agency than those who procured additional evidence, which may be due in part to the culture of disbelief described in section 2.7.3. It was often the case that the narrative evidence given by the appellant was subjected to more scrutiny than expert or medical reports. However, whilst documentary evidence is often crucial to an asylum decision, this chapter showed that decision-makers often fail to recognise some of the difficulties appellants face in obtaining it, and observations and interviews exposed a marked discrepancy concerning the ability to provide external evidence.

The results also indicate disparities between individual opinions of legal representatives and asylum seekers as to how much agency appellants are able to assert over their case; with some representatives declaring that they ensure appellants play the most important role in the hearing, and asylum seekers claiming the opposite; that their representative was far more important. In addition, observations showed variations between individual asylum seekers, and the extent to which they were able to engage with the process. Whilst some representatives claimed that asylum seekers were able to assert agency throughout the appeals process, others conceded that this ability was constrained-often by the representatives themselves. These representatives believed that asylum seekers sacrifice agency 'for the greater good'; in order to have a more successful outcome. This leaves the question: Can agency be justifiably constrained for procedural or substantive fairness?

---

<sup>731</sup> Hynes (n 701).



Several of the difficulties discussed in this chapter are related to the asylum system and the players within it, rather than the asylum seekers themselves. Judges, HOPOs, legal representatives and interpreters can make it difficult, and in some cases impossible for appellants to communicate their case effectively. Overall, it seems that, whilst asylum seekers have some opportunities to present their case to the judge and assert agency in the way that feels right to them, these opportunities are limited and more often than not, at some point during the appeal, the asylum seeker's agency is constrained.

This chapter has presented the accounts of nine asylum seekers and 12 legal representatives in order to explore espoused and lived experiences but has also sought depth in identifying common threads which run through them. It raises a number of points relating to the asylum seekers and legal representatives' conceptualisations of the asylum appeal system, as characterised by both welcoming and hostile experiences. It has been shown that agency and effective communication is crucial to the assessment of credibility and procedural fairness in the asylum process as a whole. The next chapter continues to explore experiences of procedural fairness, focussing on the role of language, interpretation, and effective communication.

## Chapter 6- Language and the Role of Interpreters in Asylum Appeal Hearings.

*'There are so many problems. No money. No lawyer. No charity. But the worst? No language. You can do nothing, nothing without language...'* (Asylum seeker 6)

Building on the previous chapter, which described and analysed the resources used by asylum seekers to assert agency and communicate effectively, this chapter begins to explore the external factors which constrain and enable asylum seekers in their appeal hearing with a focus on procedural fairness. The chapter highlights the role of language and communication, and the use of interpreters in asylum appeal hearings, considering whether they constrain or enable the agency of the asylum seeker, and their role in achieving procedural fairness. Asylum seekers rarely have English as their first language, and so it is often difficult for them to understand, or get their point across clearly.<sup>732</sup> In the context of an asylum appeal, the inability to speak the host nation language places significant additional psychological and structural burdens on the asylum seeker. To mitigate against this during the appeal hearing, asylum seekers can use interpreters. However, even with the help of a competent interpreter, the asylum-seeking appellant may still face misinterpretations and cultural barriers that can have an adverse impact on their claim. The chapter begins with a review of relevant literature concerning interpreters in the asylum system, along with a brief explanation of the methods employed to investigate this theme. The data is then presented and analysed, focussing on whether interpreters inhibit or facilitate the asylum seekers' agency within the appeal hearing, and investigating whether there are discrepancies between espoused and lived experiences. This chapter contributes to the thesis by reflecting on how elements of communication influence the ability of asylum seekers to play an active role in their appeal and enhance procedural fairness.

Much of the literature on interpreters in the asylum appeal setting describes the importance of their role and the problems associated with the services they provide. This chapter takes these ideas further; showing how the adequacy of interpretation can influence the ability of the asylum seeker to put their case forward at appeal, thus hindering or enhancing the likelihood of the asylum seeker achieving a fair hearing.

---

<sup>732</sup> Nick Gill, Rebecca Rotter, Andrew Burridge, Jennifer Allsopp and Melanie Griffiths, 'Linguistic incomprehension in British asylum appeal hearings' (2016) 32(2) *Anthropology Today* 18-21.

## **6.1 The importance of language in asylum appeal hearings.**

Language is shared by a group of people to express their thoughts and experiences. It is intertwined with identity, culture and belonging,<sup>733</sup> and the ability to communicate is central to human interaction and participation.<sup>734</sup> Language and communication is central to individual human rights and social justice,<sup>735</sup> as the ability to communicate freely and successfully underpins not only Article 19 of the Universal Declaration of Human Rights, but most other human rights enshrined in the European Convention on Human Rights as well.<sup>736</sup> Language is both an agency and structural force. It underpins agency, as it is the means by which individuals and society communicate, but effective communication may be compromised for those who do not speak the mainstream language. Language can also serve as a major structural constraint which appellants have little agency to control during the asylum process, both in interviews and during the appeal. English is rarely the first language of an asylum seeker, and the majority must rely on an interpreter.

### **6.1.1 Language, knowledge, and power.**

As discussed in Chapter 3, a lack of knowledge or understanding can lead to a lack of power.<sup>737</sup> This lack of knowledge contributes to a lack of agency for asylum seekers. Attributing agency and knowledge through effective communication then, is attributing power. Language can be a powerful structure which impacts on the agency of asylum seekers both within and outside the asylum appeals process as linguistic structures underlie every sentence. The power of language is influenced by context. According to Sewell, linguistic structures are unusually deep, yet their power is slight.<sup>738</sup> However, this is not the case in the context of asylum seekers as language confirms the speaker's membership in a particular community and access to the resources that community provides. There is a power disparity as the lack of understanding of the languages denies the speaker membership in this community. Sewell claims that

---

<sup>733</sup> Shuttleworth (n 7).

<sup>734</sup> McLeod (n 75).

<sup>735</sup> Pillar (n 76).

<sup>736</sup> McLeod (n 75).

<sup>737</sup> See Chapter 3, section 3.6.

<sup>738</sup> Sewell (n 429).

these linguistic structures allow for equality, but I argue that, for asylum seekers, it is an additional barrier they face in asserting their agency.

Thornborrow argues that power can be exercised both structurally, through allocation of speaking rights (turn taking in talk, and the type of space allocated to speakers in interactions), and interactionally, through the exercise of agency in that space.<sup>739</sup> Speakers can use linguistic forms as resources in exercising or resisting interactional power in the appeal hearing, but their function and effect will depend on the interactional context, partly defined by the (shifting) local talk and interactional relations, and partly by (fixed) asymmetrical institutional relationships between the parties in the hearing.<sup>740</sup> Effective interpreters are necessary in order to redistribute the power of language and allow asylum seekers to navigate the complex linguistic circumstances facing them in their appeal.

## **6.2 The right to interpretation.**

Language can be a significant barrier to access to justice for asylum seekers and procedural fairness is adversely affected where the asylum seeker cannot understand what is happening to them, and where they are unable to communicate their case properly to a judge. As outlined above, they rarely have English as their first language, so it is often difficult for them to understand the hearing and get their point across clearly.<sup>741</sup> To mitigate against this language barrier during the appeal hearing, asylum seekers can use interpreters. Although article 16 of the United Nations Convention on the Status of Refugees<sup>742</sup> specifically grants access to a court, the convention does not explicitly mention access to an interpreter. However, the importance of interpreters is highlighted in the United Nations High Commissioner for Refugees (UNHCR) *Handbook*, which advises ‘the applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned’.<sup>743</sup> The Procedures Directive also requires that an applicant should be provided with ‘at least (...) access to the services of an interpreter for

---

<sup>739</sup>Thornborrow (n 674).

<sup>740</sup> Ibid.

<sup>741</sup> Edwards (n 329).

<sup>742</sup> Refugee Convention (n 3).

<sup>743</sup> UNHCR, *Handbook* (n 93).

submitting his/her case'.<sup>744</sup> The Directive places the onus on Member States to select an appropriate interpreter for the asylum interview.<sup>745</sup> Although the wording within these two instruments present issues with ambiguities; such as what constitutes 'appropriate' and how the competence of the interpreter could be assessed, they emphasise the basic right to an interpreter within the asylum system.<sup>746</sup>

The right to an interpreter should be seen as a procedural right to understand and participate in one's own appeal hearing. In the UK, interpreting work in the courts requires the interpreter to hold a Diploma in Public Service Interpreting (DPSI), a Level 6 qualification of the UK Qualifications and Credit Framework (equivalent to an undergraduate degree level) which is accredited and examined nationwide by the UK Chartered Institute of Linguists.<sup>747</sup> Despite the frequent use of interpreters in legal advice, especially in asylum and refugee law advice,<sup>748</sup> very few empirical studies have examined the interpreter role in the specific legal advice context in any detail.<sup>749</sup>

### 6.3 Interpreters in literature.

The majority of evaluation of interpreting provision in the UK has been conducted from a service provider perspective.<sup>750</sup> There has been little work examining users' experiences of interpreters with the exception of Edwards *et al.*<sup>751</sup> These authors explore the experiences of people who need interpreters to gain access to and use of a range of services, looking at the qualities needed to make a good interpreter, and clients' experiences. This chapter builds on this work by presenting data from both professionals (legal representatives) and lay users (asylum seekers) from their point

---

<sup>744</sup> Procedures Directive (n 89) a12 (1)(b), 13(c).

<sup>745</sup> Ibid.

<sup>746</sup> Whilst not directly applicable in the UK, the International Covenant on Civil and Political Rights also expressly guarantees the right to access the services of an interpreter at Article 14 (3)(f). Whilst it restricts the right to an interpreter to an accused in a criminal charge, there is a guaranteed right to the free assistance of an interpreter where he or she does not understand the language of the court. This is similar to ECHR Article 6, which is also not applicable to immigration.

<sup>747</sup> Reynolds (n 611) 51.

<sup>748</sup> Jacob Beswick, *Not so straightforward: The need for qualified legal support in refugee family reunion* (British Red Cross 2015); Solicitors Regulation Authority, 'Asylum report: The quality of legal service provided to asylum seekers' (Solicitors Regulation Authority, 2016) <https://www.sra.org.uk/sra/how-wework/reports/asylum-seekers-report.page> accessed 20 March 2020.

<sup>749</sup> Reynolds (n 611).

<sup>750</sup> Rosalind Edwards, Bogusia Temple and Claire Alexander, 'Users' experiences of interpreters: the critical role of trust' (2005) 7 *Interpreting* 77-95.

<sup>751</sup> Ibid.

of view. In the context of an asylum appeal, the inability to speak the host nation language places significant additional psychological and structural burdens on the asylum seeker. As discussed in the previous chapter, testimony is highly important to prove a well-founded fear, and this testimony is often the only evidence an asylum seeker has. Since the asylum seeker's testimony is often heard through interpreters, interpreting plays a pivotal role in the court's endeavour to obtain applicants' testimony in its entirety.<sup>752</sup>

In order to analyse the role of interpreters and their effectiveness, it may be useful to first consider why they are a facet of the asylum system. The interpreter may assume many roles, including listener, speaker, gatekeeper, interviewer, social agent, and conversationalist.<sup>753</sup> The primary role is to facilitate communication between the asylum seeker and the judge and, where necessary, the HOPO and legal representative. Although interpreters are often encouraged to *translate* word for word what the asylum seeker says, rather than to *interpret* what they mean, Colin and Morris indicate that this 'word for word or literal translation often produces distorted communication'.<sup>754</sup> The meaning of certain words will alter based on context and other words used, and may differ between cultures. The authors suggest that an understanding of context is required for accurate translation. In practice then, the role goes beyond simple translation. This has been discussed at length by Jiménez-Ivars and León-Pinilla as they explore the perception of interpreters and asylum seekers of the service they provide and receive.<sup>755</sup> They argue that interpreters act on a continuum, from neutral to active. Some translate the given words and relay them back to the decision maker, others transcend cultural boundaries and convey the underlying meaning of the words, whilst establishing a trusting and respectful relationship with the asylum seeker.<sup>756</sup> Trust is thus an important factor in the relationship between interpreter and asylum seeker; they are often regarded as advocates, as they share the same language. However, the opposite can be true in asylum appeals where the

---

<sup>752</sup> Jieun Lee, 'A Pressing Need for the Reform of Interpreting Service in Asylum Settings: A Case Study of Asylum Appeal Hearings in South Korea' (2014) 27 *Journal of Refugee Studies* 62.

<sup>753</sup> Deborah Hwa-Froelich and Carol Westby, 'Considerations When Working with Interpreters' (2003) 24(2) *Communication Disorders Quarterly* 78-85.

<sup>754</sup> Joan Colin and Ruth Morris, *Interpreters and the Legal Process* (Waterside Press 1996).

<sup>755</sup> Amparo Jiménez-Ivars and Ruth León-Pinilla, 'Interpreting in refugee contexts. A descriptive and qualitative study' (2018) 60 *Language & Communication* 28-43.

<sup>756</sup> *Ibid.*

interpreter speaks the same language, but another dialect for example. This is discussed below in section 6.4.

Asylum seekers rely on interpreters to be professional and competent, and to have some level of expertise. Effective interpretation then, is more than the simple translation of words. Effective interpreters can alleviate some of the discomforts faced by asylum seekers, such as not being able to communicate effectively, and not understanding the process. Effective interpretation is necessary to enhance procedural fairness and agency, and to allow asylum seekers a fair hearing by redressing the power imbalances in the appeal setting. However, the agency of asylum seekers can also be constrained by interpreters.

#### **6.4 Limits of interpretation: Limits of the interpreter in the appeal.**

##### **6.4.1 Cultural and dialect difference.**

The previous chapter highlights the importance of the appellant's evidence and the impression of truthfulness as the decision is based on evidence provided by the appellant. Whilst effective interpreters can heighten procedural fairness and agency, ineffective interpreters can have the opposite effect. If they speak slightly different dialects, the interpreter may not have an adequate grasp of the specialist language and so things could get lost in translation. They may be disinterested,<sup>757</sup> fail to pass on key points,<sup>758</sup> or be unable to due to the pace the hearing moves at.<sup>759</sup> Sometimes there is no equivalent word in English, or the interpreter cannot put forward the right meaning, leading to inconsistencies which undermine the perception of veracity. In these cases, it may look from the answers given that the asylum seeker is confused or untruthful.<sup>760</sup> Differing cultures and dialects between appellant and interpreter may have an adverse effect on the appellant's credibility, especially in situations where there is little trust between the parties.<sup>761</sup> Several factors can contribute to the lack of trust in this important relationship. Asylum seekers only meet the interpreter once, often in the courtroom. There is no opportunity to build a relationship of trust prior to

---

<sup>757</sup> Jiménez-Ivars and León-Pinilla (n 756).

<sup>758</sup> Pöllabauer (n 603).

<sup>759</sup> Edwards (n 329).

<sup>760</sup> Gill *et al*, 'Linguistic incomprehension in British asylum appeal hearings' (n 733).

<sup>761</sup> Matthew Hodes, 'Psychologically Distressed Refugee Children in the United Kingdom' (2000) 5(2) *Child Psychology and Psychiatry Review* 57-68.

the hearing. The asylum seeker may feel as though the interpreter is on the side of the Home Office, and they may not be trusted if they belong to a different ethnic or religious group, or if they are of a different political persuasion.<sup>762</sup> The appellant may even believe due to their name, or something they say during the hearing that the interpreter has political or religious views similar to those from whom the appellant is fleeing. In this case, appellants may find it difficult to explain their situation to the interpreter. If the interpreter does not understand the culture of the asylum seeker's country of origin, there may be serious misunderstandings between the two. In these cases, the presence of an interpreter may become a barrier to the judge hearing the best evidence. There may be stigmatisation or confidentiality issues, which can adversely affect fairness and agency where the appellant may not be able to communicate their story effectively.

#### **6.4.2 Judicial guidance.**

Another limitation of interpretation is related to the guidance under which they operate. In the UK, various codes and judicial guidance emphasise the need for asylum seekers to speak in short, clear sentences, and to pause frequently, in order for full and accurate translation.<sup>763</sup> This is important, as it allows everything the asylum seeker says to be communicated. However, according to Robert Gibb and Anthony Good, it can discourage asylum seekers from talking, and can cause them to lose track of what they were saying before the pause.<sup>764</sup> It is a very different way of retelling information than what most people are used to, and can affect what is being said. Judicial College guidance also makes provisions for the presiding judge to check that the appellant and interpreter understand each other and to explain how they should speak to one another, but this is not always adhered to.<sup>765</sup>

#### **6.4.3 Euphemisms and omissions.**

Research also suggests that euphemisms and omissions can hinder procedural fairness. Helen Baillot found that interpreters tried to avoid using the words such

---

<sup>762</sup> Jiménez-Ivars and León-Pinilla (n 756).

<sup>763</sup> See for example Judicial College (n 583).

<sup>764</sup> Robert Gibb and Anthony Good, 'Interpretation, translation and intercultural communication in refugee status determination procedures in the UK and France' (2014) 14(3) *Language and Intercultural Communication* 385-399.

<sup>765</sup> Gill *et al*, 'Linguistic incomprehension in British asylum appeal hearings' (n 733). Judicial College (n 583).



as 'rape' during translation, because it was aggressive, even where the appellant had used it. Instead, they interpreted it as "they destroyed my respect" or "my honour is tainted".<sup>766</sup> In addition, interpreters may sometimes omit elements, or change the tenor or sarcasm; showing the considerable power they have in hearings. These euphemisms and omissions undermine the agency of asylum seekers, as the aggression that they may have experienced is belittled. This may lead to an adverse finding on credibility, or a refusal of asylum where the judge does not understand the magnitude of the story.

Asylum seekers also face difficulties in the appeal as communication is not direct, and interpreters, though necessary, may hinder communication in some cases.<sup>767</sup> This hampers the ability of a judge to determine credibility.<sup>768</sup> These findings highlight how communication both provides and constrains agency which in turn impacts on procedural fairness in the appeal hearing.

## **6.5 Methods.**

As discussed in Chapter 4, courtroom observations and semi-structured interviews were chosen as they allowed for engagement with participants, and for the researcher to experience the situation first-hand.<sup>769</sup> As two of the key themes were communication and the role of the interpreter, where possible these interviews were limited to asylum seekers who had a good command of English. Although this choice limited and served to bias the sample, it did offer an opportunity to discuss the process in the absence of individuals who may be viewed as an authority figure and as part of the institution.<sup>770</sup> Questions were phrased as simply as possible to facilitate detailed, accurate responses. All 21 participants talked about the role of interpreters, prompted by the questions;

### **What is your experience of interpreters in the appeal hearing?**

#### **Are they usually effective?**

---

<sup>766</sup> Baillot (n 62).

<sup>767</sup> *B v Secretary of State for the Home Department (Democratic Republic of Congo)* [2003] UKIAT00012, para. 7.

<sup>768</sup> Fatima Khan, 'Interpreting for Refugees: "Where practicable and necessary only?"' (2011) 28(2) *Refuge, Canada's Journal on Refugees*.

<sup>769</sup> Jacqueline Watts, 'Ethical and Practical Challenges of Participant Observation in Sensitive Health Research' (2011) 14 *International Journal of Social Research Methodology* 301–312.

<sup>770</sup> Pöllabauer (n 603).

**Do they constrain or enable the asylum seekers' agency?**

**Did they help you to tell your story?**

The next section analyses both the observation and interview data.

## **6.6 Primary Analysis.**

### **6.6.1 The importance of interpreters: Absence in observations.**

As discussed in section 6.1, language can be a structural constraint on asylum seekers as communication can be hindered when parties do not speak the same language. Most of the appellants observed had a limited knowledge of the English language, and all but eight out of 90 had access to an interpreter. Only three of these cases proceeded; the judge granted an adjournment in the other five cases, to allow for an interpreter. In three of the cases, the lack of interpreter was caused by an error; an interpreter was present, but they spoke the wrong language. The judge in each of these cases cited procedural fairness as their reason for granting an adjournment, thus recognising the importance of procedural fairness in appeal hearings and the role of interpretation in this context.

In four out of the five adjourned cases, the adjournment was granted within 15 minutes, indicating that access to an interpreter is highly important to the judges in their understanding of procedural fairness. However, the case in observation 38 went on for one hour and forty-five minutes before it was adjourned, despite numerous pleas from the appellant and legal representative. The HOPO opposed the adjournment request, arguing that the appellant could understand English, and insisted on cross-examination. The judge allowed the questioning; the appellant seemed to become increasingly anxious, stuttering and wringing his hands, and the HOPO increasingly frustrated, sighing and raising his voice. In this case, the appellant could not give good evidence in English, the HOPO found it difficult to phrase questions in a way that could be understood, and the representative frequently interrupted to clarify what the appellant meant. Eventually the judge called a halt to the proceedings, and instructed the clerk to find another court date when an appropriate interpreter could attend. The appellant let out a heavy sigh and asked the legal representative, 'do I really have to go through all of this again?' This observation further emphasised the importance of an interpreter in the appeal hearing as the judge

held that the appellant did not get a chance to adequately answer any of the HOPO's questions and the case was eventually adjourned. The asylum seekers' ability to communicate effectively and assert agency was undermined and as a result, this case did not meet the requirements of procedural fairness set out in Chapter 2, and recognised by the judges in the cases adjourned at the beginning of the hearings.

The average duration of the cases I observed was two hours. The three cases which proceeded without an interpreter lasted 75 (observation 6), 50 (observation 32) and 100 minutes (observation 38) respectively. With the exception of observation 38, a case with complicated details, medical evidence, and many points of contention, cases without an interpreter were considerably shorter than the average case. Although the judges did spend time explaining procedure to these appellants, it was no longer than they spent on cases with an interpreter present (<5 minutes). Although several questions had to be repeated and rephrased in these cases, and misinterpretations were frequent, the same is true for many of the cases involving an interpreter (see section 6.10.1). When an interpreter is present, everything has to be translated from English to the appellant's chosen language, and back to English to address the judge, HOPO and legal representative. This can extend the length of proceedings.<sup>771</sup> Overall, however, the observation data highlighted the importance of interpreters, as judges were more likely to adjourn a case without an interpreter than hear it, and this was also the most common reason for a judge granting an adjournment (five out of 11 adjournments were granted due to the absence of an interpreter).

If an interpreter was present during observations, all of the questions and answers had to go through them even when, as in several of the cases, the appellant tried to answer in English. When this happened, either the judge, HOPO, or legal representative would interrupt the asylum seeker; asking them to speak in only one language. This was particularly prominent in one case where the asylum seeker spoke very good English to her representative both in the waiting room and in the courtroom. At one point, the judge interrupted and asked which language she would prefer to speak in. Although this enabled the asylum seeker, as she was offered the chance to

---

<sup>771</sup> Edwards (n 329).

communicate in whichever language would make her feel most comfortable, her agency was also constrained by this language barrier. She chose to speak in her native tongue as she was not confident enough in her ability to speak only English; she had told her representative that she was terrified of misinterpreting something. Indeed, this appellant may also have struggled to understand the specific terminology or legal jargon used, or any complex questions posed by the judge or HOPO without the help of the interpreter.<sup>772</sup> Once she made this selection, she could no longer speak directly, rather she had to wait for the interpreter and could not interject in English. It was difficult for her to remain quiet whilst the interpreter translated something she already understood. This vignette highlights the structural constraints of language facing asylum seekers and emphasises the need for effective interpretation so that they can successfully communicate their story and establish agency.

### **6.7 Behaviour of other parties.**

During the appeal, the asylum seeker trusts that the interpreter will put their words forward, and that the legal representative will argue diligently in their favour.<sup>773</sup> The majority of asylum seekers will not have been in the setting of an asylum appeal before, and may have only used an interpreter during their interview, or not at all. The Judicial College accepts that language and cultural barriers, coupled with poor or inaccurate information about the process, have been identified as critical barriers to people using the tribunal system.<sup>774</sup> It would make sense then, for the presiding judge to check that the appellant and interpreter understand each other and to explain how they should speak to one another. This is set out in Judicial College guidance, which states, '*Where applicable, ensure the interpreter speaks the correct dialect of the language in question and that the witness and interpreter can communicate properly*'.<sup>775</sup> During observations, where an interpreter was present, all of the judges checked whether the interpreter and appellant could understand each other. Most simply asked which language they spoke, and whether they could understand each other, but one judge would ask a question, such as 'what football team do you support?' or 'what mode of transport did you use to get here today?'. Whilst this initially

---

<sup>772</sup> Ibid.

<sup>773</sup> Burridge and Gill, 'Conveyor-Belt Justice' (n 238).

<sup>774</sup> Judicial College (n 583).

<sup>775</sup> Ibid pg 231 para 119.

confused both the appellant and the interpreter, the judge would go on to explain that the purpose of the question was to check whether they understood each other beyond the basics of 'can you understand each other?' which usually only elicited a yes/no response or a nod/shake of the head.

Despite all of the observed judges acknowledging the presence of the interpreter, and checking whether the parties understood each other, only one judge instructed the appellant on how to use their interpreter at the beginning of the hearing, as per Judicial College guidance.<sup>776</sup> Several judges had to stop the asylum seeker, and ask them to speak in shorter bursts, to enable accurate interpretations. When this happened, the appellants would often apologise, despite the fact that they had not been told to behave differently.

*'The judge interrupts the asylum seeker. He explains "this is your evidence; you want it to be to your advantage. I'm writing everything down. The best way to make it to your advantage is to listen to the question given, then answer in small chunks so that we can all understand."* (Observation 37)

The judge in Observation 37 shares an important piece of information, one which could have benefitted the asylum seeker. However, it would have been more useful if they had explained this from the outset, as the judge may, by their own insinuation, have missed important parts of the appellant's answer prior to this. Several judges interrupted appellants when they had 'spoken for too long'. They did not, however, explain to the appellants that they should speak in small segments at the start of the hearing. Failing to explain how to use the interpreter can have an adverse effect on procedural fairness and may hinder the ability of the asylum seeker to assert agency and communicate their best evidence. This finding is troubling as it supports those of Gill *et al*/who suggest that when some judges follow the procedures outlined in Judicial College Guidelines<sup>777</sup> and others do not, procedural inconsistencies emerge.<sup>778</sup> These inconsistencies can undermine faith in the procedural fairness of the appeal, and a

---

<sup>776</sup> Judicial College (n 583).

<sup>777</sup> Ibid.

<sup>778</sup> Gill *et al*, 'Inconsistency in asylum appeal adjudication' (n 39) 2.

reduced perception of fairness could result in further appeals, as appellants seek to challenge what feels like an unjust decision.<sup>779</sup>

### **6.7.1 Interpreters and time.**

Another way in which other parties influence the role of the interpreter is through whether or not they give them time to engage with the appellant. Observations showed 22 cases where interpreters were given time to engage with the appellant; judges, HOPO's and legal representatives all paused to allow time for interpretation, before continuing with their question or comment. In contrast to those interpreters who were not allowed adequate time, this appeared to facilitate space for the claim and enhance procedural fairness, as the interpreter had an opportunity to translate what was being said, without having to rush to make notes, or ask the speaking party to repeat themselves. These pauses reduced the pressure placed on appellants by breaking up the intensity of some of the questioning and providing a buffer between the HOPO and the judge, and the appellant.<sup>780</sup> According to Gill *et al*, pauses can also help to diffuse highly charged situations, deflecting the emotion and accusation of the cross-examination.<sup>781</sup> However, one problem which occurred when parties paused to allow the interpreter to translate part of a question, was that appellants felt obliged to answer when the interpreter finished. I observed eight asylum seekers being reprimanded by agitated HOPO's when this happened;

*'That wasn't the question. Wait for me to finish before you answer.'* (Observation 53)

Breaking down a narrative into small segments and waiting until each element is interpreted before continuing can also work against the appellants by making them lose track of what they are saying.<sup>782</sup> The pauses were unnatural, and some appellants found it difficult to remember the first part of the question by the time they had been asked the second part. When the interpreter had finished asking a question, several asylum seekers had to ask them to repeat it. Whilst it was encouraging that the interpreters in these cases were given adequate time to engage, difficulties still arose.

---

<sup>779</sup> Ibid 3.

<sup>780</sup> Gill *et al*, 'Linguistic incomprehension in British asylum appeal hearings' (n 733).

<sup>781</sup> Ibid.

<sup>782</sup> Gibb and Good (n 765).

It may be the case that, instead of pausing for interpreters to translate, questions should be made simpler, so that the interpreter can put them to the asylum seeker in their entirety.<sup>783</sup> Observations also showed 18 instances where interpreters were not given adequate time to engage with the appellant. When this happened, some interpreters failed to interpret anything, or spoke for a short period of time.

*'The interpreter is not given adequate time to engage and there is no simultaneous interpretation during the witness testimony nor during submissions. He attempts to talk to the appellant before the judge enters but the representative stops him, 'please don't talk until the judge gets here.'* (Observation 41)

In these cases, the interpreter failed to interpret at certain points. During the HOPO's submissions, there was no pause; the interpreters did not speak, and several asylum seekers looked around absent-mindedly. In these cases, the appellants were not active participants. As discussed in the previous section, fragmentation of the narrative introduces limitations.<sup>784</sup> Long narratives, whether paused or not, work in the favour of the Home Office because people do not speak like that naturally, and they can lose track; both interpreters and asylum seekers will say less than they mean to say simply because they have to break it down.<sup>785</sup> It may be impossible for the interpreter to remember everything when the other parties speak for longer periods of time. This was exemplified during observations when HOPOs asked long questions without pausing, but the interpreters only translated a few words. The asylum seekers in these cases often failed to answer the question.

Procedural fairness was undermined in these cases because the appellants were not hearing the whole case. Contextual details may have been missed, in addition to important parts of the question, which could result in a 'wrong' answer from the appellant. Other, more effective interpreters spoke over the HOPO, judge or legal representative, to remind them that they needed to translate. This usually resulted in the party pausing, sometimes apologising, and allowing the interpreter to speak before continuing.

---

<sup>783</sup> This is advised in the Judicial College Equal Treatment Benchbook (n 583).

<sup>784</sup> Gibb and Good (n 765).

<sup>785</sup> Ibid.

*'The interpreter is not given time to engage but he interrupts the judge to ask for time. He asks the HOPO and judge to repeat questions several times.'* (Observation 26)

These interpreters enhanced procedural fairness and gave asylum seekers a greater chance of a fair hearing, as they could better understand everything that was going on.<sup>786</sup> Sometimes however, the HOPO appeared irritated when this happened, shown through exasperated sighs, eye rolls and folded arms, and the interpreter would not be allowed to continue. This did nothing to further the case, as the interpreter could not adequately translate what was being said. They complained about missing certain points, and would have to ask the HOPO to repeat or rephrase what was being said. In these cases, agency was undermined as asylum seekers were unable to communicate effectively and participate in their hearing.

*'The interpreter tries to interpret before she (the HOPO) has finished speaking but she stops him sharply. 'Wait for me to finish the question if you don't mind'. The question is long and convoluted, and the interpreter has to ask her to repeat it or break it down.'* (Observation 30)

As shown above, a potential solution would be for all parties to speak in short sentences, as per judicial college guidance, and pause for the interpreter where this is not feasible to allow for accurate translation.<sup>787</sup> At times, it was the appellants rather than the HOPOs, legal representatives or judges who failed to pause, and the interpreters used the same techniques as it seemed as though nine interpreters may not have translated the whole answer.

*'The appellant gives long answers, yet the interpreter's translation is short.'* (Observation 7)

---

<sup>786</sup> Gill *et al*, 'Linguistic incomprehension in British asylum appeal hearings' (n 733).

<sup>787</sup>Judicial College (n 583).



Six interpreters stopped the appellant, translated, and then asked them to continue. Whilst this may have been necessary to ensure nothing was missed, several asylum seekers appeared to lose their train of thought, which may have resulted in their story becoming less convincing.

*'The interpreter interrupts the appellant several times as he has spoken for too long, although he was never made aware of the necessity to speak in small chunks. When this interruption happens, the appellant appears to lose his train of thought, and the story becomes less fluid.'* (Observation 26)

In cases such as this one, interpreters would tell the appellant to stop talking when they veered off-topic or spoke for too long. They would tell the judge that the appellant was not answering the question. Ordinarily, this role was performed by the judge, HOPO, or legal representative. As highlighted earlier in this section, there is a need for interpreters to speak in short, clear sentences, and to pause frequently, in order for everything the asylum seeker says to be communicated. It is a very different way of retelling information than what most people are used to, and can affect what is being said. This problem was reiterated by an asylum seeker during an interview. They explained that;

*'They [the interpreter] keep stopping you, then translate a little bit. I forget where I was, what I was saying. It gets confused and stops making sense, even to me. It is easier to say the whole story, but then the interpreter forgets things.'* (Asylum seeker 3)

Two other asylum seekers discussed losing their train of thought, and two legal representatives complained of answers sounding disjointed when appellants had to pause, with responses sometimes failing to answer the question asked. With regards to the behaviour of other parties, and interpreters being given adequate time to engage, this interview data confirms the observation data. Language and interpretation here both enhanced and hindered effective communication as interpreters allowed asylum seekers to assert agency and put their own words before the judge, but long narratives and pauses on part of all of the parties made communication disjointed and unnatural. This section has shown that interpreters are not always able to perform their role to the best of their ability as they are hindered by

other parties. The next section examines the importance of effective interpretation from the perspectives of legal representatives and asylum seekers.

### **6.7.2 Importance of interpretation in interview data.**

The interview data corroborated the conclusion drawn from the observation data; interpreters play a central role in the asylum appeal hearing. All of the participants interviewed agreed that communication and interpretation were important facets of procedural fairness. When asked to define 'fairness' in the first question, three legal representatives out of 12 discussed access to an interpreter as part of their definitions.

*'I think it's essential that they have umm (1) an interpreter who certainly has a good grasp of the language they are speaking, and a good grasp of the English language so that they can adequately translate and put across what the asylum seeker's case is to the tribunal.'* (Representative 10)

These representatives emphasised the importance of adequate interpretation as a means to ensure fairness; to allow asylum seekers to effectively communicate their story to the judge, and establish the facts needed to make a decision on their case. All 21 participants talked about interpreters to varying degrees, although many, especially the legal representatives, treated them as an afterthought, as though it was obvious that they were necessary. This is comparable to the literature discussed in section 6.3; it is agreed that interpreters are important, but parties in the asylum system often do not go beyond this, to identify why they are important, and how they influence the case.<sup>788</sup> None of the legal representatives interviewed spoke of their own accord about the adequacy of interpreters they have worked with, and most spent time considering their response to the questions 'in your experience, are interpreters usually effective?' and 'do they constrain or enable asylum seekers?'. The answers varied greatly, as will be discussed in section 6.9. Several asylum seekers talked about problems with the interpreters used before being asked, showing a discrepancy between the experiences of legal professionals and asylum-seeking appellants. The previous sections have discussed the importance of interpretation in asylum appeals. The next section provides evidence of *effective* interpretation, focussing primarily on

---

<sup>788</sup> Edwards (n 329).

observation data, supported by interviews with asylum seekers and legal representatives.

### **6.8 Are interpreters effective?**

The previous sections indicate that access to justice may be constrained for asylum seekers even if they are provided with the similar opportunities as the host community (access to a court/hearing) due to language barriers. Effective interpreters can alleviate some of the constraints faced by asylum seekers, and they rely on that interpreter to be professional and competent, and to have some level of expertise. Content analysis of the observations found 46 examples of effective interpretation, and 55 examples of ineffective interpretation. Effective interpretation is defined for this thesis as any tactics used which facilitate space for the claim, allow the asylum seeker to communicate their story, or enable the asylum seeker to assert agency to enhance procedural fairness. Ineffective representation for this thesis is defined as anything which hinders communication between parties, or constrains the agency of the asylum seeker. Each hearing could include multiple examples of both effective and ineffective interpretation. Consistent with the research outlined above in sections 6.3 and 6.4, language played a largely constraining role in the observed appeals, and throughout observations, it became clear that the effectiveness of interpretation varied hugely between different individual interpreters. This influenced the decision to overtly ask interview participants about their views on the effectiveness of interpretation in asylum appeal hearings.<sup>789</sup> I wanted to find out whether asylum seekers and legal representatives had different perceptions about the effectiveness of interpreters, and if these were different from what I had observed.

#### **6.8.1 What makes an effective interpreter?**

Observations highlighted 46 instances of effective interpretation, and five of the legal representatives interviewed were happy with the general effectiveness of the interpreters they had engaged with. As noted in section 6.3, effective interpretation included whispering throughout submissions, keeping the appellant informed and as up to date as possible, and interrupting the legal representative or HOPO if they had

---

<sup>789</sup> 'What is your opinion on interpreters in asylum appeals? Are they effective?'

forgotten to pause. Others told appellants to stand when the judge comes in and changed 'yes' to 'that's correct ma'am' to show respect.<sup>790</sup>

One of the legal representatives explained that, for them, effectiveness meant professionalism, a sound knowledge of language, and not overstepping the boundaries of their duty. The need for the presence of someone from the same community was also highlighted;

*'Most are very good, pretty professional, very linguistically good, and there often enough to understand the procedure. There will always be that rapport and bond if they are from the same community. I think it's a very strict environment and interpreters are usually well versed and know how to behave. They rarely overstep the mark and act like their duty is to the court, which it is, because that is what they're employed to do.'* (Representative 4)

Whilst this representative pointed out that there are flaws, both with the system and with individual interpreters, they thought that interpreters were generally 'pretty professional'. For another representative, the role of the interpreter is clear-cut. The question of whether the interpreter is effective is a simple one, and one that they did not feel the need to expand on.

*'Their role is, and should be rather simple, in saying what the client is saying. I think they play an important role and I think they are quite effective.'* (Representative 6)

These representatives all seemed surprised to be asked about the effectiveness of interpreters, and paused for longer when answering the question in comparison to questions on other topics. This supports the points made in section 6.8, interpreters are rarely consciously thought about by other parties, but their importance is highlighted when they are absent from proceedings. When prompted to think about interpreters, these representatives realised how difficult it would be to proceed with the case without them, and had mostly positive experiences of working with them. Whilst two representatives commented on the linguistic skills of interpreters, neither

---

<sup>790</sup> Gill *et al*, 'Linguistic incomprehension in British asylum appeal hearings' (n 733).

expanded on whether they thought that translation should be literal, or whether interpreters should convey meaning in certain scenarios. This is unsurprising given that the majority of representatives interviewed had no working knowledge of the languages spoken by clients, and so may not have recognised a situation where the interpreter expanded the appellants answer to convey meaning. During observations, there were some obvious examples of interpreters using their linguistic skills to convey meaning, and help further the case.

### **6.8.2 Beyond literal translation, conveying meaning.**

With regards to the asylum interview and appeal, decision-makers prefer interpreters to remain neutral; they should not add information. However, Colin and Morris point out that ‘word-for-word or literal translation often produces distorted communication’,<sup>791</sup> due partly to the fact that the meaning of words depend on how they are combined with other words within a given utterance. An understanding of context is required for accurate translation and interpretation to be possible.<sup>792</sup>

*‘The interpreter whispers throughout, and the appellant seems to understand her, and she considers cultural differences in her interpretation, translating the meaning behind the words used. ‘In Farsi, we say bible and CD, but that doesn’t necessarily mean singular items’. (Observation 12)*

This interpreter helped clear up a perceived ‘inconsistency’ relied upon by the HOPO. Whilst the HOPO was correct that the appellant may not be persecuted for having one personal bible in his bedroom, he may have been persecuted for having enough to proselytise, as the interpreter confirmed. Although interpreters are often encouraged to *translate* word for word what the asylum seeker says, rather than to *interpret* what they mean, the meaning of certain words will alter based on context and other words used, and may differ between cultures. In practice then, effective interpretation goes beyond simple word-for-word translation. This is supported by Mano Candappa *et al*, who raise the fact that speakers often use ‘referential language’ in their asylum accounts, which can be problematic since contextual knowledge is needed to

---

<sup>791</sup> Colin and Morris (n 755).

<sup>792</sup> Ibid 17.

disambiguate them.<sup>793</sup> An example of this is given by Good; the meaning of kinship terms can shift according to context and languages.<sup>794</sup> Good explains that the Tamil terms ‘annan’ (older brother, or senior cousin) and ‘tampi’ (younger brother, or junior cousin), differentiate by age rather than exact family relationship, and can be inconsistently translated into English if this is not clear from the context, or explicitly clarified.<sup>795</sup> It is difficult for interpreters in these situations to decide whether to follow guidelines and remain neutral, or enter the arena to clarify something they may be uniquely qualified to detect. In addition to assisting appellants in conveying meaning during the hearing, effective interpreters helped to make them feel more comfortable, both before and during the appeal hearing, which may have contributed to the appellants giving better evidence.

### **6.8.3 Making the appellant feel more comfortable.**

Some interpreters enabled the asylum seeker before the case began; helping them to relax, and educating them about the process. I observed one interpreter explaining to the appellant that they must stand when the judge enters. Others added ‘sir/ma’am’ to an obvious ‘yes’ when speaking to a judge, to show respect. There is evidence to suggest that the manner of speaking affects the credibility of persons involved in legal procedures.<sup>796</sup> As credibility is generally one of the most important factors affecting asylum appeals, helping the appellant to speak in a way the judge could understand, and showing respect to the other parties may further the case, enhance procedural fairness, and allow the appellant to put their best evidence forward. Other ‘minor’ support observed included pouring a glass of water, and holding the appellant’s baby during a break. These behaviours may have served to make the appellant feel more comfortable; their shoulders visibly relaxed and they appeared less nervous when answering questions. Effective interpreters also helped the appellants to feel more comfortable by building rapport and maintaining eye contact.

---

<sup>793</sup> Mano Candappa, Miriam Ahmad, Ben Balata, Rayenne Dekhinet and Dogan Gocman, *A Small Scale Qualitative Study on the School Education Experience of Asylum - Seeking and Refugee Children in Scotland* (Scottish Government *Insight* 2007).

<sup>794</sup> Good, *Anthropology and Expertise in the Asylum Courts* (n 344) 180.

<sup>795</sup> *Ibid.*

<sup>796</sup> Brenda Danet ‘Language in the Courtroom’ in Howard Giles, Peter Robinson and Phillip Smith (eds) *Language, Social Psychological Perspectives* (Pergamon Press 1979) 367-376.

*'He mostly keeps eye contact with and faces the interpreter, but he looks at the other parties when they address him.'* (Observation 39)

That the asylum seeker maintained eye contact with the interpreter when answering questions and rarely looked at the judge or HOPO when talking could indicate that they felt more comfortable with the interpreter than with the other parties, and had built up a relationship, or alternatively that they saw the interpreter as their primary informer, in a reflection of the pattern of interpreting.<sup>797</sup> Whilst this may have given the judge and HOPO less opportunity to send visual signals of active listening, which may have allowed them to build a more trusting relationship, it did serve to relax the appellant, which in turn allowed them to give good evidence and communicate effectively, furthering the case.

Interestingly, none of the asylum seekers interviewed thought that the interpreters they encountered were effective. Effectiveness was defined by one asylum seeker as 'telling the judge all of my story, moving from my language to theirs'. Some interview participants felt as though they had had experiences where the interpreter was effective, but also where they were ineffective, leading to a feeling that interpreters can be somewhat 'hit-and-miss' in the appeal hearing.

### **6.9 'Hit-and-miss' interpretation.**

Some legal representatives interviewed worried that, despite having experienced highly effective interpretation, standards often slipped to below adequate levels. This was also highlighted in observation data. Sometimes, a single interpreter both facilitated space for the claim, and hindered communication simultaneously. The same interpreter that translated meaning and emphasised the importance of culture in section 6.8.2, also misinterpreted frequently.

*She frequently mistranslates words and struggles to translate certain concepts; describing 'Holy Communion', as 'Spiritual something...I am not sure'. She takes off her scarf and fiddles with it, seeming unfocussed. She apologises several times for forgetting what the appellant said, even when he spoke in small chunks. She says, 'I*

---

<sup>797</sup> Trust is discussed in more depth in Chapter 5, section 5.5.

*can't remember what he said, but I think he's reading out this letter, so I'll just read it to you'. At another point, she says 'I lost concentration then, I'll have to ask him to repeat it'. (Observation 12)*

The problems associated with misinterpretations are discussed in more depth in section 6.10.1. This theme was further augmented by several representatives who spoke anecdotally about their experiences.

*'Well, I would say it's very hit and miss to be honest with you. Umm a lot of the appeals that I have appeared in the level of interpretation (.) goes from being very good on one side of the scale to being very patchy on the other side of the spectrum and you will get some interpreters who are very good at putting across the asylum seeker's umm story, and then you will get some others who (3) have almost a basic understanding of the language that the asylum seeker is speaking in and it makes it very difficult to properly get across the asylum seekers case to the tribunal umm through the interpreter simply because I don't think they understand the the words and phrases that are being used sometimes.'* (Representative 1)

These representatives felt that interpretation standards vary. Five talked of feeling helpless, as they could tell there was an 'issue' with the interpretation but could not do anything to help. They felt as though they knew that one party had failed to understand, but did not have the capacity to intervene. They also emphasised that effectiveness was very personal, and could vary hugely between interpreters. Representative 6 also draws attention to the effect a good or bad interpreter can have on the case in question, implying that they have experienced both.

*'If you have a good interpreter that acts as a go between between the asylum seeker and the court or tribunal then they certainly help. The flipside of that coin is where the interpreter has a limited understanding of what the asylum seeker is saying and if that comes across as very basic and very disjointed to the tribunal then certainly that's going to be a hindrance to that asylum seeker.'* (Representative 6)

For this representative, the effectiveness of interpretation and in some cases, rested on the competence of the individual interpreter. The representative worried that their



clients were not always receiving a fair hearing, able to communicate effectively or asserting agency due to a lack of skill on part of the interpreter. The representative recognises that language and interpreters can have a substantial effect on procedural fairness and the right to a fair hearing in asylum appeals. For some representatives, worries over the effectiveness of interpreters went beyond the idea of competence. One representative showed a sense of unease that some interpreters transcend boundaries to try to help appellants. They feared that this 'help', could more often be a hindrance, but recognised the good intentions.

*'Interpreters, they (1) sometimes they (1) they try their best. Sometimes they ask if they can say something at the end of the case and it's hard sometimes. You have to stress sometimes, that it's not your case. You may feel like you're a part of it that you know the client somewhat from your meeting, but you have to know it's not your case. Sometimes the judge will ask a question and the interpreter will answer, not because he's answering for the client, but in a way he is. He knows what he wants, what he's going to say, and it may have been something he said in an earlier question but the judge sometimes has to say, can you ask him. And it's not that they want to take the claim for themselves, but sometimes it's just difficult you know.'* (Representative 6)

This ties in with the point made in section 6.2 with regards to the role of the interpreter. In cases such as this, the interpreter goes beyond literal translation and beyond conveying meaning in entering the arena and answering for the appellant. This is in line with the findings of Gibb and Good, who suggest that the interposition of interpreters creates barriers to communication, irrespective of their competence.<sup>798</sup> In this case, the interpreter tried to further the case and contribute to a positive outcome for the asylum seeker but, in the eyes of the representative, actually hindered the case by putting words into the appellant's mouth.

Despite some positive examples of effective interpretation, there were far more instances of inadequate interpretation; both in observations and interview data. The next section details examples to highlight some of the issues that can occur when the interpreter is ineffective.

---

<sup>798</sup> Gibb and Good (n 765).

### **6.10 Ineffective interpretation.**

Evidence was uncovered in observations and interviews to suggest that ineffective or inadequate interpretation is widespread in asylum appeal hearings. Observations revealed 55 examples of inadequate interpretation, and when asked whether interpreters were generally effective, six legal representatives and seven asylum seekers interviewed indicated that they were not. Representative 5 gave anecdotal evidence to highlight the problems that can occur with regards to interpretation.

*'Interpreters, gosh, I have seen them make and break cases and it is very hard to prove that interpreters were wrong because the hearings are not taped as you would in magistrates or Crown Court. There is no dictation to it, you just have what the parties wrote down. So, if the interpreter interprets something, and all the parties write it down, and the appellant comes out and says that it isn't what he said, it is really hard! And lots of the appellants are so scared of the process, they just sit there like deer in the fog lamps, they don't know when it is appropriate for them to turn around and say 'that's not what I said' or they are too scared to put their hand up and say 'the interpreter didn't say the right thing' because they are scared that the judge will then say 'well why do you need an interpreter if you can tell me that it's not interpreted correctly?' and that derails the process as well.'* (Representative 5)

This quote highlights a number of issues with interpreting in asylum appeal hearings, including a lack of accountability. In many cases, the interpreter is the only person who can speak both English and the language of the appellant. As hearings are not tape recorded, nor is a written record kept, it is difficult for an appellant or legal representative to prove or in some cases even identify a mistake in the interpretation after the fact. The power imbalances present within asylum appeal hearings cannot be redressed, as asylum seekers are powerless to challenge mistakes due to a lack of knowledge and language skills. Another representative also commented on the ineffectiveness of one interpreter, because of the way she spoke her professed language.

*'There is one court interpreter, I think she interprets French, who is appalling. I'm not sure how someone who speaks French could understand her because she spoke French with an Essex accent; it was incomprehensible.'* (Representative 11)

Again, it may have been difficult in this case for the appellant to understand the interpreter, and vice versa. The interviewee was aware of the issue but in this case did not seek to mitigate the limitations. Effectiveness was questioned not only by legal representatives, but also by asylum seekers.

*'It was difficult because my English was umm very poor and there was a problem of communication because I couldn't hear the interpreter properly and I wasn't given proper time as well. There was a problem with communication because of the interpretation.'* (Asylum seeker 1)

Whilst this respondent could articulate the issues they faced during the appeal, they were unable to tell the judge or legal representative whilst the case was going ahead. This may have adversely affected procedural fairness, as the asylum seeker did not feel as though he received a fair hearing, or that he communicated his story to the judge. I observed cases similar to the one described by asylum seeker 1, where interpreters had trouble understanding the other parties, and it is unclear whether, even after several restatements, the interpreter understood.

*'The interpreter also asks the HOPO to clarify her questions several times. It is unclear whether this helps him translate more effectively, or whether he gives up trying to understand and interprets as best he can.'* (Observation 7)

In this case, it did not seem as though the interpreter interpreted everything; the HOPO asked long questions without pausing, and the interpreter did not speak for long. The asylum seeker then failed to answer the question. As shown above in section 6.4, findings of fact and decisions often rest on evidence given by people whose testimony is being interpreted (the asylum seeker). It can be argued then, that incompetent or inadequate interpreting can change the outcome of appeal hearings. In some instances, the mistranslation of even a single, significant word may be sufficient to

alter an outcome.<sup>799</sup> Often during submissions, the interpreter said nothing at all and during one case, the judge told the interpreter to 'just translate the gist of things'.

It is not good practice to tell the interpreter that an aside or something unimportant need not be translated.<sup>800</sup> This can make the appellant feel excluded and even distrustful, leading to a lack of rapport between the appellant and the other parties. This may also constrain the asylum seeker's agency, but the interpreters told the judges that, often, a lot of the story being told was irrelevant, and failed to answer the question. In some cases, it seemed as though the interpreter was acting *ultra vires* as they decided which details the judge heard. This is an example of ineffective interpreting hindering procedural fairness and impeding the asylum seeker's ability to communicate and assert agency as they are unable to tell the story that they want the judge to hear. This was reiterated in interviews; some representatives were unsure whether interpreters always translate everything they are supposed to.

*'I think sometimes interpreters don't interpret word for word, they summarise, and they regurgitate and then the essence is lost. I have seen that first-hand, because I speak a few languages, I've been to court sometimes and I've had to put my hand up and say 'that's not what he said, I think the interpreter needs to reinterpret this'. And I do get death glares from them, but if you are doing your job wrong, you are doing your job wrong. You cannot summarise, you cannot, if it is phrased as a question, you cannot frame it as an answer. If there is an emotion that punctuates that sentence, you need to convey that as well.'* (Representative 5)

Empirical studies suggest that interpreters can affect the way in which appellants, and their evidence are perceived, and their credibility assessed. According to Gibb and Good, differences in the register of speech employed by participants in the hearings constitute potential barriers to communication and pose further challenges for interpreters.<sup>801</sup> When evidence is channelled through an interpreter it is transformed

---

<sup>799</sup> Michael Barnett, 'Mind Your Language - Interpreters in Australian Immigration Proceedings' (2006) 10 *University of Western Sydney Law Review* 109.

<sup>800</sup> Judicial College (n 583).

<sup>801</sup> Gibb and Good (n 765).

by the interpreter's voice, mannerisms, linguistic competence, age, race and gender which may have consequences for the credibility of witnesses.<sup>802</sup> This is a real issue as asylum appeals are often decided on the basis of credibility.<sup>803</sup> It is difficult to argue that appellants receive a fair hearing when their emotions and details of their case are not put before the judge. Shuman and Bohmer highlight the difficult balance that appellants must often strike in conveying emotion in their accounts with the help of an interpreter.<sup>804</sup> They rely on the work of John Conley *et al* into the language used by rape victims when giving evidence in court,<sup>805</sup> to suggest that overly emotional asylum accounts will not be well received. However, it is not for the interpreter to decide how much emotion the appellant can exert. If an appellant is visibly distressed, but this does not come through in their answers, they may be disbelieved by the judge; the disjointedness may adversely affect perceived credibility. A related issue which can adversely affect communication, agency, and credibility stems from misinterpretations.

#### **6.10.1 Misinterpretations.**

*B v Secretary of State for the Home Department (Democratic Republic of Congo)*<sup>806</sup> recognised that interpreters, though necessary, can hinder communication in asylum appeal hearings, specifically through misinterpretations. These can often impede the asylum seekers' ability to put evidence forward. Misinterpretation is one of the most commonly cited and observed problems with interpretation, within both the data collected during this research project and in the literature discussed in section 6.3. Of the interview participants, four of the legal representatives had knowledge of at least one other language in addition to English. All four talked about misinterpretations that they had witnessed.

---

<sup>802</sup> Kathy Laster and Veronica Taylor, *Interpreters & the Legal System* (Federation Press 1994) 120; Susan Berk-Seligson, *The Bilingual Courtroom: Court Interpreters in the Judicial Process* (University of Chicago Press 1990) 163; Norman Segalowitz, 'Communicative Incompetence and Non Fluent Bilingualism' (1976) 8 *Canadian Journal of Behavioral Science* 122; Roger Shuy, 'Language and the Law' (1986) 7 *Annual Review of Applied Linguistics* 50.

<sup>803</sup> See Chapter 2, section 2.7.

<sup>804</sup> Carol Bohmer and Amy Shuman, *Political Asylum Deceptions: The Culture of Suspicion* (Palgrave 2018).

<sup>805</sup> John Conley, William O'Barr and Robin Conley Riner, *Just Words Law, Language and Power* (3<sup>rd</sup> edn University of Chicago Press 2019).

<sup>806</sup> *B v Secretary of State for the Home Department (Democratic Republic of Congo)* [2003] UKIAT00012, para. 7.

*'I mean first of all interpreting at tribunals isn't great. I only speak two other languages and they are not often the languages that asylum seekers speak but once I could speak their language. It was quite horrifying to see; I mean I had to stop the first hearing because the interpretation was so bad. Had it been Arabic or Farsi, I'd never have known. But that's why it's so important to go over and over the witness statement so you'll know 'that doesn't sound right. We've had all these appointments and you've never mentioned it before'. Umm so you can pick up the error in translation then. Otherwise you are relying on the asylum seeker's English being good enough to tell you they think they've said something wrong.'* (Representative 5)

This representative acknowledged the widespread problem of misinterpretation in the appeal setting and was worried about the effectiveness of interpreters in all cases after experiencing misinterpretations in the one case they did understand. Another representative shared the same concerns.

*'Yeah, I told the court immediately. The misinterpretations, they didn't just happen once. It was maybe 5 times during very important points of law and fact. What would have happened if I wasn't there? It affects the fairness. Lots of the cases don't have someone other than the interpreter who can speak both languages. Nobody would be there; you can imagine the consequences.'* (Representative 8)

Representative 8 asks a very important question. We cannot rely on the asylum seekers' knowledge of English to pick up on misinterpretations as it is often poor, and they are unlikely to be on the lookout for mistakes in such a stressful environment. In the majority of cases, it is only the interpreter who can speak both languages. There is no gatekeeper to ensure that there are no mistakes, mistakes which can change the outcome of an appeal. During interviews, six legal representatives and all of the asylum seekers interviewed talked about misinterpretations.

*'One of the biggest problems is interpretation and translation. I know that they, the interpreters, they say wrong things. I know because I have heard them. He needs a chance to say his story. Properly. With the right words. The words that he wants to say.'* (Representative 10)

*\*Was the interpreter effective?\* ‘Uhh... I’m not sure. It is hard for me to say. He tried to help. Sometimes I’m not sure if he was saying it right to the judge, you know? Because then they would say no. And I’d have to answer again, 2, 3 times, but it is the same question. I was confused, I thought I was answering right.’ (Asylum seeker 3)*

These quotes show two very different reactions to a similar situation. The representative was angry that these misinterpretations occurred. They talk about standing up and telling the judge that there has been a mistake. This shows a level of power and knowledge that the representative believes they have, which is not possessed by the asylum seeker, as discussed in section 6.1.1. As with the previous examples, this is contingent on the representative recognising a misinterpretation when it occurs, which may be impossible. There is indignance that misinterpretations are allowed to happen, and an awareness that they can hinder agency and communication. The asylum seeker, who has arguably suffered more than the representative due to misinterpretation, shows no anger at all. The dominant emotions in this response were confusion and fear. The appellant wanted to believe that the interpreter was on their side, and that they tried to help, but they worried that things had been mistranslated. It seems unlikely that this asylum seeker was able to communicate their best evidence, as they felt as though the answers they gave were not good enough, nor were they ones which the judge and HOPO wanted to hear. In this case, the appellant did not know enough English to be sure of any mistakes, and so was reluctant to raise a complaint during the hearing, again highlighting the power disparities due to unequal knowledge in asylum appeal hearings. This is a stark example of the appellant’s agency being constrained, and procedural fairness being undermined, as they were not able to effectively communicate their story to the judge. Another asylum seeker showed the influence a simple misinterpretation can have on a case, especially in cases where credibility is an issue.

*‘I told them that I was a mechanic but there was uhh a misunderstanding uhh he interpreted it as a welder? A welder, yeah? I don’t do welding; I didn’t know what it was! They was asking technical questions and I didn’t know!’ (Asylum seeker 1)*

In this case, the HOPO detected a perceived discrepancy and spent a long time questioning the appellant on their job during cross-examination. When the appellant

could not answer these technical questions, the HOPO deduced that they were a liar, and that their claim for asylum should not be believed. As with the previous examples, the appellant could not speak sufficient English to recognise the different word and it was only after the appeal hearing that they realised the mistake.

Interpreters will often be faced with the difficulty of having to accurately convey a meaning of a word or phrase where there is no precise or even similar equivalent to an English word or phrase in the other language. According to Michael Barnett, literal word for word translations will rarely render accurate translations and often it will produce 'nonsensical utterances'.<sup>807</sup> This linguistic complexity indicates that accuracy is not synonymous with literalism. As discussed in section 6.2, there are shared cultural assumptions in every language and so interpreters do not simply translate words; rather they translate concepts and ideas from one cultural context to the next.<sup>808</sup> However, this does not detract from the issues that misinterpretations can cause for the appellant. Evidence from observations corroborate the interview data presented in this section, showing that these misinterpretations happen frequently in real asylum appeal hearings. Sometimes the interpreter themselves picked up on the error, other times one of the other parties noticed. In some cases, it was not until one of the parties had to rephrase their statement or question so many times that the judge had to halt proceedings.

*'The interpreter struggles to phrase questions in a way that the asylum seeker understands. There seems to be interpretation problems as the asylum seeker fails to answer the question despite seven attempts. On the eighth attempt, the representative gets the information he needs and looks relieved.'* (Observation 14)

In this case, it appeared that the appellant and interpreter did not understand one another completely, despite assuring the judge at the outset that they could. In another case, a friend who had come to support the appellant picked up on some serious misinterpretations which may have been detrimental to the case. The judge decided to adjourn this hearing after the friend caught the attention of the legal representatives

---

<sup>807</sup> Barnett (n 800).

<sup>808</sup> Ibid.



several times to point out the errors. Without this friend, procedural fairness would have been undermined, as the appellant was unable to communicate, and the hearing could not have been considered fair.

Both UKBA's Central Interpreters Unit and the Tribunals Service have codes of conduct for the interpreters they use. These are generally concerned with professional behaviour, and the UKBA code includes a section on 'Accurate and Precise Interpretation'. This code stresses that interpreters must 'retain every single element of information that was contained in the original message, and interpret in as close verbatim form as English style, syntax and grammar will allow'.<sup>809</sup> The Tribunals Service's Handbook for Freelance Interpreters also instructs interpreters to 'use the witness's exact words. If you cannot make a direct or exact interpretation, interpret it as accurately as possible in the witness's own words and then inform the Judiciary what the phrase means'; later, it re-emphasises 'Please do not ... use an English expression or phrase which is not an exact translation of the witness's own words'.<sup>810</sup> What constitutes an 'exact translation' is left unclear. This indicates widespread knowledge of the existence of misinterpretations and a real attempt to reduce them. However, observations show that misinterpretations are still rife within asylum appeal hearings.

As the majority of HOPO's, legal representatives and judges do not have working knowledge of the languages spoken by asylum seekers, and asylum seekers rarely have a good grasp of English, it is difficult to say whether more misinterpretations are being missed. It seems prudent to concede that there must be errors which go unnoticed, simply due to the number of errors that have been picked up by those that can speak other languages. If there are serious misinterpretations, these can have repercussions on the appellant's case, and the parties may never rectify them. It may look from the answers that the asylum seeker is confused or untruthful, which is a disadvantage when attempting to establish credibility. This

---

<sup>809</sup> Home Office, UK Border Agency: Central Interpreters Unit, *Code of Conduct for UK Border Agency Registered Interpreters* (March 2019) <https://dpsionline.co.uk/wp-content/uploads/2019/03/ukba-interpreters-code-of-conduct.pdf> accessed 1 April 2019.

<sup>810</sup> Mark Henderson, Rowena Moffatt and Alison Pickup, 'Best Practice Guide to Asylum and Human Rights Appeals' (*Electronic Immigration Network* 2021) <https://www.ein.org.uk/bpg/contents> accessed 10 February 2021.

undermines an appellant's agency, and highlights language as an additional barrier faced by an asylum seeker that is far less of an issue for British citizens<sup>811</sup>.

### **6.10.2 Culture and dialect.**

In addition to misinterpretations, respondents also reflected on the importance of having an interpreter from the same culture, who spoke the same dialect, as opposed to the same language with a different dialect. One of the problems is that certain phrases do not translate perfectly into English. In these cases, the essence of what is being said may be lost.

*'Unfortunately with interpreters, they are often the only person in the room who knows what is actually being said. Umm so lost in translation is the perfect statement for it. Some things do not translate. Umm sayings or analogies or umm just a turn of phrase do not translate and if you were to say it umm verbatim uh it would just confuse the client. Also culture is a big issue, umm you do get brilliant interpreters who can translate cultural nuances into their native language, but this is rare.'* (Representative 3)

Whilst this representative reiterated that interpreters played an important role in appeal hearings, indicating how difficult and procedurally unfair it would be to proceed without them, they also spent time discussing the importance of dialect and culture when hiring an interpreter. They highlighted three different Arabic dialects (Iraqi, Egyptian, Libyan) which have significant differences, and detailed several clients who said that they understood their interpreters vaguely, though the dialect was off. 'Vaguely understanding' is not an appropriate level in situations such as asylum appeal hearings which have such a vast impact on the future of the asylum seeker, especially where the cases rely primarily on communication and the evidence given by the appellant. Having someone speaking the same dialect in the hearing then, can make all the difference.<sup>812</sup>

---

<sup>811</sup> Neil Spicer, 'Places of Exclusion and Inclusion: Asylum-Seeker and Refugee Experiences of Neighbourhoods in the UK' (2008) 34(3) *Journal of Ethnic and Migration Studies*, 491-510, Jenny Phillimore and Lisa Goodson, 'Problem or Opportunity? Asylum Seekers, Refugees, Employment and Social Exclusion in Deprived Urban Areas' (2006) 43(10) *Urban Studies*, 1715-1736.

<sup>812</sup> Jan Blommaert, 'Language, asylum, and the national order' (2009) 50(4) *Current Anthropology* 415-441.

*'Interpreters can create real problems. They may have really poor knowledge of religious terms for example in a Christian case. Similarly with the political- some interpreters still get prosecution and persecution wrong. Little things like that can then be added together for adverse credibility findings and you can see how the wrong year even, can affect so many other things, it's incredible.'* (Representative 2)

This representative highlights the issue that different dialects may not only cause confusion between the interpreter and appellant, but may lead to adverse credibility findings where misleading terms are used. The respondents blamed the Home Office system for most cases where an interpreter who spoke a different dialect was present as the system only says 'Arabic', without specifying dialect for example. In other cases, it was difficult to find interpreters who spoke certain languages, such as Tama, a Sudanese language. This can have an adverse effect on procedural fairness and on fact finding. Speaking Tama may be key evidence to proving an appellant is part of the Tama tribe, but they cannot prove this without an interpreter. The Home Office may then claim adverse credibility findings; that they do not believe the appellant is from the Tama tribe. Again, it was not just the legal representatives who picked up on these errors, several asylum seekers explained how different dialects had caused an issue in their appeal.

*'The interpreter, he was Egyptian! I am Sudanese. It is different. The dialect is different. Interpretation is a big problem, is a big problem. I speak a little bit of English so I stopped him once maybe twice also. He said things totally different.'* (Asylum seeker 5)

This asylum seeker could not believe that the interpreter spoke a different dialect, and this adversely affected the level of trust between them. The appellant internally rephrased answers to make it easier for the interpreter to translate, but feared that 'something must surely have been lost' before the judge heard the answer. Different dialects may have different ways of describing things which other dialects do not recognise.<sup>813</sup> This makes it difficult for the interpreter and asylum seekers to give full

---

<sup>813</sup> Diana Eades, 'Applied Linguistics and Language Analysis in Asylum Seeker Cases' (2005) 26(4) *Applied Linguistics* 503–526.

answers. One asylum seeker complained that, because of the difference in dialect, the interpreter kept stopping them partway through an answer. This was frustrating for the appellant, who felt as though they forgot where they were, and what they were saying. They complained, 'it gets confused and stops making sense, even to me'.

As shown throughout this chapter, the credibility of a person's statements depends not only on their content but also on how they are expressed.<sup>814</sup> Differing cultures and dialects between appellant and interpreter may have an adverse effect on this credibility, especially in situations where there is little trust between the parties, such as where the interpreter and appellant hold different religious or political views.<sup>815</sup> There may be stigmatisation or confidentiality issues in these cases, which can adversely affect fairness where the appellant may not be able to communicate their story properly to the judge.

According to Kalervo Oberg, even well-educated refugees with strong personalities may be unable to present their claims forcefully for reasons specific to asylum-seekers.<sup>816</sup> Oberg claims that many asylum seekers suffer from "culture shock" and Furnham and Bochner describe the situation of asylum seekers who move from one culture to another as "bewildering, confusing, depressing, anxiety-provoking, humiliating, embarrassing and generally stressful".<sup>817</sup> The experience of culture shock can gravely impair the applicant's ability to make a forceful statement. An appellant may speak in a confused, nervous, fragmented, and unconvincing manner not because they are lying but because of the anxiety and insecurity caused by the difficulties of life in an entirely new social and cultural environment.<sup>818</sup> These feelings of anxiety and insecurity can be exacerbated during stressful situations such as asylum appeal hearings, especially where all parties, including the interpreter, have a different culture from the appellant. Observation data also revealed problems with different dialects and cultures, causing one case to eventually be adjourned.

---

<sup>814</sup> Conley *et al* (n 806).

<sup>815</sup> Hodes (n 762).

<sup>816</sup> Kalervo Oberg, 'Culture Shock: Adjustment to New Culture Environments' (1960) 7 *Practical Anthropology* 177-182.

<sup>817</sup> Adrian Furnham and Stephen Bochner, *Culture Shock: Psychological Reactions to Unfamiliar Environments* (Taylor and Francis 1986).

<sup>818</sup> Oberg (n 817).

*'There is a problem with the interpreter in this case. An error was made in the bundle, which requested an Arabic interpreter. The appellant is 'fluent in Somali, with little more than a peppering of Arabic phrases'. The judge, representative and HOPO talk this through as though he isn't there.'* (Observation 16)

It may be that, if they speak slightly different dialects; the interpreter may not have a good grasp of the specialist language and so things get lost in translation. As with the misinterpretations, this could have serious consequences for the asylum-seeking appellant and their right to a fair hearing. As noted in section 6.8.2 with regards to cousins, the terms "brother" or "cousin" covers for many Africans not only very close relatives but all members of his or her tribe. If the judge or HOPO is not informed of this by the interpreter (who may not know themselves if they are from a different tribe or culture), they may reject the statement of an African asylum-seeker as implausible that, for example, he was helped to leave his country by his brother working in both the jail, and the passport office.<sup>819</sup> It is important in the interests of procedural fairness then, that there is a high level of shared context between an interpreter and appellant, in order to enable clear understanding.<sup>820</sup>

### **6.10.3 Simultaneous interpretation.**

One final problem raised by interview participants was a lack of simultaneous interpretation. The most commonly used form of interpretation in asylum appeal hearings is consecutive interpretation. This means that the interpreter translates after the speaker has finished the communication. This form of interpreting requires the interpreter to listen carefully and remember what was said, and often take written notes to help with the task.<sup>821</sup> However, as discussed in section 6.7.1, judges, HOPO's, legal representatives and appellants often fail to pause to allow the interpreter time to engage. This occurs most frequently during submissions. Some interpreters interpret simultaneously when this happens, keeping the appellant as informed and up-to-date as possible. Simultaneous interpretation is interpreting almost immediately after a statement is spoken and is made in a whisper while the speaker continues to speak.

---

<sup>819</sup> Walter Kalin, 'Troubled Communication: Cross-Cultural Misunderstandings in the Asylum- Hearing' (1986) 20(2) *The International Migration Review* 230-241.

<sup>820</sup> Candappa *et al* (n 794).

<sup>821</sup> Barnett (n 800).

The advantage of simultaneous interpretation in asylum proceedings is that it gives the appellant almost instant access to what is being said by other parties.<sup>822</sup> However, interview participants, and observation data suggest that interpreters often struggle and make mistakes.

*'Interpreters, when a long answer is given, for example in submissions umm an advocate will go on a long umm a long exchange with the judge and the interpreter has to play catch up and often things get dropped. But you can't pick up on it unfortunately. It would be good if there was some sort of umm impartial system, but technology is not there at the moment, you have to rely on people and people always make mistakes.'* (Representative 3)

Interpreting simultaneously can be highly demanding for an interpreter when they have to work continuously for such long periods, especially when required to switch between consecutive and simultaneous modes,<sup>823</sup> and judges and HOPO's have been known to ask them to stop when they attempt it, as it can be distracting.

*'The interpreter whispers and the judge interrupts; 'Can you either speak more quietly or stop speaking altogether, it is highly distracting, and I can't hear the submissions'* (Observation 29)

The potential disadvantages to simultaneous interpretation then, are that the interpreter must be able to interpret accurately and very quickly, and the instantaneous translation may become a distraction to the other participants including the judge and HOPO, especially where there is a whispered ongoing translation to the appellant of what is being said. It is difficult to balance the demands and disadvantages of simultaneous interpretation against the right of the appellant to hear the case against them, as important information or discrepancy may be adduced, which the appellant will not be able to respond to without simultaneous interpretation. These examples all appeared to limit the ability of the asylum seeker to communicate cogently when compared to instances of effective interpretation. They were left looking around the

---

<sup>822</sup> Ibid.

<sup>823</sup> Gibb and Good (n 765).

courtroom, with little evidence of knowledge about what was being said. This constrains the agency of the asylum seeker and denies them the right to a fair hearing, thus adversely affecting procedural fairness.

### **6.11 Conclusion.**

Communication is essential to procedural fairness, and the decision is centred on the effective and convincing communication of a reason to remain. As discussed in section 6.8, what makes interpreters effective in the court setting with regards to the agency of asylum seekers is that they are active listeners; they make the appellant feel more comfortable and better equipped to give evidence. Effective interpreters gave cultural context where necessary and interrupted parties speaking to ensure that they interpreted everything to the appellant. Even where the interpreter just gave 'minor' help to appellants, such as pouring them a glass of water, this began to build a relationship of trust between the two, which in turn added to the comfort felt by the appellant. Relaxed, trusting appellants almost always gave better evidence than those who felt frustrated or anxious. This will be discussed further in Chapter 7 in relation to the role of legal representatives.

It is clear from the literature and results presented in this chapter that interpreters play an essential role in the asylum system, and in the appeals process in particular. However, as this chapter shows, they are not without limitations. Although there is evidence of interpreters enabling the asylum-seeking appellants and facilitating space for the claim; they also constrain, through misinterpretations, differences in dialect and culture, and acting beyond their duty. Several of the problems discussed here are related to the asylum system and the players within it, rather than individual interpreters. Judges, HOPO's, legal representatives and appellants themselves can make an interpreter's job more difficult, and in some cases impossible. Their task is already complex and demanding, and is made harder through inadequate training and a lack of time to engage. This shows the complex interaction faced by interpreters and asylum seekers with regards to communication, agency, and fairness. The results show discrepancies between individual opinions of legal representatives and asylum seekers; with some declaring that interpreters are highly

effective, and others claiming the opposite. Observations also showed variations between individual interpreters.

Essentially, it seems as though at present, interpreters both constrain and enable asylum seekers' agency. Asylum appeal hearings contain complex interactions between multiple actors, and these interactions can be influenced by power imbalances and a lack of effective communication and agency. Asylum seekers rarely have English as their first language, and so it is often difficult for them to understand or communicate clearly.<sup>824</sup> In the context of an asylum appeal, the inability to speak the host nation language places significant additional psychological and structural burdens on the asylum seeker. Even with the help of a competent interpreter, the asylum-seeking appellant may still face misinterpretations and cultural barriers that can have an adverse impact on their claim. It may be that, if they speak slightly different dialects; the interpreter may not have an adequate grasp of the specialist language and so things get lost in translation.<sup>825</sup> Sometimes there is no equivalent word in English, or the interpreter cannot put forward the right meaning, leading to inconsistencies. In these cases, it may look from the answers given that the asylum seeker is confused or untruthful. Whilst interpretation is vital, it can inhibit effective communication, due to the unnaturally slow pace and necessary pauses which break the narrative and can cause the applicant to forget what they intended to say.<sup>826</sup>

The following chapter expands on some of the ideas of effectiveness and structure and agency put forward in this chapter to continue examining the role of procedural fairness in asylum appeal hearings, with a focus on the importance of legal representation. It will be argued that, in addition to language, a lack of expert knowledge of the asylum system in the UK can undermine procedural fairness and therefore act as a barrier to access to justice for asylum-seeking appellants. From this, it will be considered whether legal representation is necessary to allow asylum seekers to assert agency and receive a fair hearing, and whether agency can be constrained to enhance procedural fairness.

---

<sup>824</sup> Edwards (n 329).

<sup>825</sup> Henderson *et al* (n 811).

<sup>826</sup> Edwards (n 329).



## **Chapter 7: Effective communication in the asylum appeal hearing- the role of legal representation.**

*'Represent myself? \*laughs\* me? How could I? What do I know? Nothing. Just my story. I don't know evidence. I don't know how to talk to the judge. They don't listen to people like me they just listen to people like them. Lawyers are like them.'* (Asylum seeker 8)

The previous chapter discussed the role of language and interpretation in asylum appeals. This chapter continues to explore the factors which constrain and enable asylum seekers and their ability to communicate effectively in their appeal hearing, focussing on legal representation. As discussed in Chapter 3, an important facet of access to justice and procedural fairness in asylum appeal hearings centres on the ability of the asylum seeker to assert agency and communicate their case effectively to the adjudicator. This chapter examines the role of legal representatives, and whether they enable the asylum seeker to assert agency and further their case, or whether they constrain this ability. The chapter begins with an exploration of literature relating to legal representatives, developing a sense of their importance within the asylum appeal hearing. This will be followed by a brief explanation of the methods employed to investigate this theme before observation and interview data is presented and analysed. The focus will be on effective communication through legal representation, and any discrepancies between the views of asylum seekers and legal representatives, or between the espoused and observed realities of legal representatives in this field.

The analysis presented in the second half of this chapter indicates that effective communication is a central element of procedural fairness, and that effective representatives are well prepared and thorough. They procure relevant evidence, build relationships of trust with their clients, and communicate the case in a way the judge can understand. It is also argued that effective representatives protect their clients from inappropriate questioning and, similarly to the effective interpreters in Chapter 6, help to identify misinterpretations. This behaviour can enhance procedural fairness as their asylum seeking clients are better able to assert agency and communicate their story. Conversely, evidence is also put forward to suggest that ineffective

representatives can hinder the ability of asylum seekers to assert agency through poor communication, including inadequate presentation of evidence and submissions, and a lack of engagement with their clients. Through this empirical research, it became apparent that different legal structures, and the agency of others, including legal representatives, were influencing the agency that an asylum seeker was able to assert over their own case, which affected the likelihood of the appellant receiving a fair hearing. This chapter contributes to the thesis by providing a partial answer to the research question: 'What factors influence the ability of asylum seekers to play an active role in their appeal?', as with effective representation, asylum seekers are more likely be able to assert agency and communicate successfully.

### **7.1 Legal representation as a central element of fairness for asylum seekers.**

As discussed in Chapter 2, fairness is vitally important in the asylum process as, if the claim is rejected, a life may be at stake. An important facet of access to justice and procedural fairness in asylum appeal hearings centres on the ability of the asylum seeker to assert agency and communicate their case effectively to the adjudicator. There is little known about the factors that influence this agency, but one crucial element that has been implicated is the provision of legal representation, due in part to the complexity of the asylum process. Whilst the judge and HOPO know and understand the law, the asylum seeker often does not.<sup>827</sup> In addition to the language barrier discussed in Chapter 6, asylum seekers are silenced by a lack of understanding over what is happening to them. Legal representation is therefore a necessary facet of access to justice. It is central to the asylum-seeking process, in terms of both substantive fairness,<sup>828</sup> and moving beyond this to the agency of the asylum seeker within the process. This chapter focusses on the relationship between legal representation, effective communication, and procedural fairness, as UK based studies have shown that effective legal representatives have a positive impact on the outcome of asylum claims at all stages of the asylum system.<sup>829</sup>

---

<sup>827</sup> Gill *et al*, 'Experiencing Asylum Appeal Hearings' (n 35).

<sup>828</sup> As exemplified by Genn and Genn's study on outcome. Genn and Genn (n 552).

<sup>829</sup> See for example Deborah James and Evan Killick, 'Empathy and Expertise: Case Workers and Immigration/Asylum Applicants in London' (2012) 37(2) *Law and Social Inquiry* 430–455.

The majority of research focusses on the importance of representation to outcome. For example, Genn and Genn found that representation increased the likelihood of winning an immigration case from 20% to 38%.<sup>830</sup> This figure illustrates the tangible impact that representation can have in asylum appeals, and which was echoed by the interviewed representatives and asylum seekers in this thesis. As discussed in Chapter 2, whilst substantive fairness and outcome are undoubtedly crucial, this thesis explores the role of legal representation beyond outcome, focussing on quality, behaviour, and capability, in order to determine whether the effectiveness of legal representatives is a structural constraint on the agency of asylum seekers, their ability to communicate, and ultimately, their access to justice. All representation is not equal, and this chapter highlights the differences in representation, and the impact this has on the ability of asylum seekers to communicate effectively. For the purposes of this thesis, the term legal representative refers to anyone qualified to give immigration advice, including caseworkers, solicitors, and barristers. These often have very different roles; caseworkers and solicitors usually prepare the claim, and barristers are often instructed to take the appeal. Caseworkers and solicitors then, are more likely to spend extensive time with appellants than barristers, who may not meet their client until the appeal hearing.

The ability to communicate effectively with all actors including clients is considered important in the legal profession. The Solicitors Regulation Authority requires solicitors to ‘establish and maintain effective and professional relations with clients, including...providing information in a way that clients can understand, taking into account their personal circumstances and any particular vulnerability’.<sup>831</sup> Effective communication then, is an important facet of procedural fairness in asylum hearings as, due to multiple inter- and multicultural borders, the interaction between legal representatives and asylum seekers can be complex and unpredictable.<sup>832</sup> This chapter adds to the literature on procedural fairness as it investigates whether access to competent representation allows asylum seekers to communicate effectively and receive a fair hearing.

---

<sup>830</sup> Genn and Genn (n 552).

<sup>831</sup> Solicitors Regulation Authority, ‘Statement of solicitor competence’ (SRA November 2019) <https://www.sra.org.uk/solicitors/resources/cpd/competence-statement/> accessed 13 January 2021.

<sup>832</sup> Reynolds (n 611).

### **7.1.1 The importance of legal representation in literature- a preoccupation with outcome.**

Before analysing the role that legal representatives play in asylum appeal hearings, it is necessary to consider why they are deemed so important. Previous research has shown that legal representation plays a significant role in access to justice for asylum seekers.<sup>833</sup> Without legal representation, it is difficult to argue that asylum seekers receive a fair hearing. They have little knowledge of the language or legal system, and may struggle to put forward a coherent argument. They are unlikely to know what constitutes evidence, or how to get it.<sup>834</sup> This lack of understanding makes it difficult for appellants to communicate effectively, thus limiting their agency and diminishing their chance of a fair hearing. According to the Migration Observatory, legal representation can be the difference between life and death for an asylum seeker as it provides them with objective, informed advice on the merits of their cases and the chances of applications or appeals succeeding.<sup>835</sup> It also reduces the likelihood of unfounded and inappropriate claims and helps asylum seekers to gather the information and evidence necessary to support and substantiate their cases. Ramji-Nogales *et al* assert that in the USA, legal representation is the single most important factor affecting asylum hearings, and research from the UK promotes the use of early, high quality legal advice as a means to faster, higher quality asylum decisions.<sup>836</sup>

### **7.1.2 Representation is necessary to redress power imbalances within the appeal.**

As discussed in Chapters 3, 5 and 6, a lack of knowledge or understanding can lead to a lack of power. Attributing agency through effective communication then, is attributing power. Hay argues that agency is often informed by some “knowledge” of the structures involved,<sup>837</sup> and Giddens claims that every social actor knows a great deal about the conditions of reproduction of society of which he is a member.<sup>838</sup> However, as asylum seekers are often unfamiliar with the legal system in the UK, they

---

<sup>833</sup> Robert Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Bloomsbury 2011).

<sup>834</sup> Didier Fassin and Estelle D’Halluin, ‘The Truth from the Body: Medical Certificates as Ultimate Evidence for Asylum Seekers’ (2005) 107(4) *American Anthropologist*, 597-608.

<sup>835</sup> The Migration Observatory, ‘Asylum and refugee resettlement in the UK’ (n 54).

<sup>836</sup> Ramji-Nogales *et al* (n 298); Anderson and Conlan (n 644).

<sup>837</sup> Hay (n 466).

<sup>838</sup> Giddens, *The Constitution of Society* (n 73).

do not possess the knowledge necessary to successfully communicate during their appeal and so knowledge can be a powerful structure which contributes to a lack of agency for this group. Procedural fairness is adversely affected where the asylum seeker cannot understand what is happening to them, and where they are unable to communicate their case appropriately to a judge. Despite informal support mechanisms such as the shared knowledge in asylum seeker communities, without representation, asylum seekers are unlikely to know how to proceed with their appeal.<sup>839</sup> Effective representation can redress some of the power imbalances within the appeal by communicating the case to the judge, and providing the asylum seeker with the necessary knowledge and agency to participate in their appeal hearing.

### **7.1.3 Knowledge in an adversarial system.**

In addition to the complexity of the law, tribunals are also primarily adversarial, despite being established as informal, specialist courts which were to be used where adjudication in the ordinary courts was deemed unnecessary.<sup>840</sup> This can make them difficult for inexperienced asylum seekers to navigate. Tribunal hearings were intended to be 'informal and largely inquisitorial', and were designed to be accessible to those making appeals without the help of legal experts.<sup>841</sup> Whilst legal representation is allowed at the majority of British tribunals, funding restrictions are in place as it is believed that an over-reliance on legal representation might undermine the advantages of tribunals, namely speed and informality.<sup>842</sup> According to Genn and Genn however, none of the procedural informalities of tribunals can overcome or alter the need for applicants to bring their cases within the regulations or statute, and prove their factual situation with evidence.<sup>843</sup> Following the introduction of the Asylum and Immigration Appeals Act 1993,<sup>844</sup> there has been an increase in legislation concerning asylum. Since the 1993 Act, many other major, complex pieces of legislation have significantly altered the legal landscape for refugees seeking asylum, in 1996, 1999, 2002, 2004, 2006, 2014 and 2016.<sup>845</sup> Despite claims that the tribunal procedure is more relaxed than the typical adversarial court case, the judge still plays

---

<sup>839</sup> Thomas, 'Evaluating Tribunal Adjudication' (n 38).

<sup>840</sup> Hazel Genn, 'Tribunals and Informal Justice' (1993) 56(3) *The Modern Law Review* 393-411.

<sup>841</sup> Macintyre, 'Imposed Dependency' (n 63).

<sup>842</sup> Genn and Genn (n 552).

<sup>843</sup> *Ibid.*

<sup>844</sup> Asylum and Immigration Appeals Act 1993.

<sup>845</sup> See Chapter 2, section 2.6 and the Nationality and Borders Bill 2021 (n 9).

an adversarial (rather than inquisitive) role in the case, and needs to make reasoned, consistent decisions. It is difficult for a judge to properly consider evidence given in a form they are not used to, which can prejudice a case, through no fault of the defendant nor of the judge. Representatives can adduce evidence in a way that the judge understands, which can enhance the procedural fairness of an asylum appeal hearing.

The process of the hearing is also adversarial, as HOPO's cross examine the witness. Legal representatives can defend their client, protecting them from inappropriate questions and ensuring the judge hears the asylum seekers' side of the story. Despite the important role that legal representation plays in securing protection for asylum seekers, there is very little research on the effectiveness of representatives in the asylum appeals process. Most of the research considers the process of representation rather than how it operates in reality. JUSTICE, MacIntyre and Smart suggest that the majority of legal representation in the UK is inadequate.<sup>846</sup> Indeed, MacIntyre is one of the few academics who discuss legal representation in depth, from the perspectives of the clients.<sup>847</sup> Her work affirms the vital role of legal representation in the asylum system, but also highlights the realities of poor quality and lack of choice.

The lack of scrutiny into the role of legal representation in the process of claiming asylum seems all the more surprising given the acceptance that 'poor quality' representation exists in the sector.<sup>848</sup> The frequent anecdotal references to the need for, or loss of, 'good quality representation' recognise the existence of poor-quality representation.<sup>849</sup> There is a wide variation in the quality of work being carried out in the legal sector. Research by Amnesty International largely based on interviews with

---

<sup>846</sup> Kate Smart, 'Access to legal advice for dispersed asylum seekers' [2008] Asylum Support Partnership Impact Report  
<[www.refugeecouncil.org.uk/Resource/Refugee%20Council/downloads/policy\\_responses/08%2007%20Access%20to%20legal%20advice%20for%20dispersed%20asylum%20seekers.pdf](http://www.refugeecouncil.org.uk/Resource/Refugee%20Council/downloads/policy_responses/08%2007%20Access%20to%20legal%20advice%20for%20dispersed%20asylum%20seekers.pdf)> accessed 22 February 2021;  
MacIntyre, 'Imposed Dependency' (n 63); JUSTICE, 'Immigration and Asylum Appeals – a Fresh Look' [2018]  
<<https://justice.org.uk/our-work/administrative-justice-system/immigration-asylum-determination-reform/>>  
accessed 24 February 2021.

<sup>847</sup> MacIntyre, 'Imposed Dependency' (n 63). Although the study was conducted prior to LASPO, it reflects the clients' thoughts post legal aid cuts.

<sup>848</sup> Thomas, *Administrative Justice and Asylum Appeals* (n 834). MacIntyre, 'Imposed Dependency' (n 63).

<sup>849</sup> See for example Banks Miller, Linda Keith and Jennifer Holmes, 'Levelling the Odds: The Effect of Quality Legal Representation in Cases of Asymmetrical Capability' (2015) 49(1) *Law and Society Review* 209.

destitute rejected asylum seekers found that 'most complained about the poor quality of legal advice and representation at all stages of the asylum process'.<sup>850</sup> Similarly, a survey by Legal Action for Women and others of female detainees in Yarl's Wood Removal Centre found that 'half reported that bad legal representation had either undermined their cases and directly contributed to their asylum claim having been refused, or was leaving them vulnerable to deportation now'.<sup>851</sup> In part, this may be a reflection of the lack of success of the appeal. The research contained within this chapter undertakes a similar examination of appellants' perceptions of representation but, in contrast to the Amnesty research, the focus of this study is on those still within the appeals process. Poor quality and paucity of legal representation can adversely affect procedural fairness and access to justice for asylum seekers,<sup>852</sup> yet very little is said about this poor-quality representation beyond an acknowledgement of its existence.

## 7.2 What constitutes effective representation?

Access to legal representation is not enough; it needs to be effective, otherwise there is no access to justice. This section considers what makes a 'good' or effective legal representative, with a focus on the centrality of communication. The UNHCR sets out standards for legal representatives.<sup>853</sup> To effectively represent asylum seekers, they must have a working knowledge of refugee law and procedures and a thorough understanding of the applicant's claim. In addition, effective representatives offer clear guidance to their client throughout the asylum process. This results in asylum applications that are well-prepared and coherently argued; making refusals based on credibility (or the perceived lack thereof) less likely.<sup>854</sup> To be considered effective representatives who facilitate procedural fairness, legal representatives need to spend time with clients, preparing statements, building rapport and trust with the

---

<sup>850</sup> Amnesty International UK, 'Get It Right. How Home Office Decision-Making Fails Refugees' <[https://www.amnesty.org.uk/files/get\\_it\\_right\\_0.pdf?3tisZ\\_5\\_ZLA4Bc\\_4TstKb8B\\_yQyDwQZA=>](https://www.amnesty.org.uk/files/get_it_right_0.pdf?3tisZ_5_ZLA4Bc_4TstKb8B_yQyDwQZA=>)> accessed 24 February 2021.

<sup>851</sup> Legal Action for Women, *For Asylum Seekers and their Supporters - A Self-Help Guide Against Detention and Deportation* (Crossroads Books 2005).

<sup>852</sup> Gill *et al*, 'Experiencing Asylum Appeal Hearings' (n 35).

<sup>853</sup> UNHCR, *UNHCR RSD Procedural Standards - Legal Representation in UNHCR RSD Procedures* (2016) <<https://www.refworld.org/docid/56baf2c84.html>> accessed 24 February 2021. In the UK, anyone providing legal representation must also be qualified and registered with the OISC.

<sup>854</sup> John Campbell, 'The Role of Lawyers, Judges, Country Experts and Officials in British Asylum and Immigration Law' (2020) 16(1) *International Journal of Law in Context* 1-16.

client. Communication is thus an important part of effectiveness, as in MacIntyre's UK based study, where effective representation was measured by client satisfaction, less satisfied clients felt alienated when they had no clear way to communicate with their representative or were made to feel that their representative had more pressing engagements to attend to.<sup>855</sup> Effective communication then, is a key facet of adequate representation and access to justice.

Effective communication is not limited to client-representative interactions, it is also required in the courtroom, to ensure that the case is coherently, accurately, and effectively argued. As highlighted by Justice Collins in the asylum appeals system, 'the system does not enable us to act as the inquisitor, or at least not to any great extent'.<sup>856</sup> As the judge cannot play an inquisitorial role, access to justice requires effective representatives to present all of the appropriate information for adjudication, in a way that the judge understands. Legal discourse also tends to be fact centred, which can minimise the emotional content of the asylum seekers' stories in favour of an objective presentation of events.<sup>857</sup> This can prejudice a case, through no fault of the appellant nor of the judge.<sup>858</sup> Part of the representative's role then, is to 'translate' their clients' emotional narratives into a factual account in acceptable (legal) language.<sup>859</sup> Clients often have little control over this translation, and their agency may be undermined. Communication of their story, however, is enhanced.

### **7.3 Ineffective representation is largely the result of ineffective communication.**

Ineffective representation is problematic as, in addition to failing to protect clients from possible removal, ineffective representatives can also prolong asylum claims, which can have adverse effects on the clients' mental and physical well-being,<sup>860</sup> and on the

---

<sup>855</sup> Ibid.

<sup>856</sup> Constitutional Affairs Committee, *Oral Evidence*, Justice Collins response to Q35 <<https://publications.parliament.uk/pa/cm200506/cmselect/cmconst/1006/6032103.htm>> accessed 4 February 2021.

<sup>857</sup> Shonna Trinch, *Latinas' narratives of domestic abuse: Discrepant versions of violence* (John Benjamins Publishing 2003).

<sup>858</sup> Diana Eades, *Sociolinguistics and the Legal Process* (Multilingual Matters 2010); Good, *Anthropology and Expertise in the Asylum Courts* (n 344); William Felstiner and Austin Sarat, 'Enactments of power: Negotiating reality and responsibility in lawyer-client interactions' (1992) 7(6) *Cornell Law Review* 1447–1498; Trinch (n 849).

<sup>859</sup> Eades, *Sociolinguistics* (n 814); Trinch (n 858); Reynolds (n 611).

<sup>860</sup> Henderson *et al* (n 811).



justice system due to additional costs. It is alarming then, that there is little recourse available when incidents of ineffective or inadequate representation occur. It is difficult to persuade future adjudicators to accept representatives' mistakes as a valid excuse for non-compliance with procedures.<sup>861</sup> This causes difficulties when new representatives attempt to remedy mistakes made by past representatives.

Research shows that much of the inadequate representation stems from communication errors including failing to give clients advice in writing, or to prepare a written statement with the client.<sup>862</sup> Other examples of inadequate representation include failures to obtain evidence, open disbelief in their clients' stories, and a lack of communication between legal representative and asylum seeker.<sup>863</sup> The literature in this field highlights examples of ineffective representation, which can have serious consequences for asylum seekers. As highlighted above, effective representatives ensure the appellant has the opportunity to present their story fully and effectively before the judge. Ineffective representation which hinders this ability, also limits procedural fairness and access to justice. In part, these failures may be related to the time constraints imposed by cuts to legal aid.

Legal aid is the pathway to representation. It is necessary to give full effect to the right to seek asylum,<sup>864</sup> and without it, most asylum seekers cannot afford legal representation. Despite widespread criticism, asylum policy in the UK has become increasingly restrictive. In 2012 the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012) dramatically reduced legal aid in many areas, including immigration.<sup>865</sup> Although legal aid remains available to asylum seekers, the changes have resulted in a serious shortage of providers and financial support.<sup>866</sup> One provision which has gained particular criticism is the reduction from 40 to five hours in the amount of legal advice funded by the taxpayer for asylum cases.<sup>867</sup> These cuts to

---

<sup>861</sup> Macintyre, 'Imposed Dependency' (n 63).

<sup>862</sup> Campbell, 'The Role of Lawyers' (n 855).

<sup>863</sup> Ibid.

<sup>864</sup> Burridge and Gill, 'Conveyor-Belt Justice' (n 238).

<sup>865</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) Sch 1 Pt 1 para 30.

<sup>866</sup> Research by Refugee Action shows that there has been a 56% drop in the number of asylum and immigration legal aid providers since 2005. Refugee Action and NACCOM, 'Tipping the scales, access to justice in the asylum system' (2019) <<https://www.refugee-action.org.uk/tipping-scales-access-justice-asylum-system/>> accessed 24 February 2021.

<sup>867</sup> Burridge and Gill, 'Conveyor-Belt Justice' (n 238).

legal aid are due in part to austerity and in part to the hostile environment created in the UK to keep ‘bogus’ asylum seekers out.<sup>868</sup> Restrictions on legal aid provision result in a lack of available representation and in many cases the increased time constraints and fixed fees fail to cover the work that needs to be done.<sup>869</sup> This essentially puts asylum seekers outside the scope of legal protection whilst simultaneously trapping them inside the legal process.<sup>870</sup>

#### **7.4 Methods.**

As discussed in Chapter 4, in order to investigate the role of legal representatives and communication in depth, I chose to conduct courtroom observations, enriched by semi-structured interviews with legal representatives and asylum seekers.<sup>871</sup> This allowed me to capture the everyday reality of the practices operating in asylum appeals, including the actual interaction that takes place between representatives and asylum seekers. I was able to see both parties simultaneously and to collect the seemingly incidental interactions that often go unnoticed in interview research. The interviews then provided an opportunity to explore facets of the observations in detail, adding context and opinion. These were particularly useful for exploring individual accounts of experiences in the asylum system that may not have been captured with less personal observations.<sup>872</sup> The representatives interviewed were all ‘in-house’ solicitors or barristers, and all had experience in interviewing clients, writing statements, and representing them at appeal. This allowed me to question them on their views and experiences throughout the whole appeal process. It became apparent during data collection that legal structures, and the agency of others were influencing the agency that an asylum seeker was able to assert over their own case and their ability to communicate effectively. Questions were phrased as simply as possible to facilitate detailed, accurate responses. All 21 participants talked about the role of legal

---

<sup>868</sup> O’Nions (n 81); Rosemary Sales, ‘The deserving and the undeserving? Refugees, asylum seekers and welfare in Britain’ (2002) 22(3) *Critical Social Policy*, 456–478. .

<sup>869</sup> F. Meyler and S. Woodhouse, ‘Changing the immigration rules and withdrawing the ‘currency’ of legal aid: the impact of LASPO 2012 on migrants and their families’ (2013) 35(1) *Journal of Social Welfare and Family Law* 55-78.

<sup>870</sup> It is beyond the scope of this thesis to discuss legal aid in any depth. But see Burrridge and Gill, ‘Conveyor-Belt Justice’ (n 238).

<sup>871</sup> Discussed in more depth in Chapter 4, section 4.9.

<sup>872</sup> Blitz and Otero-Iglesias (n 597).

representatives. Some spoke on this topic in depth without a need for prompting, other were prompted by the questions;

**Are there enough specialist lawyers for the demand?**

**What role do you play/did your representative play in the appeal?**

**Are lawyers necessary in asylum appeals?**

According to Thomas, without acceptable representation, asylum seekers have an inadequate opportunity to put their case forward.<sup>873</sup> From this, I expected legal representatives to play a substantial role in the appeal hearings. I hypothesised that they would have extensive knowledge of the case, be well-prepared and for them to have built a good relationship with the appellant. The next section presents and analyses both observation and interview data, considering the behaviour and capability of representatives, in order to determine whether the adequacy of legal representation is a structural constraint on communication, the agency of asylum seekers, and their access to justice.

## **7.5 Legal representation in empirical data.**

### **7.5.1 Are representatives necessary in asylum appeals?**

Legal representation is important in asylum appeals to allow for an equality of arms. Unlike HOPO's and judges, asylum seekers are unlikely to have functional knowledge of the English language or legal system, and so need assistance in navigating the complex journey. Building on the importance of representatives as identified in literature, and in order to investigate whether the presence of legal representation influences the progress of the tribunal, participants were asked, 'are representatives necessary?' All 12 legal representatives interviewed agreed that they were necessary to the asylum process. This result is unsurprising. All of the representatives interviewed associated the presence of a legal representative with fairness and success.

---

<sup>873</sup> Thomas, 'Evaluating Tribunal Adjudication' (n 38).

*'Fundamental. Absolutely fundamental. We often see clients that have got themselves in quite a pickle. And it is really important, I say this to everyone; that they come and get legal advice. As. Soon. As. Possible.'* (Representative 12)

Representatives expressed that their job was to protect and enhance the credibility of their clients, through effective communication, whilst neutralising the effects of the HOPO's cross-examination. Frequent complaints were made by representatives about the complexity of asylum law, and many felt that few asylum seekers had a chance of a successful appeal without representation. Whilst the appeal hearings are more informal than full court hearings, this was of little consequence if the appellants could not establish an entitlement under immigration law.

*'Because it is complex work, and what is the asylum seeker gonna do? If they struggle with English, or even if they don't struggle with English, they'll struggle with the legal system, so I think it's a necessity.'* (Representative 6)

Almost all of the representatives interviewed felt that the process was now (or always had been) too complex for asylum seekers to navigate alone. Similar to Genn and Genn's study, these opinions were based both on the complexity of the law and the imbalance of power between parties.<sup>874</sup> Despite claims that asylum appeals are informal, asylum seekers must still satisfy the conditions of the Refugee Convention in order to gain protection. Judges make decisions based on complex, ever-changing immigration law, and without access to competent representation, it is unlikely that asylum seekers can hope to understand these complexities, once again highlighting the knowledge imbalances in the appeal system. Whilst all of the representatives interviewed recognised the importance of representation in the asylum appeals process, two went further and suggested that they played the most important role in the hearing.

### **7.5.2 Are lawyers more important than asylum seekers?**

The grant or refusal of asylum is perhaps the most important decision ever to be made in the life of an asylum seeker. It seems logical then, to presume that since the decision

---

<sup>874</sup> Genn and Genn (n 552).

is made based on their evidence, that the asylum seeker plays the most important part in the appeal process. Most representatives reiterated this idea, indicating that cases can be won or lost based on the asylum seekers' evidence, and that they as representatives, play an important *supporting* role. However, representatives 5 and 7 believed that their role usurped that of the asylum seeker.

*'I think I play the most pivotal role. Because we act as, counsellors to our clients, to ensure we elicit the best information from them. We are being lawyers, we are applying the law, to a particular circumstance, we are ensuring that the supporting evidence, usually expert reports, or witness statements are there. We have to ensure that the process of the court is followed. We are playing various roles at the same time. So, the most important person to the appeal, is the solicitor.'* (Representative 5)

These representatives recognised the limited communicative ability of the asylum seekers in the process and viewed themselves as the asylum seekers' only advocate, expressing that someone needs to help them present their case to the judge. Representative 7 claimed that without representation, asylum seekers had no voice at all. I was told that 'representation is the most important part of the hearing. It is the key to everything'. For these legal representatives, representation was seen as the solution to all of the asylum seekers' communication and understanding problems. Representative 5 highlighted the different roles played by the representatives in order to give the best service possible to the asylum seeker, stressing the knowledge and power differentials between representative and client. Neither of these representatives spoke in depth about the role asylum seekers play in their case. This emphasises the power imbalances involved in asylum appeal hearings, and how agency can be constrained for asylum seekers, even when those doing the constraining are trying to further their case.

### **7.5.3 Asylum seekers' thoughts on the importance of representatives.**

These examples intensify the idea of the espoused importance of representatives, and four of the nine asylum seekers interviewed corroborated these claims, and agreed that representatives played the most important role. Only one indicated that they themselves played the most important role.

*'Me being here is not gonna change anything. No. it makes no difference at all. The representative will tell the judge my words. I have faith in the representative, she is the main person, but also I think this is a lost cause.'* (Asylum seeker 3)

These results are similar to those of Roxana Rycroft.<sup>875</sup> All of the asylum seekers interviewed were aware of the power that their representatives had over the progress of their claims. For this asylum seeker, the representative was the 'main person', despite conceding that they would be telling the judge the asylum seekers' 'words'. This further enhances the idea of power imbalances and communication issues within the appeals system, and supports Thomas' argument that legal representatives are important as they can communicate in a way the judge understands.<sup>876</sup> Whilst the representative may be telling the judge about the experience of the asylum seeker, it is unlikely that the whole narrative will be in the asylum seekers' 'words'. Rather, it will be grounded in law and communicated effectively. This was evidenced by legal representatives citing cases alongside the Refugee Convention to convince the judges of their clients' claim to asylum. The following sections move from the presence of representation to a more nuanced understanding of 'effective' representation.

#### **7.5.4 Effective communication is a central element to justice.**

This section details examples of effective representation and demonstrates the impact that effective representation can have on the appellant, with a focus on effective communication. The data presented here emphasises the relationship between communication, procedural fairness, and access to justice; four representatives talked about legal representation unprompted, in answer to the question; 'can you define fairness in this context [asylum tribunals]?'

*'I would say fairness is having the opportunity to put their story across and that would mean having proper representation through an interpreter and legal representative.'* (Representative 3)

*'Access to justice in my opinion can be severely restricted by a lack of legal representation. People going through the legal system are predominantly lay people,*

---

<sup>875</sup> Rycroft (n 273).

<sup>876</sup> Thomas, *Administrative Justice and Asylum Appeals* (n 834).

*and in the case of asylum and immigration people these are usually more vulnerable people, they don't have English language skills or knowledge of the UK legal system.'* (Representative 9)

For these representatives, the concepts of justice, fairness and access to justice were synonymous with access to representation, or more accurately, adequate representation and effective communication. The representatives recognised the importance of their own role in asylum appeals in facilitating effective communication in the courtroom. In these examples (and other interviews), representatives are recognised as central to enabling asylum seekers to assert agency and access a fair hearing.<sup>877</sup> This reiterates Thomas' idea that without legal representation, it is difficult to argue that asylum seekers receive a fair hearing.<sup>878</sup> These perspectives emphasise the lack of specialist knowledge that asylum seekers possess, knowledge they perceive as essential to communicating a successful asylum case. Both quotes also highlight the importance of the asylum seekers' 'story' (often their only evidence), recognised as the most important factor in deciding a case. These representatives believed effective communication through representation was necessary in order for the story to be told to an acceptable standard. The importance of representation was also discussed by three participants when asked whether, in their experience, asylum seekers have a fair hearing.

*'If you've got someone who is unrepresented, that is the key part for me, because they don't know how to put their best foot forward, they don't know what to highlight, they don't know when they're falling into traps. When you've got a legal representative who's guiding them, that makes a real difference. I would say the system is overall fairer if there is a legal representative involved because they are able to make sure things are done to their best possible ability.'* (Representative 11)

Again, the representative here believed that access to effective representation was an important facet of a fair hearing. The representatives viewed effective communication as essential to effective representation and the protection of their client. The

---

<sup>877</sup> Thomas, *Administrative Justice and Asylum Appeals* (n 834).

<sup>878</sup> *Ibid.*

communication was two-fold. The legal representatives suggested, firstly that they could enhance the client's credibility through effective communication and, secondly, that they could neutralise the HOPO's cross-examination.

Knowledge, or a lack thereof, is an important element in accessing justice, and is something that can be enhanced by an effective representative. Asylum seekers are vulnerable; they often have little knowledge of the English language or legal process and have no country, family, or support networks to help guide them through it. Despite informal support mechanisms such as the shared knowledge in asylum seeker communities, without representation, asylum seekers are unlikely to know how to proceed with the appeal. Effective representation can help overcome this limited knowledge and help guide the appellant through the appeal. Asylum seekers themselves explicitly recognised this, commenting on the importance of having someone who understood the process present at the hearing.

*\*Could you have represented yourself?\* \*laughs\* 'Me? (1) How could I? (.) What do I know? Nothing. Just my story. I don't know evidence. I don't know how to talk to the judge. They don't listen to people like me they just listen to people like them. Lawyers are like them. I think this one is on my side, but she is still one of them, like the judge and the Home Office.'* (Asylum seeker 3)

This response reinforces the idea that representation is necessary for an equality of arms. For this asylum seeker, having a representative meant being on a more level playing field, and the thought of self-representing seemed laughable. Having a competent representative facilitated a fair balance between the opportunities afforded to the parties involved in litigation. This emphasises the point made in section 7.1.1; the judge and HOPO understand the law, yet the asylum seeker is often silenced by a lack of understanding.<sup>879</sup> Representation gives them a voice in this arena, supporting procedural fairness and access to justice. This asylum seeker recognised the lack of specialist knowledge they possessed, and equated this to a lack of power. This links to the discussion of agency in Chapter 3. The above quote highlights that structures such as the asylum process empower agents differently; they are laden with

---

<sup>879</sup> Gill *et al*, 'Experiencing Asylum Appeal Hearings' (n 35).



differences in power. In part, asylum seekers and representatives see representation as a way of redressing the power imbalances inherent within the asylum appeal system. The preceding examples are mostly drawn from the interview data; showing the importance of representation through the eyes of the representatives (and service users) themselves. The subsequent sections draw on the data collected during the observations. This data is used to interrogate whether the behaviour of representatives in practice aligns with their views, or if there are discrepancies between the opinions of the representatives, and the reality of appeal hearings. Examples of effective and ineffective representation are explored, showing how these constrain or enable the agency of the appellant, with a focus on effective communication.

### **7.6 Evidence of effective representation in asylum claims.**

During observations, instances of effective and ineffective representation were not as clear cut as those presented in the literature above. Whilst some representatives could easily be categorised as one or the other, others behaved both effectively and ineffectively during the hearing. During data analysis, I coded behaviours such as offering guidance, or communicating well as 'effective' and those including a lack of engagement with clients and evidence as 'ineffective'. The representatives observed could exhibit a number of these behaviours. As discussed in section 7.2, to be considered effective, representatives need to spend time with clients, preparing statements, building rapport and trust with the client, and obtaining expert or medical reports. Whilst the majority of this work happens behind the scenes, observations revealed examples of trusting relationships and external evidence being put before the judge. I recorded 82 examples of effective representation, where legal representatives communicated effectively, and treated the asylum seeker as an individual, which reinforces the importance of representation put forward by the literature and by representatives themselves as in these cases, asylum seekers were better able to assert agency and communicate their narrative to the judge. Several representatives asked open questions, allowing the asylum seeker to answer in their own words. One representative ensured clarity and consistency throughout, by repeatedly pausing to check that the appellant understood. Legal representatives were also more likely to be both engaged and engaging during the hearing than the HOPO; treating the appellant as a person rather than a case. Effective representatives were prepared, thorough, and introduced evidence to the judge. They interrupted HOPO's if they felt the

questions being asked were inappropriate, and built a relationship of trust with the appellants by ensuring they were comfortable with the procedure. In one case, the representative supported his client's decision to proceed without an interpreter, telling the judge that he had no issues with it and that she had a sufficient grasp of the language, ensuring that communication between the parties was effective and sufficient. Others attempted to help their clients remain calm, by offering coffee or a quiet room to talk through the procedure in. During observations, effective representatives also offered clear guidance throughout the asylum process. This resulted in asylum applications that are well-prepared, coherently argued and effectively communicated; making refusals based on credibility (or the perceived lack thereof) less likely.<sup>880</sup>

*'The representative asks thoughtful questions; she is highly effective, well-prepared and has extra copies of everything. She gives the asylum seeker a copy of his statement and asks lots of questions. She asks if she can assist several times; showing the map to the judge and clarifying what the asylum seeker is saying. She has a strong skeleton argument which she relies upon, in addition to several further points, and addresses all of the HOPO's points as she has made notes throughout.'* (Observation 31)

In this extract, there is evidence to reiterate Thomas' claim that there are representatives who provide high-quality services.<sup>881</sup> Several representatives furthered the cases; their efficiency ensured the progress of the case, and their preparedness guaranteed that the best evidence was put before the court. These effective representatives also communicated in a way that the judges could recognise.

### **7.6.1 The importance of procuring relevant evidence in asylum claims.**

One theme which frequently emerged in both observations and interviews, was the importance of representatives procuring evidence. As outlined in section 7.1.2, asylum seekers are unlikely to have working knowledge of the legal system and the need for evidence. The asylum process is highly complex, and appellants may not understand

---

<sup>880</sup> Campbell, 'The Role of Lawyers' (n 855).

<sup>881</sup> Thomas, *Administrative Justice and Asylum Appeals* (n 834).

what constitutes evidence, or where to obtain it.<sup>882</sup> In many cases, the sudden departure from their country of origin results in a lack of supporting evidence. It is surprising then, that there is so little literature on the role of legal representatives in identifying, gathering, and presenting evidence. One asylum seeker told me,

*'He (representative) even took me to another doctor. I was tortured in Sudan and that's why he referred me to a doctor to examine me and write a medical report. I didn't know I needed that- I thought it was enough to show my scars'* (Asylum seeker 1)

This reiterates the idea that representation is necessary to guide asylum seekers through the process, to communicate their case coherently, and to give them the best chance of success. According to Genn and Genn, one of the most significant barriers to effective case preparation is the lack of understanding of what constitutes evidence and the need to procure relevant evidence.<sup>883</sup> Appellants often think their story is enough, exemplified by asylum seeker 1 above. Without effective representation to help procure evidence, asylum seekers may be unable to present their cases coherently or be unaware of the need to provide evidence of the facts they are asserting.<sup>884</sup> Procuring evidence, however, does little to mitigate against HOPO cross-examination; effective representatives also defended their clients against hostile questioning to allow for effective communication of the appellant's story.

### **7.6.2 Effective representatives interrupted HOPO's inappropriate questioning.**

The HOPO's primary function is to cross-examine and discredit the asylum seeker through exposing inconsistencies in their claim. During data collection, some HOPO's undertook this role in a business-like manner, but cross-examination was more often aggressive, lengthy, and hostile. For the purpose of this section, it is enough to say that all of the HOPO's I observed asked at least one 'inappropriate' question. This can be regarded as any leading, convoluted, or repetitive questions, or any questions presented in a hostile or aggressive tone. When this happened, effective

---

<sup>882</sup> Bohmer and Shuman (n 805).

<sup>883</sup> Genn and Genn (n 552).

<sup>884</sup> Olga Keselman, Ann-Christin Cederborg, M Lamb and Örjan Dahlström, 'Mediated Communication with Minors in Asylum-seeking Hearings' (2008) 21(1) *Journal of Refugee Studies* 103.

representatives would react quickly, interrupting the HOPO before the question could be interpreted, and asking the judge to order that the question be rephrased.

*'The legal representative interrupts often, asking the judge if the HOPO would rephrase the question. He always interrupts before the inappropriate question is put to the appellant. He offers alternatives to the HOPO's questions, breaking them down into simple chunks.'* (Observation 34)

These types of questions can be considered as inappropriate as the fundamental objectives for tribunals is fact seeking which values openness, fairness, and impartiality.<sup>885</sup> These objectives are not being achieved where the HOPO makes the asylum seeker feel uncomfortable, or as though they are not being believed. This supports Genn and Genn's findings as HOPOs did not shrink away from accusing appellants of lying, and effective representatives attempted to prevent this from happening.<sup>886</sup> In addition to protecting their clients from hostile cross-examination, effective representatives offered efficient guidance through the complex UK asylum process, and in this respect, they played an important role not only in the hearing, but also in the preparatory work beforehand.

### **7.6.3 Preparing the client- Effective explanations.**

Another way in which effective representatives enhanced the perception of procedural fairness and allowed asylum seekers to assert agency was through a thorough explanation of the process. This allowed the case to run smoothly and seemed to lower anxiety levels when compared to those appellants who had not had time to engage with their representative.

*'The representative joins the group and explains the procedure. She tries to ensure everyone remembers what they said in their witness statement as they will be questioned on it and explains that 'consistency is important'. The interpreter has already met the appellant, as the legal representative had requested they find time to chat before the first hearing commenced'.* (Observation 14)

---

<sup>885</sup> Franks Report (n 51) para 41.

<sup>886</sup> Genn and Genn (n 552).

Explaining the process to the asylum seekers, and allowing them the opportunity to be involved in their case is an example of the ways in which legal representatives can help asylum seekers assert agency through effective communication. According to MacIntyre, some asylum seekers report the issue of client alienation from their asylum claims and a desire to have some feeling of control over or connection with the work of their legal representative. The asylum seekers who were happy with their representation were communicated with and made to feel as though they were involved in their claim.<sup>887</sup> Observations showed that this was achieved through representatives listening to their clients, answering their questions, and ensuring the client's interests were considered. These asylum seekers seemed more likely to engage with their representatives, becoming more animated and asking and answering questions about their case. Their body language also seemed more confident going into the hearing, as they sat up straight with their heads held high. Whilst explaining the asylum process to the client may not have a direct effect on the outcome of the case, it enhanced the clients' perceptions of fairness, as they felt more involved in their case, and better able to give evidence. These results are also similar to those of Bridget Anderson and Sue Conlan who found that asylum seekers who cannot engage with the process of their claim will not believe it to be fair.<sup>888</sup> These examples are closely related to the next theme, as they contributed to a better experience for the asylum seeker, and attempted to make them more comfortable.

#### **7.6.4 Effective representatives attempt to reduce stress levels.**

As noted in section 7.1.1, the asylum appeals process can be complicated and arduous for anyone involved. In addition, the language barrier and personal circumstances of asylum-seeking appellants ensure high levels of stress and anxiety in this setting. Effective representatives found ways to manage the stress, with the aim of helping appellants to feel more comfortable and relaxed.

*'The legal representative checks the pronunciation and spelling of the terrorist group, making sure he's got it right. The asylum seeker explains in depth about the organisation, and the representative relays it back to him. He writes notes on his laptop and consults the bundle, speaking simply and explaining the process. The asylum*

---

<sup>887</sup> Macintyre, 'Imposed Dependency' (n 63).

<sup>888</sup> Anderson and Conlan (n 644).

*seeker nods curtly. The representative asks if he likes football. The asylum seeker looks up. They talk animatedly about 'the big game tomorrow'. They talk like friends.'* (Observation 18)

Here, the representative furthers effective communication by drawing on a safe topic that many people enjoy. He sees that the appellant is nervous, and helps him to relax and open up by changing the conversation topic to something more light-hearted. In this example, the asylum seeker visibly relaxed, his shoulders dropped, and he made eye contact with the representative and smiled. From this, it seems as though the relaxation tactic was successful. Other representatives recognised the anxiety caused by the hearing and attempted to reduce stress levels by offering coffee or a quiet room in which to talk through the procedure.

*'A legal representative comes in and speaks to the nervous looking single woman. He is very kind, and frequently tells her not to worry. He tells her about the procedure in detail, indicating that the interpreter will talk to her first. Again, he reassures her that everything will be fine, but 'please say if you need anything'. (Observation 11)*

Given their difficult situations, and their lack of knowledge of the language, law, and legal system of the country where they are claiming asylum, asylum seekers need legal advice to manage stress and enable engagement.<sup>889</sup> Legal representation can mitigate against the stress of lengthy and unfamiliar procedures, and enable asylum seekers to view the system as efficient, and thereby increase the likelihood of compliance and decrease the possibility of absconding. By taking the time to relax their clients, the legal representatives in these examples ensured they were able to give their best evidence in the hearing and thus furthered their cases. These asylum seekers were better able to engage during their hearing, as they may have felt as though they had someone on their side. Effective representatives who managed to reduce the stress levels of their clients had a better chance of forging a trusting relationship with them.

---

<sup>889</sup> Anderson and Conlan (n 644).

### 7.6.5 Supporting clients- Building trust.

Ensuring the appellants felt comfortable went some way towards building a trusting relationship between the representative and appellant. According to Lyytinen, trust is an important factor in the journey of asylum seekers, where they often have to place trust in strangers.<sup>890</sup> Trust also extends to their asylum claim. During the appeal, the asylum seeker trusts the legal representative will argue diligently in their favour. According to Anderson and Conlan, appellants may have been severely traumatised, and this can have a significant impact on the time it takes to disclose important evidence, particularly for torture survivors and victims of gender-based violence.<sup>69</sup> Building this trust allows the asylum seeker to feel more confident in explaining their story and asserting agency.

*“The representative explains the procedure slowly and simply, using hand gestures and constant eye contact. The asylum seeker visibly relaxes and leans towards the representative. He explains ‘we won’t get a decision today; the judge goes away and thinks, then you get it in the post in a few weeks. It all turns on whether the judge believes you’. The asylum seeker nods. ‘I have read your witness statement, interview, and all of the other documents, do you have any questions for me?’ The asylum seeker says no, and smiles.”* (Observation 13)

By using hand gestures and eye contact as forms of effective communication, the representative in Observation 13 succeeds in building a relationship with their client. The appellant’s body language indicates that their relationship has changed, and that she trusts him enough to be relaxed in his company. One representative also built a relationship of trust and enabled the asylum seeker to assert agency as he supported her decision to proceed without an interpreter.

*‘Actually sir, she says she doesn’t want or need an interpreter, and is happy for the case to proceed. I have spoken to her at length in the waiting area and I would say she has a sufficient grasp of the language so as to allow her to do this.’* (Observation 6)

---

<sup>890</sup> Lyytinen (n 703).

This allowed the appellant to put forward her story in her own words before a judge. Without the endorsement from her representative, she may have been forced to wait for an adjournment and interpreter. She gave compelling evidence and was well-supported by her representative. Trust and confidence between the legal advisor and the asylum seeker can be seen as an essential component of the process. These results support Anderson and Conlan's assertion that advice and encouragement given by the legal advisor reduced the fear of the unknown for the asylum seeker, thus allowing them to communicate their evidence effectively and ensuring that they were an active participant in the process.<sup>891</sup> Another way in which effective communication allowed representatives to coax the best information from their clients, thus furthering the case, was through active listening. This built on the relationship of trust they had achieved.

*'The legal representative holds his gaze, showing respect and allowing him to use his agency She explains exactly why she is asking the questions, and allows the asylum seeker to speak unhindered. At points, she looks as though she'd like to interrupt, but lets the appellant finish'. (Observation 59)*

This behaviour seemed to give the appellant confidence, as he answered fully and quickly, with no pauses, thus generating better evidence and asserting agency. Some appellants found it difficult to disclose difficult information to the unknown judge and HOPO, and so building a relationship of trust with their representative in these cases may have assisted in presenting their account to the other parties. This helped enhance the asylum seekers' perceptions of fairness, whilst allowing them to assert agency over their case. This echoes the results of Genn, who found that respondents who were happy with their representation felt as though they had some involvement in their claim.<sup>892</sup> This was achieved through representatives listening to clients, and answering their questions, helping them to feel as though their interests were being considered.<sup>893</sup> This is in stark contrast to section 7.7.3 where it is clear that the representatives failed to listen, to the detriment of their client's case. According to

---

<sup>891</sup> Anderson and Conlan (n 644).

<sup>892</sup> Genn, 'Tribunals and Informal Justice' (n 841).

<sup>893</sup> MacIntyre, 'Imposed Dependency' (n 63).



Helen Spencer-Oatey and Peter Franklin,<sup>894</sup> building rapport is important in intercultural communicative situations, more so where the engagement ‘extends beyond the superficial’. This can be achieved through emotional engagement.<sup>895</sup>

#### **7.6.6 Identifying misinterpretations.**

The previous chapter details the adverse effects of misinterpretation for the appellants’ claims. Although it is difficult to pick up on misinterpretations without speaking the language, during observations several representatives picked up on inconsistencies.

*‘These mistakes led to confusion and inconsistencies in the evidence, until the representative noticed (she was on high alert for obvious misinterpretations, as the previous hearing resulted in an adjournment when the appellant and interpreter failed to understand each other).’* (Observation 41)

This example substantiates the analysis of interview data in Chapter 6, where representatives claimed that they stopped hearings due to poor interpretation.

*‘I mean first of all interpreting at tribunals isn’t great. I only speak two other languages and they are not often the languages that asylum seekers speak but once I could speak their language. It was quite horrifying to see; I mean I had to stop the first hearing because the interpretation was so bad. Had it been Arabic or Farsi, I’d never have known.’* (Representative 5)

As discussed in Chapter 6, this is important as adverse decisions are usually based on inconsistencies and credibility issues within the asylum seeker’s story. If these misinterpretations go unnoticed, they can be interpreted by the HOPO or judge as inconsistent, and the asylum claim may fail. This undermines procedural fairness and hinders the asylum seeker’s agency as they are not presenting their case properly. The representatives in these examples knew the case well, and when the answers from the interpreter did not match those in the witness statements, they were quick to pick up on it. This enhanced fairness in these cases, as the claims were not prejudiced

---

<sup>894</sup> Spencer-Oatey and Franklin (n 609).

<sup>895</sup> Chalen Westaby, ‘Feeling like a sponge’: the emotional labour produced by solicitors in their interactions with clients seeking asylum’ (2010) 17(2) *International Journal of the Legal Profession* 153-174.

by perceived inconsistencies which were actually misinterpretations. Identifying these misinterpretations may go some way to help eliminate inconsistent decisions.

The representatives exemplified in the previous sections have enhanced fairness within the asylum appeals process, and may have gone some way to eliminating some inconsistent decisions through levelling the playing field and adducing evidence in a way that the judge can understand. These effective representatives may have all contributed to a better experience for the asylum seeker; as they appeared more comfortable, confident, and able to put their story forward when compared with those appellants with poor representation. The examples presented highlight the importance of *adequate* representation, and were authenticated by the interviews with asylum seekers.

#### **7.6.7 Endorsements of representatives from asylum seekers.**

Effectiveness can also be measured by client satisfaction.<sup>896</sup> Of the nine asylum seekers interviewed, seven had access to legal representation, either through a solicitor, or through Asylum Justice. Of these, four claimed to be happy with their representation.

*'He was good. I really appreciate him. He is a very good person. He worked hard for me. The way in which the solicitor handled my case was very good, and that gave me hope. I still remember his name. I am totally happy with the way in which he handled my case.'* (Asylum seeker 1)

In this example, the asylum seeker had met with their representative before the hearing, and the process was explained in full. They were able to tell the representative their story with confidence after they had built a relationship of trust. This shows the importance of effective communication on part of the legal representatives. After the hearing, these asylum seekers indicated that they were able to communicate effectively within their case, and they perceived that they had received a fair hearing. They were active participants in their hearing, and this can at least in part be attributed to the effectiveness of their representatives.

---

<sup>896</sup> Macintyre, 'Imposed Dependency' (n 63).

The evidence presented in the preceding subsections suggests that the value of the effective representatives was in their ability to listen and put the case forward coherently, rather than increasing their chances of winning (increasing procedural fairness as opposed to substantive).<sup>897</sup> Appellants may be confused by the language, law and procedure; representatives can guide them through the uncertainty.<sup>71</sup> With effective representation, appellants should feel as though they had a fair hearing, whatever the eventual outcome. The asylum seekers above may not have been so complimentary had they been represented by one of the representatives discussed in the subsequent sections.

## **7.7 Ineffective representation**

### **7.7.1 Evidence of ineffective representation.**

According to Thomas, whilst there are a substantial number of representatives who provide high-quality services, there are also those who provide either incompetent, unscrupulous, or exploitative services.<sup>898</sup> Whilst effective representation can help provide asylum seekers with a fair hearing and a chance to assert agency, ineffective representation may hinder them. Representative 3 was quick to explain the role of representatives in depth.

*'So, the job of the advocate is to present the client's case, to give them the best opportunity possible. Often you do play the role of warden, to guide the client through the difficult waters that is the adversarial system. Your job is to present the client's case as best you can, as clearly and as cogently as possible so that hopefully the judge will agree with you. Your job is also to provide things that the clients cannot reasonably get on their own such as expert reports and um to present the law to the judge.'* (Representative 3)

This textbook answer sets out how a representative *should* behave, and the sentiments were echoed by other representatives. This is how they see themselves, and how they propose to behave. However, I observed that this is not the reality in many cases. In contrast to the examples given above, both in the form of observation

---

<sup>897</sup> Gill *et al*, 'Experiencing Asylum Appeal Hearings' (n 35).

<sup>898</sup> Thomas, *Administrative Justice and Asylum Appeals* (n 834).

and interview data, analysis of observations uncovered 64 examples of ineffective representation. For context, as discussed in section 7.6, there could be multiple examples of effective or ineffective representation in each hearing. One representative could present evidence poorly and fail to engage with their client. This would be coded as two separate instances of ineffective representation.

Legal representatives were often unprepared and had failed to explain the procedure to their client. There were many fumbles, pauses and struggles to find evidence. There was also evidence of a lack of knowledge or engagement with the client. These observations exposed a sizeable discrepancy between the espoused and observed reality of the effectiveness of representation. This is troubling as procedural fairness is undermined where appellants are unable to communicate their story to the judge.<sup>899</sup> Smart highlights examples of incompetent representatives, such as those who do not give clients their advice in writing, and those who do not prepare a written statement with the client.<sup>900</sup> The accounts presented throughout this section add to these examples, indicating that ineffective representation is widespread in asylum appeal hearings and is often the result of ineffective communication.

### **7.7.2 Poor presentation of evidence and submissions.**

An investigation by MigrationWork highlighted key concerns with poor representatives, including poor legal and case knowledge, inadequate interview experience and failure to secure further evidence.<sup>901</sup> The interviews and observations undertaken during this thesis support these findings. One of the most blatant examples of ineffective representation observed occurred when representatives presented evidence poorly and communicated ineffectively with other parties. This most often stemmed from a lack of preparedness.

*‘His bundle and evidence are poor. It has not been put together properly; it is a mish-mash of papers, something which the judge picks up on. He is sheepish and quiet. The paragraph numbers in the witness statement are also wrong. He has no supplementary questions, leaving it to the judge to ask whether his interview answers*

---

<sup>899</sup> Gill *et al*, ‘Experiencing Asylum Appeal Hearings’ (n 35).

<sup>900</sup> Smart (n 847).

<sup>901</sup> MigrationWork (n 78).

*are correct. During re-examination, he asks a question which he failed to ask during evidence in chief. The judge shouts at him and threatens not to allow him to ask such questions.'* (Observation 37)

Ineffective representation in the form of poor presentation of evidence and poor communicative skills hinders procedural fairness. Ineffective representatives such as this risk their client being sent back unfairly to their country of origin to face persecution, torture, or death.<sup>902</sup> The representative above does little to further the case and fails to promote the interests of the asylum seeker. They angered the judge and allowed the HOPO to dictate all of the questions, neglecting to adduce useful evidence on part of their client. In these cases, asylum seekers were unable to assert agency and communicate their case effectively, and procedural fairness was undermined. This lack of preparedness is startling, considering the representative in question had dealt with this appeal from the initial refusal; interviewing the appellant, drafting the statement and bundle, and presenting the case to the judge. This is in stark contrast to the data presented in section 7.6. As representative 2 reminded me,

*'It's necessary for the representative to spend time on the case and prepare the case properly as opposed to do a rushed job with no expert evidence.'* (Representative 2)

This is a clear discrepancy; it rarely happens in practice. I observed more evidence of rushed jobs, with little or no expert evidence. It was clear in ten cases that the legal representative had failed to prepare, and seemed unfamiliar with the case.

*'The HOPO is more prepared than the legal representative, who stares blankly at most of the judge's questions. He cannot find any of the relevant evidence, and doesn't know exactly what he is contesting. Several times, the judge asks a question which the legal representative cannot answer, and the HOPO steps in.'* (Observation 46)

Representatives in these cases asked few, if any supplementary questions, had no copy of the bundle, and little or mixed-up evidence, again showing a lack of effective communication with or for their client, despite meeting them on at least one other

---

<sup>902</sup> Macintyre (n 63).

occasion. Some representatives had failed to date translations or failed to include important documents. It appeared as though they had very little knowledge or understanding of their client's case, and fumbled their way through the hearing, unsettling both the judges and their clients. Agency and procedural fairness were undermined in these cases as appellants were unable to put forward their best evidence. In addition to an unfamiliarity with the case, at least five representatives knew very little about the appellant. This contradicts the beliefs of the interviewed representatives, especially representative 1, who claimed,

*'I meet them as early on in the process as possible. This helps me learn everything I can about the client, and relax them.'* (Representative 1)

Again, this is what the representatives say, and what they may believe happens, but it does not seem to be happening in every case.

*'I only met her just now when she came over. This one is nice, I think, but I don't know her. She doesn't know me; does she know my case?'* (Asylum seeker 3)

This unfamiliarity seemed to exacerbate feelings of stress and anxiety for the asylum seekers. They became restless, and their answers took on a pleading, questioning tone. The appellant in question had been told that her 'usual' solicitor would be representing her, only to be faced with an unknown solicitor from the same firm, ten minutes before the appeal started. This solicitor had only been given the evidence that morning. It seems unlikely that this lack of preparedness would further the case, or allow asylum seekers to assert agency or communicate effectively, as they appeared more flustered and less eager to talk than the instances described above when representatives made them feel comfortable.

### **7.7.3 Lack of engagement with clients.**

Another example of ineffective communication from representatives which emerged during both observations and interviews with asylum seekers was a lack of engagement with clients. Representatives spoke about their clients as if they were not present, told the judge that the case was not meritorious, and failed to engage with any of the parties in the hearing.

*'He begins his submissions with 'I'm not telling you it's an excellent, meritorious case; it is not. All of the evidence is outdated.' 'It is hard to get any cogent information out of him' 'I'm embarrassed, some of the statement is incomprehensible' 'My client is not engaging with healthcare professionals, I don't know why.' He is asking for an adjournment, or discretionary leave to remain. 'I agree that this case is rubbish.' He doesn't know when he got the legal aid contract, he lost contact with the respondent, and confuses the timeline. He is floundering. During submissions he uses complicated language and legal jargon.'* (Observation 38)

During this case it was clear that the asylum seeker did not understand what the representative was saying. The representative sounded enthusiastic and passionate, and gestured to his client, who looked at him and smiled. But in reality, he did not further the case at all. Representatives such as the example above repeatedly talked to other parties *about* their client, rather than engaging with them personally and speaking to them directly. There is little evidence in examples such as this that the asylum seekers had the opportunity to communicate effectively, or be heard. This characteristic of an ineffective representative is explored by MacIntyre who found that some clients often felt that their case was being handled by someone with little motivation and that there was nothing they could do about it. Ineffective representatives can make clients feel as though their case is unimportant, and that the representative has other, more important things to do.<sup>903</sup>

*'The legal representative asked very few preliminary questions before handing it over to the HOPO. He looks bored throughout cross examination, often not bothering to look at the bundle page to which the HOPO is referring to. He is distracted, twirling a rubber band around his fingers, whilst the HOPO remains attentive throughout.* (Observation 2)

This constrained the agency of the asylum seeker as without acceptable representation, they had an inadequate opportunity to put their case forward.<sup>904</sup> This

---

<sup>903</sup> Jennifer Hambly and Nick Gill, Law and Speed: Asylum Claims and the Techniques and Consequences of Legal Quickening (2020) 47(1) *Journal of Law and Society* 3-28.

<sup>904</sup> Thomas, 'Evaluating Tribunal Adjudication' (n 38).

asylum seeker recognised the lack of engagement and appeared increasingly worried. By the end of the hearing, the appellant was wringing his hands together and his eyes darted quickly around the room. This is troubling because, as shown in section 7.1.4, representatives understand the law and process far better than their clients, and their role is to communicate their client's story effectively to the judge, in a way that the judge can understand. Although all of the legal representatives interviewed asserted their effectiveness and active engagement in the process, almost half of the asylum seekers highlighted a lack of engagement by their representative during interviews.

*'Before, I have I think bad representation. They don't listen, they get my story wrong, I don't even tell them whole story! I think they will help me in appeal, but 10 days before, they say no. What am I supposed to do?' (Asylum seeker 4)*

This quote authenticates the examples above; just as active listening was an important characteristic of effective representation, here a failure to listen indicated poor representation and ineffective communication, leaving the asylum seeker confused and dissatisfied. This theme of disempowerment ran through four interviews. In contrast to the clients in section 7.6.7, who were happy with their representation as they had been made to feel as though they were involved in their claim, these appellants felt as though they had no real communication with their representative, furthering the confusion they felt when faced with the complex asylum process. These appellants were less satisfied with their representatives and did not feel as though they had received a fair hearing, regardless of the eventual outcome. This emphasises the importance of effective representation in achieving procedural fairness in asylum appeal hearings. These asylum seekers were not able to communicate the best version of their case, and were left feeling frustrated, disappointed, and anxious.

#### **7.7.4 Failure to adequately consult with the client before the hearing.**

The dominant role played by certain representatives effectively excluded asylum seekers from participating in their hearing. During observations, I witnessed six representatives limiting their clients' participation in the process by talking over their client or shutting them down before they could finish an answer, thus not allowing them to communicate with the adjudicator. This constraint on communication was confirmed in five interviews with representatives.



*'In practical terms; it's better if the appellant just doesn't speak, mainly. Practically, it's a high pressure environment (.) they're likely to say something which contradicts something they said before just because they're nervous, or they get twisted up, they get confused, therefore they lose their credibility so they might have been really clear in their statement, but they get to the hearing and they freak out and that does happen. So you want your client not to speak. Ideally. That is my personal opinion. I think it is probably more beneficial for the asylum seeker to sacrifice a bit of agency, to have a more effective appeal'* (Representative 9)

These representatives knew what they were doing; they acknowledged the constraint and tried to justify it. They referred to concepts such as 'high pressure environments' and 'effectiveness', implying that they stopped their clients speaking, and thus constrained their agency, for the good of the asylum seeker and their case. Whilst representatives indicated that asylum seekers are often free to speak for themselves, they argued that unconstrained 'story-telling' may damage a case in several ways. They may not communicate their story in the way that a judge might expect, they are unlikely to produce legal arguments, and may reveal details which may be irrelevant or even harmful to their case. Although it seems as though these constraints were to avoid assertion of irrelevant information, this could add to an overall feeling of frustration and a poor perception of fairness in the appeal setting.<sup>905</sup> The asylum seekers involved may have left the hearing feeling as though they had not communicated their whole story, or said everything they wanted to say. It can be difficult for the appellant to accept that not all of the details of their claim are relevant or significant. Certain events may be very important to the appellant, and preventing them from talking about these events to the judge can cause stress and anxiety as the whole case has not been put forward. For many appellants, the hearing is seen as their opportunity to communicate their story and get their claim granted. It is understandable then, that they would want all of the information presented. Whilst representatives may genuinely believe they are helping their client's case by keeping to the 'most important' facts, it could in fact be detrimental. If the appellant feels as though they are not being heard, they may become more frustrated or anxious, leading

---

<sup>905</sup> Thomas, *Administrative Justice and Asylum Appeals* (n 834).

to poorer communication. They may not be able to concentrate fully on the questions being put to them if they feel as though they have not adequately answered the previous one.

However, it can be argued that the tribunal is a place where the judge ascertains relevant facts and legal decisions take place, and that justice does not require the full story or a complete absence of stress. This may be justified in some cases, as it can be argued that a representative's attempt to prevent their client from contradicting their earlier submissions, or adducing irrelevant information, is in the interest of their client. In terms of substantive fairness and outcome, the representative's aim of a positive decision may outweigh an appellant's view. For procedural fairness, this highlights the importance of communication between legal representative and asylum seeker; effective representatives explain why they are focussing on some, but not all, of their story before the hearing. As these examples show, inadequate and ineffective legal representation can contribute to perception of a lack of justice, as asylum seekers may feel that they have not had a fair hearing, or that their agency has been constrained. Ineffective representation can lead to a significant risk of removal, and mistakes by representatives prolong asylum claims and the disempowerment of being an asylum seeker.

### **7.8 Conclusion.**

This chapter has highlighted the significance of effective legal representation in the asylum appeals process. The findings add to the existing literature, emphasising the importance not only of legal representation, but of *effective* representation. These results have emphasised that legal representatives can both constrain and enable the agency of asylum seekers in their appeal hearings through effective or ineffective communication. Of the 12 legal representatives interviewed, I observed the behaviour of eight in the courtroom. From these observations and interviews, I concluded that effective representatives were well prepared and thorough. They ensured clarity throughout, and helped clients feel more comfortable through listening and establishing a relationship of trust, allowing asylum seekers to communicate effectively and assert agency.

Ineffective representatives were unprepared or had a lack of knowledge about the client or their case, or a lack of engagement with them. There was also evidence of ineffective communication manifesting as incompetence, shown through poor presentation of evidence and submissions. Unlike the previous chapter, there were discrepancies between the espoused and observed realities of legal representatives. Representatives allege that they are an integral part of the process, and that they always allow their clients to assert agency. None of the interview participants admitted to any personal flaws, only flaws within the system. This is very different from the results of observations in which there were 64 examples of ineffective representation.

Representatives claimed that they spent time preparing the case properly but in six cases I saw no evidence of this. On the contrary, I observed failures to prepare and unfamiliarity with the case. It would be interesting to find out the outcomes of these cases, in order to ascertain whether effective representation had an effect on substantive justice, or a successful appeal. However, as this thesis focusses on procedural fairness, the emphasis is on the procedures employed by the representatives, as to whether they helped their clients receive a fair hearing. Restrictions on legal aid may have had an impact on representation. A lack of specialist representatives prepared to do legal work means that more work falls on a smaller number of representatives, leaving them with even less time to spend with clients.<sup>906</sup>

The observations show a clear relationship between effective communication, agency, and procedural fairness, as asylum seekers with effective representation were better able to communicate their story to the adjudicator, and assert agency, which enhanced the likelihood of a fair hearing. The duality of structure is highlighted throughout this chapter, with examples of hindering and enabling structures (representatives) influencing the ability of asylum seekers to assert agency. Observations uncovered more examples of effective than ineffective representation. This is a positive outcome in terms of access to justice for asylum seekers, as with effective representation, they are better able to assert agency and put a clear, coherent case forward. Access to a fair hearing is also ensured, as the

---

<sup>906</sup> Wilding (n 81).

representative helps bring the asylum-seeking appellant to the same level as the judge and HOPO through their knowledge and understanding of the case and legal system. Representation is absolutely necessary in order for hearings to be, and to appear to be, fair. This is due to the adversarial nature of the hearing, the complexity of the law involved, and the lack of knowledge and understanding on part of the appellant. Overall, there is no denying the importance of effective legal representation to ensure the standards required for procedural fairness can be met. The next chapter concludes the thesis, synthesising the ideas presented in the previous chapters and summarising the conclusions drawn.

## **Chapter 8- Conclusion**

### **8.1 Aims of the thesis.**

The main aim of this study was to explore access to justice in asylum appeal hearings, considering structural barriers faced by asylum seekers and the ways in which they overcome these barriers to assert agency. This thesis presents a theoretically and empirically grounded investigation into procedural fairness in the asylum appeal hearing, through a structure and agency lens. I wanted to demonstrate the importance of procedural fairness and the influence of structure and agency within the asylum appeal system, providing a rich, detailed and holistic account of the various ways in which asylum seekers are constrained and enabled by legal structures, and the resources used to assert agency and achieve procedural fairness in their appeal.

The thesis intended to contribute to an understanding of how structure, agency, and communication influence procedural fairness and access to justice for asylum seekers in Wales. A multi-method approach of 90 court observations and 21 semi-structured interviews was used to apply structuration theory to a non-ideal society to investigate procedural fairness and access to justice in asylum appeal hearings. This allowed me to gain an understanding of the meanings, understandings, and experiences that asylum seekers attach to procedural fairness and access to justice and to explore how these experiences intersect with the behaviours and experiences of other actors within the process; considering whether the right to a fair hearing is undermined by increasingly hostile policies and barriers to agency. As discussed in Chapter 4, three overarching arguments run through this thesis, which mirror these aims:

- **Hostile policies and procedures (legal structures) have the potential to constrain the agency of asylum seekers in the appeals system.**
- **Asylum seekers are able to draw on tactics and resources to assert agency and create space for effective communication of their story.**
- **Legal representation and effective interpretation are necessary for asylum seekers to have a fair hearing.**

The next section discusses the main findings of this research, and the contribution to knowledge.

## **8.2 Main findings and contribution to knowledge.**

This thesis applied facets of Giddens' structuration theory to empirical research, arguing that agency may be viewed as a spectrum, where different agents stand at different points in terms of how much agency they possess.<sup>907</sup> The findings contained in the previous chapters provide new insights into the role of agency and communication in the asylum appeal hearing. They highlight the ways in which legal structures promote and hinder fairness, considering whether procedural fairness and, in turn access to justice, is achieved in this setting.

I drew upon empirical research undertaken during this project to identify the experiences and challenges that many asylum seekers commonly face in their appeal hearing, including a lack of knowledge of the system and linguistic and cultural barriers. Much of the work in the field of fairness and access to justice for asylum seekers focusses on the outcomes of asylum cases; and whether these are 'fair'. This thesis aimed to move away from outcome and substantive fairness, to investigate whether the procedures followed in appeals are fair. As I did not pursue the outcome of cases I observed, or appellants interviewed (decisions are usually delivered by post after the hearings), I was able to guarantee that my study is focused on process rather than outcomes, thus remaining distinct from work that considers outcomes as the sole indicator of fairness and thus providing an original contribution to knowledge.

It has been shown throughout the thesis that procedures can undermine the substantive principles of the right to asylum. In Chapter 2, I discussed protection under international and supranational law, including a dissection of the definition of a refugee given in the Refugee Convention. It was argued that the vague allusions to 'persecution' and a 'reasonable degree of likelihood' have allowed States to adopt increasingly hostile policies whilst still fulfilling their obligations under the Convention with regards to 'genuine' refugees. I introduced the idea that asylum procedures in the UK that are deemed to achieve this minimal threshold, can be procedurally unfair. In this context of increasingly hostile policies, asylum seekers are treated with suspicion,

---

<sup>907</sup> Giddens, *The Constitution of Society* (n 73).

and are accused of bringing fraudulent claims, creating a culture of disbelief in the UK asylum process. I argued that in this context, justice as fairness was an appropriate lens for this thesis as it is an accepted standard in the British system which has been used to justify the development of asylum law.<sup>908</sup>

A thorough engagement with Rawls and his critics in Chapter 3 allowed me to further develop a non-ideal theory of justice as fairness, which would accommodate the asylum seeker as an outsider, and apply it to asylum seekers in the appeal hearing. The chapter also developed an argument for a structure and agency theoretical framework to examine whether the asylum appeals process achieves the standards of a fair hearing to ensure justice. The definitional issues and limitations of current theories that surround debates of structure and agency were interrogated, and I proposed that Giddens' structuration theory was appropriate to use for studies into access to justice for asylum seekers, as both structure and agency play an important role in reproducing society and enhancing procedural fairness.<sup>909</sup> Despite Giddens himself expressing doubt as to whether it can be used in empirical research; I found evidence to suggest that useful and original data can be generated using this approach. Structure and agency are linked to fairness as I argue throughout that asylum seekers in the appeal system cannot be deemed effective agents without access to a fair hearing, including the right to representation and interpretation. It is suggested that effective communication is key to enhancing procedural fairness and enabling asylum seekers to have the capacity to be effective agents.

Throughout the chapter, and the remainder of the thesis, I presented the idea that, whilst it is often limited, asylum seekers demonstrate agency in various ways. I have used the analytical framework to assess how structures constrain and enable agency in asylum appeals, and whether this limits a fair hearing and access to justice. In Chapter 4, I explained and justified the methodology used in this research. I used a qualitative multi- method approach of courtroom observations and semi-structured interviews with asylum seekers and legal representatives, focussing on experiences of procedural fairness and episodes of agency in the appeal setting. With the exception

---

<sup>908</sup> Endicott (n 34).

<sup>909</sup> Giddens, *The Constitution of Society* (n 73).

of Gill et al, who have conducted extensive research using observation,<sup>910</sup> few asylum studies utilise observations and so this thesis aims to expand the literature on observations in asylum appeals.

Evidence from literature and the preceding chapters within this thesis demonstrates that asylum seekers are constrained throughout the asylum process, and are seen to have little power to communicate freely, suggesting a lack of agency. This may be exacerbated by a lack of knowledge and understanding of the system and their role within it.<sup>911</sup> However, the results presented in Chapter 5 revealed that they also employ tactics and resources that allow them to assert agency. The data gathered from observations showed that, despite language barriers and difficulties regarding credibility, asylum seekers attempt to communicate effectively using whatever resources they have available. The ability of asylum seekers to assert power, and therefore agency in their appeal is important as, discussed in section 5.1.5, asylum decisions very often rest on a judgement of whether or not the claimant and their story are credible. During observations, agency was most often asserted through discourse, and demeanour; body language, gestures, and eye contact. This bodily agency allowed the appellants to engage with the process and the actors within it, to ensure that they were heard. This chapter highlighted that the procedures in place in asylum appeal hearings can however fail to provide space for the appellant to provide full oral testimony relating to their account of persecution and claim for asylum.<sup>912</sup>

Trust was shown to be one of the principal ways in which asylum seekers managed their lack of understanding of both the English language and legal system.<sup>913</sup> This enhanced communication, and facilitated space for agency. Many of the interviewed representatives also highlighted the importance of asylum seekers providing additional supporting evidence. Appellants who relied solely upon their own narrative were more constrained and less able to assert agency than those who procured additional evidence. It was often the case that the narrative evidence given by the appellant more likely to be challenged by the HOPO than expert or medical reports. However, whilst documentary evidence is often crucial to an asylum decision,

---

<sup>910</sup> See for example Gill *et al*, 'Experiencing Asylum Appeal Hearings' (n 35).

<sup>911</sup> See for example Kendall (n 4).

<sup>912</sup> Herlihy *et al* (n 676).

<sup>913</sup> Hynes (n 701).



Chapter 5 showed that decision-makers often fail to recognise some of the difficulties appellants face in obtaining it, and observations and interviews exposed a marked discrepancy concerning the ability to provide external evidence. Mayblin<sup>914</sup> and Thomas<sup>915</sup> call for further empirical evidence on how credibility is being assessed in the UK to establish whether the system is functioning effectively; this chapter aims to contribute to this research gap by highlighting strategies used by asylum seekers in order to establish credibility. It has been shown that agency and effective communication is crucial to the assessment of credibility and procedural fairness in the asylum process as a whole, and a system that supports agency and thus effective communication will support justice.

In Chapter 6, I found that language is a powerful structure which impacts on the agency of asylum seekers both within and outside the asylum appeals process. Access to justice is affected where the asylum seeker cannot understand what is happening to them, and where they are unable to put their case properly to a judge. To mitigate against this, asylum seekers have the right to interpretation. Much of the literature on interpreters in the asylum appeal setting describes the importance of their role and the problems associated with the services they provide. Chapter 6 extended these ideas; showing how the adequacy of interpretation can influence the ability of the asylum seeker to put their case forward at appeal, thus hindering or enhancing the likelihood of the asylum seeker achieving a fair hearing. I argued that a fair hearing not only depends on the presence of an interpreter but also the effectiveness of that interpreter. I then argued that effective interpreters are active listeners; they make the appellant feel more comfortable and better equipped to give evidence. Effective interpreters also provided cultural context where necessary and interrupted parties speaking to ensure that they interpreted everything to the appellant. Even where the interpreter just gave 'minor' help to appellants, such as pouring them a glass of water, this began to build a relationship of trust between the two, supporting the appellant to ensure their story was heard and increasing the likelihood of a fair hearing. Relaxed, trusting appellants almost always gave better evidence than those who felt frustrated

---

<sup>914</sup> Mayblin (n 669).

<sup>915</sup> Thomas, 'Assessing the Credibility of Asylum Claims' (n 10).

or anxious, and the delivery of complete, detailed evidence was central to a fair hearing.

I identified that interpreters both constrain and enable asylum seekers' agency as they facilitate space and further the claim, but they can also hinder the asylum seeker, through misinterpretations and acting outside their duty. Asylum appeal hearings contain complex interactions between multiple actors, and these interactions can be influenced by power imbalances and a lack of effective communication and agency. Asylum seekers rarely have English as their first language, and so it is often difficult for them to understand, or communicate their story clearly.<sup>916</sup> Even with the help of a competent interpreter, the asylum-seeking appellant may still face misinterpretations and cultural barriers that can have an adverse impact on their claim. Whilst interpretation is vital, it can inhibit effective communication, due to the unnaturally slow pace and necessary pauses which break the narrative and can cause the applicant to forget what they intended to say.<sup>917</sup>

In Chapter 7, I found that effective communication and agency are also influenced by the role of legal representation. This chapter emphasised that legal representatives can both constrain and enable the agency of asylum seekers in their appeal hearings through effective or ineffective communication. I concluded that effective representatives were well prepared and thorough. The effective representatives ensured clarity throughout, and helped clients feel more comfortable through listening and establishing a relationship of trust, allowing asylum seekers to communicate effectively and assert agency. Ineffective representatives were unprepared or had a lack of knowledge about the client or their case, or a lack of engagement with them. There was also evidence of ineffective communication manifesting as incompetence, shown through poor presentation of evidence and submissions. This chapter adds to the literature on procedural fairness as it investigated whether access to competent representation allows asylum seekers to communicate effectively and receive a fair hearing.

---

<sup>916</sup> Edwards (n 329).

<sup>917</sup> Ibid.

The observations showed a relationship between effective communication, agency, and procedural fairness, as asylum seekers with effective representation were better able to communicate their story to the adjudicator, asserting agency and in this context achieving a fair hearing. The duality of structure was highlighted, with examples of hindering and enabling structures (representatives) influencing the ability of asylum seekers to assert agency. On the whole, observations uncovered more examples of effective than ineffective representation, which is a positive outcome in terms of access to justice for asylum seekers, as with effective representation, they are better able to assert agency and put a clear, coherent case forward. Access to a fair hearing is supported, as the representative helps bring the asylum-seeking appellant to the same level as the judge and HOPO through their knowledge and understanding of the case and legal system. I concluded that representation is absolutely necessary in order for hearings to be, and to appear, fair. This is due to the adversarial nature of the hearing, the complexity of the law involved, and the lack of knowledge and understanding on part of the appellant.

This section has highlighted the main findings and contribution to knowledge, situating the thesis within the field of procedural fairness and access to justice for asylum seekers. It has also demonstrated the usefulness of Giddens' theory, especially in highlighting the role of communication. The next section discusses the limitations of the research, along with suggestions for future research.

### **8.3 Limitations and ideas for future research.**

One of the principal limitations of this research was a lack of engagement with two key actor cohorts; the Home Office and Judiciary. As discussed in Chapter 4, section 4.11, I made a request to the Judiciary to interview a sample of judges from the Immigration and Asylum Chamber on 28<sup>th</sup> September 2018. Although a response seeking further information was received on 12<sup>th</sup> November 2018, a decision was never communicated despite three follow up emails. As a result, there is an absence of judicial perspective in this research. Similar difficulties were faced in attempting to interview HOPOs, none of the eight HOPO's asked at Columbus House were willing to speak 'on the record'. This limitation means that this research may not show the whole picture, judges and HOPOs were unable to add context to their observed behaviour, and the results may be biased towards the views of asylum seekers and

legal representatives. Future research could involve interviewing judges and HOPOs to investigate their perceptions of procedural fairness in the appeal hearing, to reveal any disparities between theirs and the appellant's views, or between espoused and observed realities.

As discussed in Chapter 4, section 4.9.2, another possible limitation of this research was that, as a single researcher, the benefit of another opinion to consolidate understandings of each case was lost, and it became difficult to maintain an explicit awareness as I became more familiar with the process and courtroom itself. To mitigate against this, I included prompts in my observation notes. I am also aware that the interview participants may have had reasons for participating in this research which may have influenced their answers and affected the validity of their contribution.

This research has been impacted somewhat by the global pandemic; Covid19. Whilst I believe I had reached a point of saturation, I would have liked to have conducted more interviews, to add further validation to my findings. I elected not to conduct interviews via Zoom or Microsoft Teams, as I would have been unable to observe some non-verbal, physical cues such as body language which, as noted in Chapter 4, section 4.10, are important as they indicate different points of view, and encourage the researcher to ask follow-up questions.

Finally, a possible limitation of this research is that I do not comment on the validity of the claims presented within this thesis; the focus is instead on different perceptions of procedural fairness within the asylum system, and the relationships between the actors within it. Whilst I believe this is justified, as the asylum appeal process aims to ensure that accurate decisions are reached through fair procedure, and attitudes towards the law are centred on procedural fairness rather than outcome, substantive fairness emerged as a theme in observation and interview data. For example, in Chapter 7, several representatives said that they met with their clients as early on in the process as possible, but at least five representatives had never met their client before the appeal, and appeared to know very little about their client. Representatives also claimed that they spent time preparing the case properly but in some cases I saw no evidence of this. On the contrary, I observed failures to prepare and unfamiliarity with the case. It would be interesting for future researchers to

reinterview appellants after they had received a decision, in order to ascertain whether effective representation influenced substantive justice, or a successful appeal. Similarly, as shown in Chapter 6, section 6.4, incompetent or inadequate interpreting can change the outcome of appeal hearings, and reinterviewing appellants after they have been granted or refused asylum may provide evidence of this.

As discussed in Chapter 1, section 1.1, post Brexit, immigration policy in the UK is already undergoing substantial changes to its immigration and asylum system.<sup>918</sup> Future research could use the lens put forward in Chapter 3 to investigate whether future asylum policies can be deemed fair in a non-ideal society. The lens could also be used for future research into the effect of 'othering' in the asylum system. As discussed in Chapter 1, despite instances of othering emerging in the empirical data, it was outside the scope of this thesis to discuss it in any depth.<sup>919</sup> However, it cannot be ignored that asylum seekers do face othering. This in part may be due to the ethnic minority backgrounds of the majority of asylum seekers. There are arguably racist structures within the UK asylum system, as the whole asylum system is set up to keep people (others) out. The next section sets out a series of recommendations to improve fairness and access to justice in the asylum appeal hearing.

#### **8.4 Challenges and injustices faced by asylum seekers during the hearing, and ideas for change .**

The asylum process as a whole can be described as challenging and difficult to negotiate. It is a process filled with uncertainty and limitations. The previous chapters show that, whilst asylum seeking appellants are able to carve out space for agency, asylum appeal hearings are not always procedurally fair, and more often than not, at some point during the appeal, the asylum seeker's agency is constrained. Many of the barriers to effective communication discussed in previous chapters are related to the asylum system and the players within it, rather than the asylum seekers themselves. Judges, HOPOs, legal representatives and interpreters can make it difficult, and in some cases impossible for appellants to communicate their case

---

<sup>918</sup> Nationality and Borders Bill 2021 (n 9).

<sup>919</sup> For more information on 'othering' asylum seekers, see Amanda Haynes, Eoin Devereux and Michael Breen 'Fear, Framing and Foreigners: The Othering of Immigrants in the Irish Print Media' (2006) 16 *International Journal of Critical Psychology* 100-121; Grove and Zwi (n 19).

effectively. According to Gill *et al*, little attention is paid to the experiences and perspectives of appellants going through the process.<sup>920</sup> The thesis centred on the experiences of the appellants and the following recommendations aim to enhance procedural fairness in the appeal hearings, with a focus on allowing asylum seekers to communicate effectively. They are based on existing literature, and the data and analysis presented in this thesis.

#### **8.4.1 Judicial and HOPO behaviour.**

I will begin with challenges relating to the behaviour of judges, and HOPOs. These are brief to reflect the fact that they were unable to add context to their behaviours in interviews. The ideas for change are based on observation data, and should enhance procedural fairness in future appeals.

As shown throughout this thesis, asylum seekers' stories are often unusual, and are frequently judged as implausible in relation to normative or Western notions of common sense.<sup>921</sup> Thomas argues that there is a risk that decision-makers will take decisions from their own western assumptions, and that they may be unaware of the importance of cultural differences between themselves and asylum seekers.<sup>922</sup> This research highlighted examples of HOPOs and judges applying credibility guidelines and the standard of proof too restrictively and the accounts presented throughout this thesis indicate that judges often assume credibility based on experience. This can include the ways in which people behave following traumatic events, and whether they believe this to be an appropriate reaction. This culture of disbelief is unfair as it does not achieve the threshold of impartiality. In some cases, even where decision makers adopt the lower standard of 'believability' as opposed to 'truth', procedural fairness is still undermined, and agency is constrained where asylum narratives are forced to comply with western assumptions. It is important therefore, for judges (and HOPOs) to understand the importance of cultural understandings. Guidelines on assessing credibility could therefore be adjusted, applying the benefit of the doubt principle where necessary, and reminding judges of the importance of context and individual differences. In some cases, this may require evidence from an expert.

---

<sup>920</sup> Gill *et al*, 'Experiencing Asylum Appeal Hearings' (n 35).

<sup>921</sup> Kendall (n 4).

<sup>922</sup> Thomas, 'Assessing the Credibility of Asylum Claims' (n 10).

A related injustice which emerged during observations, was a lack of communication between judge and appellant. Whilst judges attend asylum appeal hearings daily, appellants (usually) only attend one. They will understandably be anxious, and lack the necessary knowledge and experience to understand the process. As per judicial guidelines,<sup>923</sup> during observations, whilst all of the judges checked whether the interpreter and appellant could understand each other (some more briefly than others), only one judge instructed the appellant on how to use their interpreter at the beginning of the hearing. In most cases, the judge introduced themselves and stated their independence from the Home Office, but only two appellants (and one injured interpreter) were informed that they could take a break during the hearing. Of these, one was underage and the other had a mental illness. Judges also gave a different time frame on when the asylum seeker would receive a decision- ranging from one to three weeks. These inconsistencies could have the effect of undermining procedural fairness, and perceptions of fairness, in the appeal hearing. Despite time constraints on asylum appeals, judges could adhere more fully to Judicial College guidelines, pausing occasionally to ask appellants if they have questions or if they are understanding the proceedings, and signposting different stages of the hearing. This should be emphasised in Judicial training.

As discussed in section 7.6.2, the primary function of the HOPO is to cross-examine and challenge the asylum seeker through exposing inconsistencies in their claim. During data collection, some HOPO's undertook this role in a business-like manner, but cross-examination was more often aggressive, lengthy, and hostile. This type of questioning questions can be considered as inappropriate, and can contribute to procedural unfairness as the fundamental objectives for tribunals are openness, fairness, and impartiality.<sup>924</sup> These objectives are not being achieved where the HOPO makes the asylum seeker feel uncomfortable, or as though they are not being believed. More stringent training and monitoring of Home Office officials could be implemented to prevent these injustices, especially with regard to cross-

---

<sup>923</sup> Judicial College (n 583) Para 110.

<sup>924</sup> Franks Report (n 51) para 41.

examination.<sup>925</sup> Aggressive language and styles of questioning should be avoided, and they should focus on the claim as a whole, rather than minor inconsistencies.<sup>926</sup>

#### **8.4.2 Proposed changes to encourage effective interpretation.**

As discussed in Chapter 6, section 6.8.2, decision-makers prefer interpreters to remain neutral; they should not add information.<sup>927</sup> Although interpreters are often encouraged to translate word for word what the asylum seeker says, rather than to interpret what they mean, this can often produce distorted communication.<sup>928</sup> Several interview participants picked up on this, with varying levels of concern. Representatives complained that interpreters do not interpret the whole answer from the asylum seeker, rather they summarise and regurgitate, leading to worries that the essence of what is being said is lost. Other representatives also worried about the accuracy of translation, especially when appellants spoke for a long time and interpreters only spoke a few words to the judge. As discussed in Chapter 6, section 6.7.1, procedural fairness was undermined in these cases because the appellants were not hearing the whole case. Contextual details may have been missed, in addition to important parts of the question, which could result in a 'wrong' answer from the appellant. It may therefore be necessary for guidance to explicitly clarify the role of the interpreter to avoid different types of interpretation. At present, some interpreters convey only the evidence given by the asylum seeker, almost word for word, whilst others deliver evidence and interpret through a cultural prism., Whilst adding cultural information may be seen as constraining agency because the appellant is not telling the judge their story in a way that is meaningful to them, procedural fairness and effectiveness are enhanced as the judge receives the best evidence in particular case, in a way that they can understand, which may have otherwise been missed.

The quality of interpretation in asylum appeal hearings could be improved through appropriate training and better oversight, scrutiny, and regulation. As it stands, in most cases only the interpreter can understand all parties, and so, as outlined in Chapter 6, section 6.10, misinterpretations or other errors do go unnoticed and

---

<sup>925</sup> Gill *et al*, 'Experiencing Asylum Appeal Hearings' (n 35).

<sup>926</sup> See Chapter 6, section 6.6.2.

<sup>927</sup> Colin and Morris (n 755).

<sup>928</sup> *Ibid*.



unchecked. It is impossible to remove interpretation from asylum appeals, so there needs to be a focus on improving the way they work. As discussed in Chapter 6, section 6.2, in the UK, interpreting work in the courts requires the interpreter to hold a Diploma in Public Service Interpreting (DPSI), a Level 6 qualification of the UK Qualifications and Credit Framework (equivalent to an undergraduate degree level) which is accredited and examined nationwide by the UK Chartered Institute of Linguists. All interpreters observed and discussed in this thesis then, had formal training and were paid to interpret. However, it may be that more rigorous vetting procedures should be put in place, along with greater training and ongoing monitoring, such as spot checks, to ensure that misinterpretations do not happen. If legal interpreters are equipped with appropriate skills, self-awareness, and ethical standards, they may be better able to acknowledge the importance of working within their own competency levels, and disclosing to judges if the work goes beyond these.<sup>929</sup>

Several of the challenges and injustices discussed in Chapter 6 are related to the asylum system and the players within it, rather than individual interpreters. Judges, HOPO's, legal representatives and appellants themselves can make an interpreter's job more difficult, and in some cases impossible. Their task is already complex and demanding, and is made harder through inadequate training and a lack of time to engage. This shows the complex interaction faced by interpreters and asylum seekers with regards to communication, agency, and fairness. I agree with Gill *et al's* recommendation that, in order to improve the situation, experts on interpretation should be consulted to develop specific guidelines on interpretation.<sup>930</sup>

One final issue with regards to interpretation is a lack of engagement, and so one possible solution is better training and/or guidance for judges, HOPO's and legal representatives on how to use interpreters, focussing on pausing during long excerpts and allowing them time to engage, without losing the essence of the questions being asked. It would also be useful for judicial guidance to include a section on explaining to the appellant how to use the interpreter. Whilst guidance from the Judicial College

---

<sup>929</sup> Reynolds (n 611) 56.

<sup>930</sup> Gill *et al*, 'Experiencing Asylum Appeal Hearings' (n 35).

is available,<sup>931</sup> this is not always adhered to in practice. It may also be helpful for judges to allow for more breaks in order to reduce errors, especially where simultaneous interpretation is used.<sup>932</sup>

### **8.4.3 Injustices stemming from the behaviour of legal representatives.**

When interviewing legal representatives, I asked what could be improved in terms of legal representation for asylum seekers. The most frequent answers given were the quality of decision making, lack of specialist lawyers, and legal aid funding.<sup>933</sup> These results show that it is the system, rather than representatives themselves that may need to be improved. Representatives claimed that we need to encourage students, and educate universities about asylum and immigration law. The government should support the rule of law and the role of lawyers in public law to challenge the state, not attack them. Recent government attacks on 'lefty lawyers' undermines respect in the rule of law and may discourage students from this area.<sup>934</sup> Part of this could include governmental funding for pro bono units in law schools.

With regards to the legal aid fee, all of the representatives agreed that it is simply not enough to cover the work that needs to be done on an average asylum claim. Governmental cuts have been widespread, especially with the introduction of LASPO,<sup>935</sup> and whilst asylum remains within its remit (for now), the cuts have had a detrimental impact on the work representatives are able to do, without working pro bono. It may be necessary for the government to consider increasing the fee for asylum cases, to give real effect to the state's obligations under the Refugee Convention.<sup>936</sup> This would allow representatives more time to prepare the case and build a relationship of trust with their client in order to allow space for the appellant's narrative, similarly to the effective representatives discussed in section 7.6. Interestingly, however, observations also uncovered 64 examples of ineffective

---

<sup>931</sup> Judicial College (n 583).

<sup>932</sup> Gill *et al*, 'Linguistic incomprehension in British asylum appeal hearings' (n 733).

<sup>933</sup> Wilding (n 81). Restrictions on legal aid have led to a lack of specialist lawyers, and a 'legal desert' in Wales.

<sup>934</sup> See for example, Jemma Slingo 'Patel lashes out at 'lefty lawyers' in asylum speech' (*Law Gazette* 5 October 2020) <https://www.lawgazette.co.uk/news/patel-lashes-out-at-lefty-lawyers-in-asylum-speech/5105870.article> and Diane Taylor 'Man faces terror charge over alleged attack at immigration law firm' (*The Guardian* 23 October 2020) <https://www.theguardian.com/uk-news/2020/oct/23/man-faces-terror-charge-over-alleged-attack-at-immigration-law-firm>

<sup>935</sup> LASPO (n 866).

<sup>936</sup> Refugee Convention (n 3).

representation, which centred around the representatives themselves communicating ineffectively. From this, a positive change could include better training and guidelines for legal representatives, similar to Judicial College Guidelines, on how to communicate with appellants, to combat this ineffectiveness.

### **8.5 Summary of contribution.**

The thesis aimed to investigate whether there is space for asylum seekers to assert agency in their appeal, highlighting some of the structures which hinder or facilitate this ability. It contributes to the fields of refugee law, communication studies, and empirical legal research by improving understanding of the procedural challenges and legal structures faced by asylum seekers in their appeal hearing, through courtroom observations and semi-structured interviews. In doing so, the thesis also responds to broader issues of procedural fairness and access to justice, with a focus on effective communication and agency, through use of structuration theory. Despite claims that the theory cannot be applied to empirical studies, this thesis has shown that it can be a useful method to measure access to justice in the context of procedural fairness in a non-ideal society. Overall, it has been argued that, whilst legal structures, hostile policies, and the agency of others work to constrain the ability of the asylum seeker to assert agency, they are able to carve out space to communicate effectively, through access to effective interpretation and legal representation, and by using the resources available to them, thus enhancing the likelihood of a fair hearing and access to justice.

## **Bibliography**

### **Primary Sources**

#### **UK Cases**

Horvath v Secretary of State for the Home Department UKHL 37, [2000] 3 WLR 379, [2000] 3 All ER 577, [2001] 1 AC 489 [496-497] (Lord Hope).

RT (Zimbabwe) and others (Respondents) v Secretary of State for the Home Department (Appellant) [2012] UKSC 38

#### **European Cases**

B v Secretary of State for the Home Department (Democratic Republic of Congo) [2003] UKIAT00012

CJEU - C-465/07 Meki Elgafaji, Noor Elgafaji v Staatssecretaris van Justitie JT (Cameroon) v Secretary of State for the Home Department [2008] EWCA Civ 878

Ilhan v Turkey App no 22277/9 (27 June 2000)

Ipek v Turkey App no 25760/94 (17 February 2004)

Maaouia v France (39652/98) [2001] 33 EHRR 42

MSS v. Belgium and Greece App no 30696/09 [2011] (ECtHR)

NA v UK App no 25904/07 (17 July 2008)

Karanakaran v. Secretary of State for the Home Department, [2000] EWCA Civ. 11

R v Secretary of State for the Home Department, ex parte Blanusa [1999] All EE(D) 499

R v Secretary of State for the Home Department, ex parte Ravichandran (NO. 1) [1996] Imm Ar97

R v. Secretary of State for the Home Department, ex parte Sivakumaran and Conjoined Appeals (UN High Commissioner for Refugees Intervening) [1988] AC 958

Shah & Islam v Secretary of State for the Home Department [2001] IAC 489

The Director of Legal Aid Casework and Lord Chancellor v IS [2016] EWCA Civ 464

#### **UK Primary Legislation**

Aliens Act 1793

Aliens Act 1905

Aliens Act 1914.

Asylum and Immigration Act 1993

Asylum and Immigration Act 1996

Asylum and Immigration Appeals Act 1993

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

Crime and Disorder Act 1998

Data Protection Act 1998

Immigration Act 1971

Immigration and Asylum Act 1999

Immigration, Asylum and Nationality Act 2006

Legal Aid, Sentencing and Punishment of Offenders Act 2012

Nationality and Borders Bill 2021

Nationality, Immigration and Asylum Act 2002

Race Relations (Amendment) Act 2000

UK Borders Act 2007

### **UK Secondary Legislation**

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.

### **Official Publications/Parliamentary Papers/Debates**

Constitutional Affairs Committee, *Oral Evidence* (2006)

<<https://publications.parliament.uk/pa/cm200506/cmselect/cmconst/1006/6032103.htm>> accessed 4 February 2021.

HC Deb 03 July 1905 vol 148 cc794-847.

Home Office, *Assessing credibility and refugee status* (2015) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/397778/ASSESSING\\_CREDIBILITY\\_AND\\_REFUGEE\\_STATUS\\_V9\\_0.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/397778/ASSESSING_CREDIBILITY_AND_REFUGEE_STATUS_V9_0.pdf) accessed 10 March 2021.

— *Controlling our borders: Making migration work for Britain: Five year strategy for asylum and immigration* (2005) <https://www.gov.uk/government/publications/five-year-strategy-for-asylum-and-immigration> accessed 23 April 2020.

— *Control of Immigration: Statistics United Kingdom 2005* (2006) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/272332/6904.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/272332/6904.pdf) accessed 16 March 2021.

— *Fairer, Faster and Firmer – A Modern Approach to Immigration and Asylum* (1998) <https://www.gov.uk/government/publications/fairer-faster-and-firmer-a-modern-approach-to-immigration-and-asylum> accessed 25 May 2018.

— *How many people do we grant asylum or protection to?* <https://www.gov.uk/government/statistics/immigration-statistics-year-ending-june-2020/how-many-people-do-we-grant-asylum-or-protection-to#:~:text=The%20UK%20offered%20protection%20%E2%80%93%20in,levels%20seen%20prior%20to%202019> accessed 13 March 2021.

— *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain* (2002) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/250926/cm5387.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/250926/cm5387.pdf) accessed 12 December 2020.

Home Office, UK Border Agency: Central Interpreters Unit, *Code of Conduct for UK Border Agency Registered Interpreters* (March 2019) <https://dpsionline.co.uk/wp-content/uploads/2019/03/ukba-interpreters-code-of-conduct.pdf> accessed 1 May 2019.

House of Commons, *Policy on the dispersal of asylum seekers* (Research Briefing, 29 April 2016) <https://commonslibrary.parliament.uk/research-briefings/cdp-2016-0095/> accessed 16 March 2021.

Joint Committee on Human Rights, *Thirteenth Report* (2004) <https://publications.parliament.uk/pa/jt200304/jtselect/jtrights/102/10204.htm> accessed 5 January 2021.

Judicial College, *Equal Treatment Bench Book* (2021) <https://www.judiciary.uk/wp-content/uploads/2021/02/Equal-Treatment-Bench-Book-February-2021-1.pdf> accessed 17 March 2021.

Lord Woolf, *Access to Justice. Draft civil proceedings rules* (London HMSO 1996) 32.1-32.9 (Woolf rules).

Sir William MacPherson, *The Stephen Lawrence Inquiry*, Report of an Inquiry (The Stationary Office 1999).

University of Oxford, *Report of Commission of Inquiry* (OUP 1966) vol 1, ch 3

### **United Nations Treaties and Documents**

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

European Commission, 'The EU and the Refugee Crisis' (2016)  
<http://publications.europa.eu/webpub/com/factsheets/refugee-crisis/en/> accessed 8 June 2020.

European Council on Refugees and Exiles, 'Asylum Information Database: Statistics Germany' (November 2020)  
<https://asylumineurope.org/reports/country/germany/statistics/> accessed 16 March 2021.

European Union: Council of the European Union, *Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts*, 10 November 1997.

Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva 1992).

Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

United Nations, 'Charter of the United Nations' (1 UNTS XVI, 24 October 1945).

UNHCR, 'Asylum Processes: Fair and Efficient Asylum Procedures' (2001)  
<https://www.unhcr.org/uk/protection/globalconsult/3b389254a/asylum-processes-fair-efficient-asylum-procedures.html> accessed 20 June 2020.

—— 'Beyond proof: Credibility assessment in EU asylum systems' (2013)  
<http://www.refworld.org/docid/519b1fb54.html> accessed 30 March 2018.

—— 'Determination of Refugee Status' (1977), RLD 2, Chapter 2.

—— 'Mid-Year Trends 2020' (2020)  
<<https://www.unhcr.org/statistics/unhcrstats/5fc504d44/mid-year-trends-2020.html>>  
accessed 13 March 2021.

—— 'Note on Burden and Standard of Proof in Refugee Claims' (1998)  
<https://www.refworld.org/docid/3ae6b3338.html> accessed 20 March 2020;

—— *Quality Initiative Project. Key Observations and Recommendations, March 2006 – December 2007* (London 2007).

— 'Statute of the Office of the United Nations High Commissioner for Refugees' (Res 428 (v) 14 December 1950).

— *UNHCR RSD Procedural Standards - Legal Representation in UNHCR RSD Procedures* (2016) <<https://www.refworld.org/docid/56baf2c84.html>> accessed 24 February 2021.

## **Secondary Sources**

### **Books**

6 P and Bellamy C, *Principles of Methodology: Research Design in Social Science* (SAGE 2012)

Alvesson M and Skoldberg K, *Reflexive Methodology: New Vistas for Qualitative Research* (2<sup>nd</sup> edn SAGE 2009)

Anderson J, Hollaus J, Lindsay A and Williamson C, *The Culture of Disbelief: An Ethnographic Approach to Understanding an Under-theorised Concept in the UK Asylum System* (Refugee Studies Centre 2014)

Barker C, *Cultural Studies: Theory and Practice* (SAGE 2005)

Becker G, *A Treatise on the Family* (Harvard University Press 1981)

Berger P and Luckmann T, *The social construction of reality* (Penguin Books 1966)

Berk-Seligson S, *The Bilingual Courtroom: Court Interpreters in the Judicial Process* (University of Chicago Press 1990) 163; Press 1994)

Beswick J, *Not so straightforward: The need for qualified legal support in refugee family reunion* (British Red Cross 2015)

Bohmer C and Shuman A, *Political Asylum Deceptions: The Culture of Suspicion* (Palgrave 2018)

Bommes M and Geddes A, *Immigration and Welfare: Challenging the Borders of the Welfare State* (Routledge 2000)

Bourdieu P, *Distinction: A Social Critique of the Judgement of Taste* (Routledge 1984)

Burr V, *An Introduction to Social Constructionism* (Routledge 1995)

Bryman A and Burgess R, *Analysing Qualitative Data* (Routledge 1989)

Bryman A, *Social Research Methods* (5<sup>th</sup> edn OUP 2016)

Candappa M, Ahmad M, Balata B, Dekhinet R and Gocman D, *A Small Scale Qualitative Study on the School Education Experience of Asylum - Seeking and Refugee Children in Scotland* (Scottish Government *Insight* 2007)



- Cane P and Kritzer H, *The Oxford Handbook of Empirical Legal Research* (OUP 2010)
- Charmaz K, *Constructing Grounded Theory: A Practical Guide Through Qualitative Analysis* (SAGE 2006)
- Cherubini F, *Asylum law in the European Union* (Routledge 2014)
- Clayton G and Firth G, *Immigration and Asylum Law* (8<sup>th</sup> edn OUP 2018)
- Cohen R, *Frontiers of Identity: The British and the Others* (Longman 1994)
- Cohen S, *Folk Devils and Moral Panics* (3rd edn Routledge 2004)
- Colin J and Morris R, *Interpreters and the Legal Process* (Waterside Press 1996)
- Conley J, O'Barr W and Conley Riner R, *Just Words Law, Language and Power* (3<sup>rd</sup> edn University of Chicago Press 2019)
- Crawley H and Lester T, *No Place for a Child: Children in Immigration Detention in the UK - Impacts, Alternatives and Safeguards* (Save the Children 2005)
- Crawley H, *Chance or choice? Understanding why asylum seekers come to the UK* (Refugee Council 2010)
- *Refugees and Gender: Law and Process* (Jordan Publishing 2001)
- Durkheim E, *Moral Education* (Free Press 1965)
- *Suicide* (Free Press 1966)
- *The Division of Labor in Society* (Free Press 1964)
- *The Elementary Forms of the Religious Life* (Free Press 1965)
- Dworkin R, *Law's Empire* (Fontana Press 1986)
- Eades D, *Sociolinguistics and the Legal Process* (Multilingual Matters 2010)
- Endicott T, *Administrative Law* (OUP 2009)
- Ewick P and Silbey S, *The Common Place of Law Stories from Everyday Life* (Chicago Series in Law and Society 1998)
- Foster M, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (CUP 2007)
- Furnham A and Bochner S, *Culture Shock: Psychological Reactions to Unfamiliar Environments* (Taylor and Francis 1986)

- Geddes A, Hadj-Abdou L and Bruma L, *Migration and Mobility in the European Union* (2<sup>nd</sup> edn Macmillan 2020)
- Genn H and Genn Y, *The Effectiveness of Representation at Tribunals* (Lord Chancellor's Department 1989)
- Gergen K, *Social Construction in Context* (SAGE 2001)
- Gibney M, *The Ethics and Politics of Asylum Liberal Democracy and the Response to Refugees* (Cambridge University Press 2004)
- *The Ethics of Refugees* (Philosophy Compass 2018)
- Giddens A, *Central problems in Social Theory- Action, Structure and Contradiction in Social Analysis* (Macmillan 1979)
- *New Rules of Sociological Method: A Positive Critique of interpretative Sociologies* (Hutchinson 1976)
- *The Constitution of Society* (Polity 1984)
- Gill N, Moran D and Conlon D, *Carceral Spaces: Mobility and Agency in Imprisonment and Migrant Detention* (Routledge 2013)
- Glaser B, *Theoretical Sensitivity* (Sociology Press 1978)
- Goffman E, *Interaction Ritual: Essays on Face to Face Behaviour* (Pantheon 1967)
- *The Presentation of Self in Everyday Life* (Doubleday 1959)
- Good A, *Anthropology and Expertise in the Asylum Courts* (Routledge-Cavendish 2007)
- Goodwin-Gill G and McAdam J, *The Refugee in International Law* (3rd edn, OUP 2007)
- Groundwater-Smith S, Dockitt S, and Bottrell D, *Participatory Research with Children and Young People* (SAGE 2015)
- Guba E and Lincoln Y, *Fourth Generation Evaluation* (SAGE 1989)
- Martyn Hammersley and Paul Atkinson, *Ethnography: Principles in practice* (Tavistock 1983)
- Hart H.L.A, *The Concept of Law* (Oxford University Press 1961)
- Hathaway J and Foster M, *The Law of Refugee Status* (2<sup>nd</sup> ed, Cambridge University Press 2014)
- Hay C, *Political Analysis* (Red Globe Press 2002)

- Held D and Thompson J, *Social Theory of Modern Societies Anthony Giddens and his Critics* (CUP 1989)
- Houston F, *You Shall Love the Stranger as Yourself: The Bible, Refugees and Asylum* (Routledge 2015)
- Jasinski M, *Social Trust, Anarchy, and International Conflict* (Palgrave Macmillan 2010)
- Kvale S and Brinkmann S, *Interviews- Learning the Craft of Qualitative Research Interviewing* (SAGE 2009)
- Laster K and Taylor V, *Interpreters & the Legal System* (Federation Press 1994)
- Legal Action for Women, *For Asylum Seekers and their Supporters - A Self-Help Guide Against Detention and Deportation* (Crossroads Books 2005)
- Lopez J and Scott J, *Social Structure* (OUP 2000)
- Marrus M, *The Unwanted: European Refugees in the Twentieth Century* (OUP 1985)
- Maryns K, *The Asylum Speaker: Language in the Belgian Asylum Procedure* (Routledge 2006).
- Maxwell J, *Qualitative Research Design: An Interactive Approach* (3<sup>rd</sup> edn SAGE 2012)
- McCarthy T, *Race, Empire, and the Idea of Human Development* (CUP 2009)
- Mehrabian A, *Nonverbal Communication* (3<sup>rd</sup> edn, Transaction Publishing 2009)
- Merriam S, *Qualitative Research and Case Study Applications in Education. Revised and Expanded from "Case Study Research in Education"* (Jossey Bass 1998)
- Millbank A, *The Problem with the 1951 Refugee Convention* (Department of the Parliamentary Library, 2000)
- Musantet K and DeWalt B, *Participant Observation: A Guide for Fieldworkers* (AltaMira Press 2011)
- Newman D, *Legal Aid Lawyers and the Quest for Justice* (Hart 2013)
- O'Neill M, *Asylum, Migration and Community* (Polity Press 2010)
- Pateman C and Mills C, *Contract and Domination* (Polity Press 2007)
- Patton M, *Qualitative Research & Evaluation Methods: Integrating Theory and Practice* (4th edn SAGE 2014)
- Ramji-Nogales J, Schoenholtz A and Schrag P(eds), *Refugee roulette. Disparities in asylum adjudication and proposals for reform* (New York University Press 2009)

- Rawls J, *A Theory of Justice* (Harvard University Press 1971)
- Political Liberalism* (Columbia University Press 1996)
- The Law of Peoples* (Harvard University Press 1999)
- Renezzi C and Lee R, *Researching Sensitive Topics* (SAGE 1993)
- Richardson J (ed), *Handbook of Qualitative Research Methods for Psychology and the Social Sciences* (BPS 1996)
- Rubin H and Rubin I, *Qualitative Interviewing: the Art of Hearing Data* (3<sup>rd</sup> edn SAGE 2012)
- Sales R, *Understanding Immigration and Refugee Policy* (Policy Press 2007)
- Sandel M, *Liberalism and the Limits of Justice* (2<sup>nd</sup> edn CUP 2010)
- de Saussure F, *Course in General Linguistics* (English Translation Bloomsbury 2013)
- Schuster L, *The use and abuse of political asylum in Britain and Germany* (Frank Cass 2003)
- Schwandt T, *Qualitative Inquiry: A Dictionary of Terms* (SAGE 1997)
- Sen A, *The Idea of Justice* (Penguin Books 2009)
- Shah P, *Refugees, Race and the Legal Concept of Asylum in Britain* (Cavendish 2000)
- Sibley D, *Geographies of Exclusion: Society and Difference in the West* (Routledge 1995)
- Spencer-Oatey H and Franklin P, *Intercultural interaction: A multidisciplinary approach to intercultural interaction* (Palgrave Macmillan 2009)
- Spijkerboer T, *Gender and Refugee Status* (Ashgate Publishing 2000)
- Stevens D and O'Sullivan M (eds), *States, the law, and access to refugee protection: fortresses and fairness* (Hart Publishing 2017)
- Thomas R, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Bloomsbury 2011)
- Thornborrow J, *Power Talk: Language and Interaction in Institutional Discourse* (Routledge 2001)

Trinch S, *Latinas' narratives of domestic abuse: Discrepant versions of violence* (John Benjamins Publishing 2003)

Tuitt P, *False Images: Law's Construction of the Refugee* (Pluto Press 1996)

Tuitt P, *Race, Law, Resistance* (Routledge 2004)

Tyler T, *Why people obey the law* (Princeton University Press 2006)

Van Hoecke M, *Methodologies of Legal Research: which kind of method for what kind of discipline?* (Hart 2011)

Willig C, *Introducing Qualitative Research in Psychology: Adventures in Theory and Method* (2<sup>nd</sup> edn Open University Press 2008)

Whiteman N, *Undoing ethics: Rethinking practice in online research* (Springer 2012)

Whittaker D, *Asylum Seekers and Refugees in the Contemporary World (The Making of the Contemporary World)* (Routledge 2005)

### **Book Chapters**

Bailey O and Harindranath R, 'Racialized 'othering' The representation of asylum seekers in news media' in Allen S (ed), *Journalism: critical issues* (Open University Press 2005)

Bulmer M, 'The Ethics of Social Research' in Gilbert N (ed), *Researching Social Life* (SAGE 2001)

Bush T, 'Authenticity in Research: Reliability, Validity and Triangulation' in Briggs A, Coleman M and Morrison M (eds) *Research Methods in Educational Leadership and Management* (SAGE 2012)

Danet B, 'Language in the Courtroom' in Giles H, Robinson P and Smith P (eds), *Language, Social Psychological Perspectives* (Pergamon Press 1979)

Georgaca E and Avdi E, 'Discourse Analysis' in Harper D and Thompson A (eds), *Qualitative Research Methods in mental health and psychotherapy: A guide for students and practitioners* (John Wiley and Sons 2012)

Gill N and Good A, 'Introduction' in Gill N and Good A (eds) *Asylum Determination in Europe* (Palgrave 2019)

Hambly J, 'Interactions and Identities in UK Asylum Appeals: Lawyers and Law in a Quasi-Legal Setting' in Gill N and Good A (eds) *Asylum Determination in Europe* (Palgrave 2019)

Menkel-Meadow C, 'Uses and Abuses of Socio-Legal Studies' in Creutzfeldt N, Mason M and McConnachie K (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge 2019)

Moore K, “Asylum Crisis”, National security and the re-articulation of human rights’ in Moore K, Gross B and Threadgold T (eds), *Migrations and the Media* (Peter Lang 2021)

Pettitt J, ‘The Use of Country of Origin Information in Reasons for Refusal Letters’ in IAS, *The Use of Country of Origin Information in Refugee Status Determination: Critical Perspectives* (IAS 2009)

Pillar I, ‘Linguistic intermarriage: Language choice and negotiation of identity in Multilingualism’ in Pavlenko A, Blackledge A, Piller I and Teutsch-Dwyer M (eds) *Second Language Learning, and Gender* (Mouton de Gruyter 2011)

Rycroft R, ‘Communicative Barriers in the Asylum Account’ in Shah P (ed) *The Challenge of Asylum to Legal Systems* (Cavendish 2005)

Spencer S, ‘The Impact of Immigration Policy on Race Relations’ in Blackstone T, Parekh B and Sanders P (eds), *Race Relations in Britain: A Developing Agenda* (Routledge 1998)

Thomas R, ‘Asylum appeals: The Challenge of Asylum seekers to the British legal system’ in Shah P (ed) *The Challenge of Asylum to Legal Systems* (Cavendish Publishing 2005)

— ‘From ‘Adversarial v Inquisitorial’ to ‘Active, Enabling, and Investigative’: Developments in UK Tribunals’ in Jacobs L and Baglay S (eds) *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives* (Ashgate Publishing 2013)

Webber F, ‘Asylum Seekers and Strategic Litigation’ in Vecchio F, and Gerard A (eds) *Entrapping Asylum Seekers. Transnational Crime, Crime Control and Security* (Palgrave 2017)

Yeo A, Legard R, Keegan J, Ward K, McNaughton Nicholls C and Lewis J, ‘In-depth Interviews’ in Ritchie J, Lewis J, McNaughton Nicholls C and Ormston R (eds) *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (2<sup>nd</sup> edn, SAGE 2013)

## **Journals**

Abbas P, von Werthern M, Katona C, Brady F and Woo Y, ‘The texture of narrative dilemmas: Qualitative study in front-line professionals working with asylum seekers in the UK’ (2010) 45(1) *BJPsych Bulletin*

Adjin-Tettey E, ‘Reconsidering the Criteria for Assessing Well-Founded Fear in Refugee Law’ (1997) 25 *Manitoba Law Journal*

Arvan M, ‘First Steps Toward a Nonideal Theory of Justice’ (2014) 7 *Ethics & Global Politics*

— 'Nonideal Justice as Nonideal Fairness' (2019) 5(2) *Journal of the American Philosophical Association*

Assiter A, 'Althusser and structuralism' (1984) 35(2) *British Journal of Sociology*  
Baillot H, Cowan S and Munro V, 'Reason to (Dis)believe: Evaluating the Rape Claims of Women Seeking Asylum in the UK' (2014) 10 *International Journal of Law and Context*

Baillot H, 'Hearing the Right Gaps: Enabling and Responding to Disclosures of Sexual Violence within the UK Asylum Process' (2012) 21(3) *Social and Legal Studies*

Bakewell O, 'Some Reflections on Structure and Agency in Migration Theory' (2010) 36(10) *Journal of Ethnic and Migration Studies*

Barnett M, 'Mind Your Language - Interpreters in Australian Immigration Proceedings' (2006) 10 *University of Western Sydney Law Review*

Behrman S, 'Accidents, Agency and Asylum: Constructing the Refugee Subject' (2014) 25 *Law and Critique*

Behrman S, 'Refugee Law as a Means of Control' (2019) 32(1) *Journal of Refugee Studies*

Benhabib S, 'The Law of Peoples, Distributive Justice, and Migrations' (2004) 72 *Fordham Law Review*

Bishop S, "What does a torture survivor look like?" Nonverbal communication in US asylum interviews and hearings' [2021] *Journal of International and Intercultural Communication*

Blitz B and Otero-Iglesias M, 'Stateless by Any Other Name: Refused Asylum-Seekers in the United Kingdom' (2011) 37(4) *Journal of Ethnic and Migration Studies*

Bloch A, 'Refugee settlement in Britain: The impact of policy on participation' (2000) 26(1) *Journal of Ethnic and Migration Studies*

Blumenthal J, 'A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanour Evidence in Assessing Witness Credibility' (1993) 72 *Nebraska Law Review*

Bogner D, Herlihy J, and Brewin C, 'Impact of Sexual Violence on Disclosure During Home Office Interviews' (2007) 19(1) *British Journal of psychiatry*

Borland E, 'Fairness and the right to legal aid in asylum and asylum related cases' (2016) 2(3) *International Journal of Migration and Border Studies*

Brochmann G, 'Control at What Cost?' (1992) Paper prepared for the workshop on migration into Western Europe, What Way Forward? London, Royal Institute of International Affairs

- Bucholtz M, 'The politics of transcription' (2000) 32(10) *Journal of Pragmatics*
- Burridge A and Gill N, 'Conveyor-Belt Justice: Precarity, Access to Justice, and Uneven Geographies of Legal Aid in UK Asylum Appeals' (2016) 49(1) *Antipode*
- Campbell J, 'Examining Procedural Unfairness and Credibility Findings in the UK Asylum System' (2020) 39(1) *Refugee Survey Quarterly*
- 'The Role of Lawyers, Judges, Country Experts and Officials in British Asylum and Immigration Law' (2020) 16(1) *International Journal of Law in Context*
- Canetti D, Snider K, Pedersen A, and Hall B, 'Threatened or Threatening? How Ideology Shapes Asylum Seekers' Immigration Policy Attitudes in Israel and Australia' [2016] *Journal of Refugee Studies*
- Carens J, 'Aliens and Citizens: The Case for Open Borders' (1987) 49(2) *The Review of Politics*
- 'Who Should Get in? The Ethics of Immigration Admissions' 17(1) *Ethics and International Affairs*
- Chakrabarti S, 'Rights and Rhetoric: The Politics of Asylum and Human Rights Culture in the United Kingdom' (2005) 32(1) *Journal of Law and Society*
- Chaney P, 'Examining Political Parties' Record on Refugees and Asylum Seekers in UK Party Manifestos 1964–2019: The Rise of Territorial Approaches to Welfare?' [2020] *Journal of Immigrant and Refugee Studies*
- Chase E, 'Agency and Silence: Young People Seeking Asylum Alone in the UK' (2010) 40 *British Journal of Social Work*
- Clements J, Rapley M and Cummins R, 'On, to, for, with- vulnerable people and the practices of the research community' (1999) 27 *Behavioural and Cognitive Psychotherapy*
- Coffey G, 'The Credibility of Credibility Evidence at the Refugee Review Tribunal' (2003) 15(3) *International Journal of Refugee Law*
- Cohen J, 'Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers' (2001) 13 *International Journal of Refugee Law*
- Collins E, 'The case for reforming the definition of 'Refugee' in the 1951 UN Convention Relating to the Status of Refugees' (2019) 6 *Bristol Law Review*
- Creswell J and Miller D, 'Determining Validity in Qualitative Inquiry' (2000) 39(3) *Theory into Practice*
- Dang A, 'Eyes Wide Shut: John Rawls's Silence on Racial Justice' [2015] *Sciences de l'Homme et de la Société*



Darawsheh W, 'Reflexivity in research: Promoting rigour, reliability, and validity in qualitative research' (2014) 21(12) *International Journal of Therapy and Rehabilitation*

De Angelis M, 'Female Asylum Seekers: A Critical Attitude on UK Immigration Removal Centres' (2019) 19(2) *Social Policy and Society*

Dhaliwal S and Forkert K, 'Deserving and undeserving migrants' (2015) 61 *Soundings*

Eades D, 'Applied Linguistics and Language Analysis in Asylum Seeker Cases' (2005) 26(4) *Applied Linguistics*

Edwards R, 'A critical examination of the use of interpreters in the qualitative research process' (1998) 24(1) *Journal of Ethnic and Migration Studies*

Edwards R, Temple B and Alexander C, 'Users' experiences of interpreters: the critical role of trust' (2005) 7 *Interpreting*

Ekman P and O'Sullivan M, 'Who Can Catch a Liar?' (1991) 46(9) *American Psychologist*

Emanuel E, Wendler D and Grady C, 'What Makes Clinical Research Ethical?' (2000) 283(20) *Journal of American Medical Association*

Faruk Al Imran H, 'An Overview of Development of Gender Based Persecution in Refugee Law under Membership of a Particular Social Group: A Study of Comparative Jurisprudence of Canada, UK & USA' (2015) 39 *Journal of Law, Policy and Globalization*

Felstiner W and Sarat A, 'Enactments of power: Negotiating reality and responsibility in lawyer-client interactions' (1992) 7(6) *Cornell Law Review*

Foster P, Gomm R and Hammersley M, 'Case Studies as Spurious Evaluations: The Example of Research on Educational Inequalities' (2000) 48(3) *British Journal of Educational Studies*

Fugita S, 'Effects of Anxiety and Approval on Visual interaction' (1974) 29(4) *Journal of Personality and Social Psychology*

Genn H, 'Tribunals and Informal Justice' (1993) 56(3) *The Modern Law Review*

Gibb R and Good A, 'Interpretation, translation and intercultural communication in refugee status determination procedures in the UK and France' (2014) 14(3) *Language and Intercultural Communication*

Gibson S, 'Testimony in a Culture of Disbelief: Asylum Hearings and the Impossibility of Bearing Witness' (2013) 17(1) *Journal for Cultural Research*

Gill N, Rotter R, Burridge A, Griffiths M and Allsopp J, 'Inconsistency in asylum appeal adjudication' [2005] *Forced Migration Review*.

- ‘Linguistic incomprehension in British asylum appeal hearings’ (2016) 32(2) *Anthropology Today*
- Gill N, Rotter R, Burrige A and Allsopp A, ‘The limits of procedural discretion: Unequal treatment and vulnerability in Britain’s asylum appeals’ (2017) 27(1) *Social & Legal Studies*
- Gilligan C, ‘In a different voice: Women’s conceptions of self and of morality’ (1977) 47(4) *Harvard Educational Review*
- Glover R, ‘Eyes Wide Shut: The Curious Silence of The Law of Peoples on Questions of Immigration and Citizenship’ (2011) 14 *Eidos*
- Goss J and Lindquist B, ‘Conceptualizing International Labor Migration: A Structuration Perspective’ (1995) 29(2) *International Migration Review*
- Graham B, Herlihy J, and Brewin C, ‘Overgeneral memory in asylum seekers and refugees’ (2014) 45(3) *Journal of Behaviour Therapy and Experimental Psychiatry*
- Griffiths M, ‘Out of Time: The Temporal Uncertainties of Refused Asylum Seekers and Immigration Detainees’ (2014) 40(12) *Journal of Ethnic and Migration Studies*
- Grove N and Zwi A, ‘Our health and theirs: Forced migration, othering, and public health’ (2006) 62 *Social science & medicine*
- Hambly J and Gill N, Law and Speed: Asylum Claims and the Techniques and Consequences of Legal Quickening (2020) 47(1) *Journal of Law and Society*
- Hammersley M, ‘Reproducing or constructing? Some questions about transcription in social research’ (2010) 10(5) *Qualitative Research*
- Harvey C.J, Strangers at the Gate: Human Rights and Refugee Protection (1999) 10 *Irish Studies in International Affairs*
- Hathaway J, The Evolution of Refugee Status in International Law: 1920-1950 (1984) 33(2) *The International and Comparative Law Quarterly*
- Hathaway J and Hicks W, ‘Is There a Subjective Element in the Refugee Convention's Requirement of Well-Founded Fear’ (2005) 26 *Michigan Journal of International Law*
- Haynes A, Devereux E and Breen M, 'Fear, Framing and Foreigners: The Othering of Immigrants in the Irish Print Media' (2006) 16 *International Journal of Critical Psychology*
- Healey R, ‘Asylum-seekers and refugees: A structuration theory analysis of their experiences in the UK’ (2006) 12(4) *Population, Space and Place*
- Heath C, “‘Refugee Voices’”: Tragedy, Ghosts and the Anthropology of Not Knowing’ (2016) 45(6) *Journal of Contemporary Ethnography*

- Helbling M and Meierrieks D, 'Transnational terrorism and restrictive immigration policies' (2020) 57(4) *Journal of Peace Research*
- Hellgren T, 'At the Crossroads of Structure and Agency: Investigating the Importance of 'Legality' for International Migrants' (2012) 2(1) *Oxford Monitor of Forced Migration*
- Herlihy J, Gleeson K and Turner S, 'What Assumptions about Human Behaviour Underlie Asylum Judgments?' (2010) 22(3) *International Journal of Refugee Law*
- Hillyard P, 'Invoking Indignation: Reflections on Future Directions of Socio-legal Studies' (2002) 29(4) *Journal of Law and Society*
- Hirsch, S, 'Racism, 'second generation' refugees and the asylum system', (2019) 26(1) *Identities*
- Hodes M, 'Psychologically Distressed Refugee Children in the United Kingdom' (2000) 5(2) *Child Psychology and Psychiatry Review*
- Hughes G, 'Community Cohesion, Asylum Seeking and the Question of the 'Stranger'' (2007) 21(6) *Cultural Studies*
- Hunt L, 'Women Asylum Seekers and Refugees: Opportunities, Constraints and the Role of Agency' (2008) 7 *Social Policy and Society*
- Hwa-Froelich D and Westby C, 'Considerations When Working with Interpreters' (2003) 24(2) *Communication Disorders Quarterly*
- Hynes T, 'The issue of 'trust' or 'mistrust' in research with refugees: choices, caveats and considerations for researchers' [2003] *New Issues in Refugee Research*
- James D and Killick E, 'Empathy and Expertise: Case Workers and Immigration/Asylum Applicants in London' (2012) 37(2) *Law and Social Inquiry*
- Jarvis C, 'The Judge as Juror Re-visited' [2003] *Immigration Law Digest*
- Jerolmack C and Khan S, 'Talk Is Cheap: Ethnography and the Attitudinal Fallacy' (2014) 43(2) *Sociological Methods & Research*
- Jiménez-Ivars A and León-Pinilla R, 'Interpreting in refugee contexts. A descriptive and qualitative study' (2018) 60 *Language & Communication*
- Jubany O, 'Constructing truths in a culture of disbelief: Understanding asylum screening from within' (2011) 26(1) *International Sociology*
- Kalin W, 'Troubled Communication: Cross-Cultural Misunderstandings in the Asylum- Hearing' (1986) 20(2) *The International Migration Review*

- Kaufmann G, Drevland G, Wessel E, Overskeid G and Magnussen S, 'The importance of being earnest: Displayed emotions and witness credibility' (2003) 17 *Applied Cognitive Psychology*
- Kelly E, 'Asylum Seekers and Politics in Scotland: August 2001' (2002) 38(1) *Scottish Affairs*
- Kelly N, 'Gender-Related Persecution: Assessing the Asylum Claims of Women' (1993) 26 *Cornell International Law Journal*
- Keselman O, Cederborg A, Lamb M and Dahlström Ö, 'Mediated Communication with Minors in Asylum-seeking Hearings' (2008) 21(1) *Journal of Refugee Studies*
- Khan F, 'Interpreting for Refugees: "Where practicable and necessary only?"' (2011) 28(2) *Refugee, Canada's Journal on Refugees*
- Killman J, 'Interpreting for asylum seekers and their attorneys: the challenge of agency' (2020) 28(1) *Perspectives*
- Koser K, 'Asylum Policies, Trafficking and Vulnerability' (2000) 38 *International Migration*
- Kritzman-Amir T and Spijkerboer T, 'On the Morality and Legality of Borders: Border Policies and Asylum Seekers' (2013) 26 *Harvard Human Rights Journal*
- Layder D, 'Structuration Theory: Anthony Giddens and the Constitution of Social Life' (1990) 19(6) *Contemporary Sociology*
- Levenson L, 'Courtroom Demeanour: The Theatre of the Courtroom' [2008] *Minnesota Law Review*
- LeCompte M, 'Bias in the Biography: Bias and Subjectivity in Ethnographic Research' (1987) 18(1) *Anthropology & Education Quarterly*
- Lee J, 'A Pressing Need for the Reform of Interpreting Service in Asylum Settings: A Case Study of Asylum Appeal Hearings in South Korea' (2014) 27 *Journal of Refugee Studies*
- Lustig S, 'Symptoms of Trauma among Political Asylum Applicants: Don't Be Fooled' (2008) 31 *Hastings International and Comparative Law Review*
- Lyytinen E, 'Refugees' 'Journeys of Trust': Creating an Analytical Framework to Examine Refugees' Exilic Journeys with a Focus on Trust' (2017) 30(4) *Journal of Refugee Studies*
- MacIntyre H, 'Imposed dependency: client perspectives of legal representation in asylum claims' (2009) 23(2) *Journal of Immigration, Asylum and Nationality Law*

——‘The New Asylum Model (NAM) Comes Under Criticism’ (2009) 23(1) *Journal of Immigration, Asylum and Nationality Law*

Mackenzie C, McDowell C and Pittaway E, ‘Beyond ‘Do No Harm’: The Challenge of Constructing Ethical Relationships in Refugee Research’ (2007) 20(2) *Journal of Refugee Studies*

Maclure M, ‘The Wonder of Data’ (2013) 12(4) *Cultural Studies Critical Methodologies*

Malloch M and Stanley E, ‘The Detention of Asylum Seekers in the UK Representing Risk, Managing the Dangerous’ (2005) 7(1) *Punishment & Society*

Mayblin L, ‘Imagining asylum, governing asylum seekers: Complexity reduction and policy making in the UK Home Office’ (2019) 7(1) *Migration Studies*

McCarthy M, ‘Interviewing People with Learning Disabilities about Sensitive Topics: A Discourse of Ethical Issues’ (1998) 26 *British Journal of Learning Disabilities*

McLeod S, ‘Communication rights: Fundamental human rights for all’ (2018) 20(1) *International Journal of Speech-Language Pathology*

Meyler F and Woodhouse S, ‘Changing the immigration rules and withdrawing the ‘currency’ of legal aid: the impact of LASPO 2012 on migrants and their families’ (2013) 35(1) *Journal of Social Welfare and Family Law*

Millbank A, ‘The Elephant on the Boat: The Problem that is the Refugee Convention’ (2010) 18(4) *People and Place*

Miller B, Keith L and Holmes J, ‘Levelling the Odds: The Effect of Quality Legal Representation in Cases of Asymmetrical Capability’ (2015) 49(1) *Law and Society Review*

Mills C, ‘Rawls on Race/Race in Rawls’ [2009] *The Southern Journal of Philosophy*

Missbach A, ‘Asylum Seekers’ and Refugees’ Decision-Making in Transit in Indonesia: The Need for In-depth and Longitudinal Research’ [2019] *Journal of the Humanities and Social Sciences of Southeast Asia*

Moore J, ‘What Is the Sense of Agency and Why Does it Matter?’ (2016) 7 *Frontiers in Psychology*

Morawska E, ‘Structuring Migration: The Case of Polish Income-Seeking Travelers to the West’ (2001) 30(1) *Theory and Society*

Morrison B, Porter L and Fraser I, ‘The Role of Demeanour in Assessing the Credibility of Witnesses’ (2007) 33 *Advocates’ Quarterly*

- Mortari L, 'Reflectivity in Research Practice: An Overview of Different Perspectives' (2015) 14(5) *International Journal of Qualitative Methods*
- Mullane K and Williams M, 'Bias in research: the rule rather than the exception?' [2013] *Biochemical Pharmacology*
- Mulvey G, 'When Policy Creates Politics: the Problematizing of Immigration and the Consequences for Refugee Integration in the UK' (2010) 23(4) *Journal of Refugee Studies*
- van Nes F, Abma T, Jonsson H and Deeg D, 'Language differences in qualitative research: is meaning lost in translation?' (2010) 7 *European Journal of Ageing*
- Noble H and Smith J, 'Issues of Validity and Reliability in Qualitative Research' (2015) 18(2) *Evidence Based Nursing*
- Oberg K, 'Culture Shock: Adjustment to New Culture Environments' (1960) 7 *Practical Anthropology*
- Okin S, "Forty acres and a mule' for women: Rawls and feminism' [2005] *Policy, Philosophy and Economics*
- Oliver D, Serovich J and Mason T, 'Constraints and Opportunities with Interview Transcription: Towards Reflection in Qualitative Research' (2005) 84 (2) *Social Forces*
- O'Nions H, "Fat cat' lawyers and 'illegal' migrants: the impact of intersecting hostilities and toxic narratives on access to justice' (2020) 42(3) *Journal of Social Welfare and Family Law*
- O'Reilly K, 'Structuration, Practice Theory, Ethnography and Migration: Bringing It All Together' [2012] International Migration Institute Working Papers, University of Oxford
- Pfeiffer N, 'Credibility Findings in INS Asylum Adjudications: A Realistic Assessment' (1988) 23 *Texas International Law Journal*
- Phillimore J and Goodson L, 'Problem or Opportunity? Asylum Seekers, Refugees, Employment and Social Exclusion in Deprived Urban Areas' (2006) 43(10) *Urban Studies*
- Pogge T, 'The Incoherence between Rawls's Theories of Justice' (2004) 72 *Fordham Law Review*
- Pöllabauer S, 'Interpreting in asylum hearings: Issues of role, responsibility and power' (2004) 6(2) *Interpreting*
- Price M, 'Persecution Complex: Justifying Asylum Law's Preference for Persecuted People' (2006) 47 *Harvard International Law Journal*

- Raghallaigh M, 'The Causes of Mistrust Amongst Asylum Seekers and Refugees: Insights for Research with Unaccompanied Asylum-Seeking Minors Living in the Republic of Ireland' (2014) 27(1) *Journal of Refugee Studies*
- Rap S, 'Access to Justice and Child-friendly Justice for Refugee and Migrant Children: International and European Legal Perspectives' (2020) 2 *Europe of Rights & Liberties*
- Richmond A, 'Reactive Migration: Sociological Perspectives on Refugee Movements' (1993) 6(1) *Journal of Refugee Studies*
- Robinson V, 'Cultures of Ignorance, Disbelief and Denial: Refugees in Wales' (1999) 12(1) *Journal of Refugee Studies*
- Sales R, 'The deserving and the undeserving? Refugees, asylum seekers and welfare in Britain' (2002) 22(3) *Critical Social Policy*
- Schock K, Rosner R and Knaevelsrud C, 'Impact of asylum interviews on the mental health of traumatized asylum seekers' (2015) 6(1) *European Journal of Psychotraumatology*
- Schuster L and Solomos J, 'Asylum, Refuge and Public Policy: Current Trends and Future Dilemmas in the UK' (2001) 6(1) *Sociological Research Online*
- Sciulli D, 'Voluntaristic Action as a Distinct Concept: Theoretical Foundations of Societal Constitutionalism' (1986) 51(6) *American Sociological Review*
- Segalowitz N, 'Communicative Incompetence and Non Fluent Bilingualism' (1976) 8 *Canadian Journal of Behavioral Science*
- Sewell W, 'A Theory of Structure: Duality, Agency, and Transformation' (1992) 98(1) *American Journal of Sociology*
- Shilubane H and Mazibuko N 'Understanding autism spectrum disorder and coping mechanism by parents: An explorative study' (2020) 7 *International Journal of Nursing Sciences*
- Shuy R, 'Language and the Law' (1986) 7 *Annual Review of Applied Linguistics*
- Simmons A.J, 'Ideal and Non-Ideal Theory' (2010) 38(1) *Philosophy & Public Affairs*
- Souter J, 'A Culture of Disbelief or Denial? Critiquing Refugee Status Determination in the United Kingdom' (2011) 1(1) *Oxford Monitor of Forced Migration*
- Spicer N, 'Places of Exclusion and Inclusion: Asylum-Seeker and Refugee Experiences of Neighbourhoods in the UK' (2008) 34(3) *Journal of Ethnic and Migration Studies*
- Stepnitz, A, 'A Lie More Disastrous than the Truth: Asylum and the identification of trafficked women in the UK' (2012) 1 *Anti-Trafficking Review*

Stevens D, 'The Nationality, Immigration and Asylum Act 2002: Secure Borders, Safe Haven' (2004) 67 *Modern Law Review*

Stevenson J and Willott J, 'The aspiration and access to higher education of teenage refugees in the UK' (2007) 37(5) *Compare: A Journal of Comparative and International Education*

Stewart D, 'Researcher as Instrument: Understanding "Shifting" Findings in Constructivist Research' (2010) 47(3) *Journal of Student Affairs Research and Practice*

Stewart E and Mulvey G, 'Seeking Safety beyond Refuge: The Impact of Immigration and Citizenship Policy upon Refugees in the UK' (2014) 40(7) *Journal of Ethnic and Migration Studies*

Storey H, 'What Constitutes Persecution? Towards a Working Definition' (2014) 26(2) *International Journal of Refugee Law*

Student R, Kendall K and Day L, 'Being a Refugee University Student: A Collaborative Auto-ethnography' (2017) 30(4) *Journal of Refugee Studies*

Sweeney J, 'Credibility, Proof and Refugee Law' (2009) 21(4) *International Journal of Refugee Law*

Thomas R, 'Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined' [2006] 8, *European Journal of Migration and Law*

—— 'Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom' (2008) 20(4) *International Journal of Refugee Law*

—— 'Evaluating Tribunal Adjudication: Administrative Justice and Asylum Appeals' (2005) 25(3) *Legal Studies*

Trueman T, 'Reasons for refusal: an audit of 200 refusals of Ethiopian asylum-seekers in England' (2009) 23(3) *Journal of Immigration, Asylum and Nationality Law*

Van Hootegem A, Meuleman B and Abts K, 'Attitudes Toward Asylum Policy in a Divided Europe: Diverging Contexts, Diverging Attitudes?' [2020] *Frontiers in Sociology*

Vishnevsky T and Beanlands H, 'Qualitative Research' (2004) 31(2) *Nephrology Nursing Journal*

Wahlbeck Ö, 'The concept of diaspora as an analytical tool in the study of refugee communities' (2002) 28(2) *Journal of Ethnic and Migration Studies*

Watts J, 'Ethical and Practical Challenges of Participant Observation in Sensitive Health Research' (2011) 14 *International Journal of Social Research Methodology*



Watts M and Bohle H, 'The space of vulnerability: the causal structure of hunger and famine' (1993) 17 *Progress in Human Geography*

Webber F, 'Borderline Justice' (2012) 54(2) *Race and Class*

Weis L, 'Identity formation and the process of 'othering': unravelling sexual threads' (1995) 9 *Educational Foundations*

Weitzer R, 'Review: Meaning, Intentional Action, and Social Structure' (1977) 22 *Berkeley Journal of Sociology*

Westaby C, "Feeling like a sponge': the emotional labour produced by solicitors in their interactions with clients seeking asylum' (2010) 17(2) *International Journal of the Legal Profession*

Wolpert J, 'Migration as an Adjustment to Environmental Stress' (1966) 22(4) *Journal of Social Issues*

Young S, 'The (Un)Reasonableness of Rawlsian Rationality' (2006) 24(4) *South African Journal of Philosophy*

Zetter R and Pearl M, 'The minority within the minority: Refugee community-based organisations in the UK and the impact of restrictionism on asylum-seekers' (2000) 26(4) *Journal of Ethnic and Migration Studies*

## **Theses**

Bogner D, 'What Prevents Refugees and Asylum Seekers Exposed to Violence from Disclosing Trauma?' (PhD Thesis, UCL 2005).

Farrell C, 'Asylum narratives and credibility assessments: an ethnographic study of the asylum appeal process in Scotland' (PhD Thesis, University of Glasgow 2012).

Hoare T, 'An exploration of how adults seeking asylum understand and cope with the asylum journey and process' (PhD Thesis, Cardiff University 2013).

Kendall F, "'Catch-22"? The Assessment of Credibility in UK Asylum Applications' (Master's thesis, Malmo University 2020).

Khan T, 'Investigating the British Asylum System for Lesbian, Gay and Bisexual Asylum Seekers: Theoretical and empirical perspectives on fairness' (PhD thesis, University of Liverpool 2005).

Mavin R, 'Producing and Contesting Precarity: The Politics of the Body in the British Asylum System' (PhD Thesis, University of Exeter 2019);

Mouncer B, 'Dealt with on their Merits? The Treatment of Asylum Seekers in the UK and France' (PhD Thesis, University of Hull 2009).

Piacentini T, 'Solidarity and struggle: an ethnography of the associational lives of African asylum seekers and refugees in Glasgow' (PhD Thesis, University of Glasgow 2012).

Reynolds J, 'Multilingual and intercultural communication in and beyond the UK asylum process: a linguistic ethnographic case study of legal advice-giving across cultural and linguistic borders' (PhD thesis, Durham University 2018).

Rotter R, "Hanging In-Between': Experiences of Waiting among Asylum Seekers Living in Glasgow' (PhD Thesis, Edinburgh University 2010).

Shuttleworth S, 'Moving language: the language geographies of refugees and asylum-seekers in Glasgow' (PhD thesis, University of Glasgow 2018).

Taylor H, 'Rawls' Difference Principle: A test for social justice in contemporary social policy' (PhD Thesis, Cardiff University 2017).

### **Web Resources**

Amnesty International, 'Get It Right. How Home Office Decision-Making Fails Refugees' <[https://www.amnesty.org.uk/files/get\\_it\\_right\\_0.pdf?3tisZ\\_5\\_ZLA4Bc\\_4TsTKb8B\\_yQyDwQZA=>](https://www.amnesty.org.uk/files/get_it_right_0.pdf?3tisZ_5_ZLA4Bc_4TsTKb8B_yQyDwQZA=>) accessed 24 February 2021

Amnesty International, 'The World's Refugees in Numbers: The Global Solidarity Movement' (*Amnesty International*, 2020 ) <https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/global-refugee-crisis-statistics-and-facts/> accessed 16 March 2021

Andrew Bano, 'Fundamentally Different from Courts' (Presentation given to the Tribunals Judicial Training Group 20 February 2011) [https://www.judiciary.uk/wp-content/uploads/2016/01/bano\\_inquisitorial-interventions-pt1-summer2011.pdf](https://www.judiciary.uk/wp-content/uploads/2016/01/bano_inquisitorial-interventions-pt1-summer2011.pdf) accessed 5 December 2020.

Annie Kelly, 'Asylum Aid condemns move to limit legal aid' (*Third Sector*, 3 September 2003) <https://www.thirdsector.co.uk/asylum-aid-condemns-move-limit-legal-aid/article/612337> accessed 20 March 2020.

Asylum Aid and Bail for Immigration Detainees (BID), 'Justice Denied: Asylum and Immigration Legal Aid - a System in Crisis' (*BID Research Reports* 2005) [https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2\\_assets/files/208/Justice\\_Denied.pdf](https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/208/Justice_Denied.pdf) accessed 10 May 2019.

Asylum Justice, 'Statistics' (*Asylum Justice*) <https://www.asylumjustice.org.uk/> accessed 4 February 2018.

Asylum Justice, 'What We Do' (*Asylum Justice*) <https://www.asylumjustice.org.uk/what-we-do/> accessed 4 February 2018.

Bob Simpson and Simon Coleman, 'Ethnography. Glossary of Terms' (*Royal Anthropological Institute* 2017) [www.discoveranthropology.org.uk](http://www.discoveranthropology.org.uk) accessed 28 July 2018.

Bridget Anderson and Sue Conlan, 'Providing Protection. Access to Early Legal Advice for Asylum Seekers' (*Compas.ox.ac.uk*, 2014) [<www.compas.ox.ac.uk/2014/pr-2014-early\\_legal\\_advice/>](http://www.compas.ox.ac.uk/2014/pr-2014-early_legal_advice/) accessed 20 February 2021.

Cathryn Costello and Emily Mancox, 'Policy Primer: The UK, the Common European Asylum System and EU Immigration Law' (*Migration Observatory* 2004) <https://migrationobservatory.ox.ac.uk/resources/primers/the-uk-the-common-european-asylum-system-and-eu-immigration-law/> accessed 16 March 2021.  
Daily Mail, 'Tories will be tough on "bogus" asylum seekers' (*Daily Mail*, 30 May 2001) <https://www.dailymail.co.uk/news/article-49963/Tories-tough-bogus-asylum-seekers.html> accessed 10 May 2019.

Dan Bousfield, 'The Logic of Sovereignty and the Agency of the Refugee: Recovering the Political from "Bare Life"' (2005) TCISS Working Paper Number 36 <https://core.ac.uk/download/pdf/10971817.pdf> accessed 10 March 2020.

David Shariatmadari, 'Swarms, floods and marauders: the toxic metaphors of the migration debate' (*The Guardian*, 10<sup>th</sup> August 2015) <https://www.theguardian.com/commentisfree/2015/aug/10/migration-debate-metaphors-swarms-floods-marauders-migrants> accessed 10 January 2021.

Diane Taylor 'Man faces terror charge over alleged attack at immigration law firm' (*The Guardian* 23 October 2020) <https://www.theguardian.com/uk-news/2020/oct/23/man-faces-terror-charge-over-alleged-attack-at-immigration-law-firm> accessed 20 November 2021

Heaven Crawley, Neil Price, Joanne Hemmings, 'Coping with Destitution: survival and livelihood strategies of refused asylum seekers living in the UK,' (*Oxfam Research Report Centre for Migration Policy Research: Swansea University* 2011). <http://boaztrust.org.uk/wp-content/uploads/2011/02/rr-coping-with-destitution-survival-strategies-uk-040211-en.pdf> accessed 10 May 2019.

Ian Drury, 'Only one in three failed asylum seekers end up leaving Britain as the others vanish into the "black economy", damning report reveals' (*Daily Mail*, 11<sup>th</sup> January 2009) <https://www.dailymail.co.uk/news/article-6579657/Only-one-three-failed-asylum-seekers-end-leaving-Britain.html> accessed 12 February 2021.

Immigration Law Practitioners' Association, 'Refugee Council Briefing. New asylum model (NAM)' (March 2006) <https://ilpa.org.uk/refugee-council-briefing-new-asylum-model-nam-march-2006/> accessed 16 March 2020.

James Slack, 'Up to 80,000 bogus asylum seekers granted "amnesty"' (*Daily Mail*, 8 December 2006) <https://www.dailymail.co.uk/news/article-404269/Up-80-000-bogus-asylum-seekers-granted-amnesty.html> accessed 10 May 2019.

Jemma Slingo 'Patel lashes out at 'lefty lawyers' in asylum speech' (*Law Gazette* 5 October 2020) <https://www.lawgazette.co.uk/news/patel-lashes-out-at-lefty-lawyers-in-asylum-speech/5105870.article> accessed 20 November 2021

John Major, 'British Conservative Party Manifesto' (*Politics News* 1992) <http://www.conservativemanifesto.com/1992/1992-conservative-manifesto.shtml> accessed 18 May 2018

Jo Wilding, *Droughts and Deserts: A report on the immigration legal aid market* (2019) <http://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf>. Accessed 20 November 2021

JUSTICE, 'Immigration and Asylum Appeals – a Fresh Look' [2018] <<https://justice.org.uk/our-work/administrative-justice-system/immigration-asylum-determination-reform/>> accessed 24 February 2021.

Kate Smart, 'Access to legal advice for dispersed asylum seekers' [2008] Asylum Support Partnership Impact Report <[www.refugeecouncil.org.uk/Resource/Refugee%20Council/downloads/policy\\_responses/08%2007%20Access%20to%20legal%20advice%20for%20dispersed%20asylum%20seekers.pdf](http://www.refugeecouncil.org.uk/Resource/Refugee%20Council/downloads/policy_responses/08%2007%20Access%20to%20legal%20advice%20for%20dispersed%20asylum%20seekers.pdf)> accessed 22 February 2021.

Mark Henderson, Rowena Moffatt and Alison Pickup, 'Best Practice Guide to Asylum and Human Rights Appeals' (*Electronic Immigration Network* 2021) <https://www.ein.org.uk/bpg/contents> accessed 10 February 2021.

Meka Beresford, 'Home Office Scraps Six-Month Wait Limit On Asylum Applications Despite Legal Warnings' (*The Guardian* 8 May 2019) [https://www.duncanlewis.co.uk/InthePress/Home Office to scrap asylum claims processing target](https://www.duncanlewis.co.uk/InthePress/Home%20Office%20to%20scrap%20asylum%20claims%20processing%20target) (*The Guardian and RightsInfo*).pdf accessed 17 March 2021.

Melanie Griffiths, 'Vile liars and truth distorters': truth, trust, and the asylum system' (*Right to Remain*, 9 November 2012) <https://righttoremain.org.uk/vile-liars-and-truth-distorters-truth-trust-and-the-asylum-system/> accessed 28 March 2018.

MigrationWork, 'Quality of legal services for asylum seekers' (*Solicitors Regulation Authority*, 2016) [www.sra.org.uk/sra/how-we-work/reports/asylum-report/](http://www.sra.org.uk/sra/how-we-work/reports/asylum-report/) accessed February 10 2021.

Nick Gill, Jennifer Allsopp, Andrew Burrige, Daniel Fisher, Melanie Griffiths, Jessica Hambly, Jo Hynes, Natalia Paszkiewicz, Rebecca Rotter, 'Experiencing Asylum Appeal Hearings: 34 Ways to Improve Access to Justice at the First-tier Tribunal' (Public Law Project, 2020) <https://publiclawproject.org.uk/resources/experiencing-asylum-appeals/> accessed 5 March 2021.

Refugee Action and NACCOM, 'Tipping the scales, access to justice in the asylum system' (2019) <<https://www.refugee-action.org.uk/tipping-scales-access-justice-asylum-system/>> accessed 24 February 2021.

Refugee Council, 'Asylum statistics Annual Trends (February 2020) <[refugeecouncil.org.uk › wp-content › uploads › 2020/03](http://www.refugeecouncil.org.uk/wp-content/uploads/2020/03/)> accessed 12 January 2021.

RESPECT (Professional and Ethical Codes for Technology-related Socio-Economic Research) (2003) [http://www.respectproject.org/code/respect\\_code.pdf](http://www.respectproject.org/code/respect_code.pdf). Accessed 28 October 2019. Economic and Social Research Council. Data available at: <http://www.esrc.ac.uk/funding/guidance-for-applicants/research-ethics/>.

Robert Booth, Four in 10 think British culture is undermined by multiculturalism (*The Guardian*, 17 September 2018) <https://www.theguardian.com/uk-news/2018/sep/17/four-in-10-people-think-multiculturalism-undermines-british-culture-immigration> accessed 16 March 2021.

Solicitors Regulation Authority, 'Asylum report: The quality of legal service provided to asylum seekers' (*Solicitors Regulation Authority*, 2016) <https://www.sra.org.uk/sra/how-wework/reports/asylum-seekers-report.page> accessed 20 March 2020.

Solicitors Regulation Authority, 'Statement of solicitor competence' (*SRA* November 2019) <https://www.sra.org.uk/solicitors/resources/cpd/competence-statement/> accessed 13 January 2021.

The Joint Council for the Welfare of Immigrants, 'The Hostile Environment Explained' (2020) <<https://www.icwi.org.uk/the-hostile-environment-explained>> accessed 15 March 2021.

The Migration Observatory, 'Asylum and refugee resettlement in the UK' (Briefing paper 4<sup>th</sup> December 2020) <https://migrationobservatory.ox.ac.uk/resources/briefings/migration-to-the-uk-asylum/> accessed 15 December 2020.

The Migration Observatory, 'UK Public Opinion toward Immigration: Overall Attitudes and Level of Concern' (*Migration Observatory*, 20 December 2020) <https://migrationobservatory.ox.ac.uk/resources/briefings/uk-public-opinion-toward-immigration-overall-attitudes-and-level-of-concern/> accessed 13 March 2021;

Tim Hilton, 'Chief Executive: "Asylum System Currently at Lowest Point I've Ever Seen"' (*Refugee Action* 15 March 2021) (<https://www.refugee-action.org.uk/asylum-system-lowest-point/> accessed 17 March 2021;

### **International Cases**

*Kathiresan v Minister for Immigration and Multicultural Affairs* (unreported, Federal Court of Australia, Gray J, 4 Mar. 1998, 6)

*Tesfu v Ashcroft* (2003) 322 F.3d 477 (USCA 7<sup>th</sup> Cir., Mar. 14 2003) at 481

