a narrative is much enhanced when the narrator achieves what folklorists call 'the breakthrough into performance', by shifting from third-person reportage to enacting the story by speaking the parts of the characters rather than merely reporting what they said (Bauman 1984; Hymes 1981; Conley and O'Barr 1990b: 40). Most asylum applicants are unable to achieve any such 'breakthrough' because of the depersonalising effects of the interpretation process. The main lesson of Mr O's case concerns the greatly enhanced quality of the verbal interaction he enjoyed with court personnel, irrespective of the legal or anthropological credibility of his account.

Chapter 8

Assessing credibility

The potential risks to asylum applicants are so serious, including risk to life itself, that asylum claims should, as we saw (§6.1), receive 'most anxious scrutiny' – a phrase brandished talismanically at some point in virtually every appeal hearing. According to the Canadian Immigration and Refugee Board (IRB), there are three stages involved in scrutinising and deciding asylum appeals: determining the credibility of the evidence;[1] weighing that evidence to assess its probative value; and, on that basis, determining whether the burden of proof has been met (IRB 1999b: ¶4.1). The next three chapters address these processes, and although it is not possible to separate them completely in practice, the distinctions are at least heuristically useful. The focus is on expert evidence, but this must be set into the context of the treatment of evidence generally, especially that from applicants themselves.

8.1 PRINCIPLES OF CREDIBILITY ASSESSMENT

Because corroborative evidence is so often lacking in asylum claims, credibility assessments based on the internal coherence of the account, its external consistency with 'objective evidence', and its 'inherent implausibility' (Weston 1998: 88), are employed throughout the decision-making process to filter out supposedly 'bogus' claimants.[2] These may all too easily fall prey to prejudice or lack of understanding, however, when the person whose credibility is being assessed comes from a cultural and political background very different from the assessor (§6.6; Bingham 1985: 14; Ruppel 1991: 5). Yet as Catriona Jarvis, herself an adjudicator, points out (2000: 6),

1 Even if credible, evidence may still be rejected as not relevant, i.e. 'not of assistance in coming to a logical conclusion regarding the issues to be determined' (IRB 1999a: ¶11.5).

2 Similarly, Thomas (forthcoming) notes that claims may be found incredible because of internal inconsistencies in the applicant's account; inconsistencies between that account and the available country evidence; or because the account is deemed to lack plausibility or truthfulness.

credibility findings 'go to the heart of the identity' of asylum applicants, and 'to get it wrong is to add insult to injury . . . to inflict yet further damage upon a human being who has already undergone experiences incomprehensible to most of us'.

Muller-Hoff (2001) sees parallels between the widespread view that many rape cases are based upon false allegations (see Adler 1987: 15; Brown *et al.* 1993: 17), and the presumption that many asylum claims are 'bogus'. Both frequently depend upon uncorroborated evidence, and although it is established law that corroboration is not required in asylum cases (Deans 2000: 124; Henderson 2003: 192; Symes and Jorro 2003: 56), Home Office caseworkers nearly always, and the courts sometimes, behave as though it is. When asylum claims are themselves based upon accounts of rape, such 'common sense' scepticism may be raised to the power two (§8.2). Moreover, Muller-Hoff (2001) notes that credibility decisions may provide scope for judicial decision makers to:

> make normative statements outside the scope of law, to set morality standards and to enforce policy decisions and to give them the authority of legal 'knowledge', thus, disguising their subjectivity and challengability [sic].

Credibility assessments are decisions as to whether an appellant's own testimony should be accepted as evidence contributing towards meeting the requisite burden of proof (Kagan 2003). They are clearly crucial in most instances (but not decisive overall, since even appellants who are disbelieved may merit refugee status because of their circumstances or conditions in their home country). Such decisions are generally made by the adjudicator who first hears the evidence, and in the UK, as elsewhere, higher appeal bodies rarely subject their decisions to more than 'very light scrutiny' (*ibid.*), even though many seem to depend upon subjective impressions rather than the application of clearly stated principles. Indeed, no such principles exist within the British asylum system.

Since the time of my field research, the issue of credibility has been addressed in sec. 8 of the *Asylum & Immigration (Treatment of Claimants, etc.) Act* of 2004. This stipulates that credibility assessments should take into account any behaviour which seems designed to mislead, to conceal information, or to obstruct the decision-making process (Thomas, forthcoming). Examples given include failing to produce a passport; producing a false passport; destroying a passport or travel documents; failing to claim in a safe third country; and failing to claim until after being arrested under immigration provisions. In other words, the approach taken still strongly recalls earlier legislation concerning certification (§5.2.2), in focusing upon appellants' behaviour on arrival in the UK. It remains the case, therefore, that British adjudicators and immigration judges have no official guidelines on the most

crucial matter of all, namely, how to assess the credibility of the substantive basis of an appellant's claim. Small wonder, then, that credibility decisions seem influenced, to some degree, by stereotypes rather than a claimant's own particularities (see Kagan 2003). 'I love Colombian appeals,' one senior adjudicator said to me, 'they're always so delightfully implausible.' Less anecdotally, more than twice as many women as men (15 per cent as against 6.5 per cent) are judged credible by British adjudicators (Harvey 1998: 191; Jarvis 2000: 8).

In some other jurisdictions, rather more progress has been made in this regard. A useful general survey of the issues involved in assessing whether evidence is indeed 'credible or trustworthy' is again provided by the Immigration and Refugee Board of Canada (IRB 1998: ¶1.1). It notes that such assessments are made more difficult by the fact that many rules of evidence used in other courts do not apply, which is broadly true of British asylum hearings too (Brooke LJ, *Karanakaran*). According to the IRB (1998: ¶1.2), testimony must be evaluated in the light of:

> conditions and laws in the claimant's country of origin, as well as the experiences of similarly situated persons in that country. The Federal Court has cautioned, however, that '[t]here can be no consistency on findings of credibility'. Credibility cannot be prejudged, and is an issue to be determined . . . in each case based on the circumstances of the individual claimant and the evidence.

The IRB's guidelines note that credibility findings, especially when adverse to appellants, must be founded properly in the evidence and in reasonable inferences drawn therefrom (1998: ¶1.6). They should take account of 'the integrity and intelligence of the witness and the overall accuracy of the statements', as well as the witness's 'powers of observation and capacity for remembering'. They involve assessments of demeanour, although these should not be given excessive weight and should focus on such considerations as whether witnesses appear 'frank and sincere or biased, reticent and evasive' (¶1.7), rather than on physical appearance (¶2.3.5). They should also take into account whether the witness is an involved 'actor' or 'mere bystander', and whether they have an interest in the outcome (¶1.7), though credibility should not be doubted merely because evidence is self-serving (¶2.4.6). They should consider all the evidence, not just portions of it, and it should be considered all together, not bit by bit (¶2.1); this involves more than just seeking out inconsistencies, because even if particular pieces of evidence are found to lack credibility – in which case 'clear reasons must be given' (¶2.2.1) – the claim must still be assessed on the basis of whatever evidence *has* been found credible (¶2.1.2). Moreover, applicants should have opportunities – through cross-examination for example – to clarify matters where credibility is in question (¶2.5.1).

8.2 TELLING THEIR STORIES

For most asylum applicants the principal evidence as to the persecution they have experienced resides in their personal narratives of suffering, which is why decisions on credibility are such important preliminaries to the determination process. A detailed study of asylum interviews remains to be carried out (§5.1), and even less is known about how asylum lawyers structure their clients' statements to maximise their acceptability as evidence; but it seems reasonable to expect, at least, that such accounts will be converted from relational into rule-oriented mode (§2.1). McKinley (1997) describes just such a restructuring for a Zimbabwean applicant in the US, fleeing from an abusive forced marriage.

With that proviso, the asylum interview, statement-taking by their own solicitor, and the appeal hearing itself, all provide opportunities for asylum applicants to narrate their stories of persecution. For some applicants, though, the very incidents most helpful to their claims have to be coaxed out of them (if they ever emerge at all) by sympathetic and trusted interlocutors. What is more, these stories often come out differently on different occasions, giving rise to the 'discrepancies' for which hawk-eyed Home Office staff are always on the *qui vive*.

No doubt many applicants do want to tell their stories to as wide an audience as possible – as a therapeutic catharsis; to 'bear witness' to atrocities inflicted on their family or community; or to obtain official validation of the seriousness of their persecution (see, in a different context, Conley and O'Barr 1990b: 130). During my research, one Nepalese appellant, on being informed what I was doing there, came up and thanked me profusely for listening to his story; it was clearly important to him that people came to hear of his problems. Whether applicants are prepared to open up straight after arrival, to complete strangers in a strange country, is another matter, yet one 'common sense' Home Office assumption is that genuine applicants will mention all serious incidents of persecution at the earliest possible opportunity. When the truth is finally coaxed out of them by doctors or solicitors, the Home Office invariably attacks their credibility on the grounds that 'you would have mentioned when first interviewed something so central to your asylum claim'. The following comment in a Refusal Letter to a Sri Lankan Tamil woman, in an appeal where I acted as expert, is typical:

> When the immigration officer asked you whether you had any other reasons or events that caused you to seek asylum, you did not add anything further. Even bearing in mind your apprehension as expressed in your additional statement, he considered that your failure to mention anything about the alleged rape in 1987 undermined your credibility in raising it later.

Yet that interview had been conducted by a male Immigration Officer in the presence of a male Tamil solicitor previously unknown to the applicant. Both circumstances were bound to inhibit disclosure. Shame before men generally, and a fear that information may percolate out to local members of their community, severely inhibit many women's willingness to disclose sexual assault (Berkowitz and Jarvis 2000: 48). Many have not even told their immediate family what happened.

Adjudicators and tribunals pay rather more attention than the Home Office to cultural and circumstantial reasons why women may not divulge sexual assaults on such occasions, but they too do not always accept this as a sufficient explanation for silence, as in this tribunal appeal by *'S'*, a Turkish Kurd:

> In our considered opinion, while her excuse was that she was ashamed and embarrassed to reveal that matter to male Immigration Officers, that excuse does not stand up when it is considered that she had been in constant touch with her solicitors, some of whom must have been female, when she could have brought such matters to light, but had failed to do so.

The argument about contact with female solicitors appears purely speculative. What is more, it is well known that many rape victims fail to report such attacks; this has been termed the 'silent reaction to rape' syndrome, and attributed to the 'tremendous psychological burden' felt by victims (Burgess and Holmstrom 1974).[3] Because of the extra pressures they face, one might expect this to be at least as true for refugees, even at the cost of weakening their legal cases. It applies to men too. Medical Foundation doctors report that male asylum applicants from Sri Lanka who suffered sexual abuse during detention are even more likely to remain silent until a relationship of trust has been established than are female rape victims (Peel *et al.* 2000; Peel 2002).

Clearly, therefore, it would be quite wrong to base a negative credibility finding on initial reticence alone; explanations for late disclosure should be taken very seriously. That does not of course mean that every applicant who ultimately claims to have been raped is telling the truth. Adjudicators must decide on credibility 'in the round', and there was, for instance, no medical or psychiatric report supporting S's claim to have been raped; such a report might have lent significant weight to her case.

Another 'common sense' supposition is that traumatic events will be remembered and recounted with preternatural clarity and vividness. This goes hand in hand with a general assumption that variations and inconsistencies

3 This American study does not consider cultural variations, however, and there are problems with such 'scientising' of social issues (Dobbin and Gatowski 1998).

between different tellings of an event, even months or years apart, are damaging to general credibility – hence the significance attached by the Home Office, and to some degree the courts, to apparent inconsistencies in different versions of applicants' stories. On both counts, however, anthropological and medical evidence point in the opposite direction.

The first issue is the incommunicability of pain. Certain pains (toothache, for example) are socialised by being labelled in everyday speech. Sufferers can map their own private experiences onto these public labels and 'from there sympathy and empathy take over, making the pain in question more or less shareable' (Daniel 1996: 142).[4] The physical pain of torture, however, 'does not simply resist language but actively destroys it, bringing about an immediate reversion to ... the sounds and cries a human being makes before language is learned' (Scarry 1985: 4). What is more, even if it has an interrogational purpose (which is not always the case), all torture is also terroristic (Daniel 1996: 137); its 'ability to shatter relationships [and] destroy trust' (Turner 1995: 58) is so great that victims often refuse to believe that their own comrades were indeed tortured, even when they themselves witnessed it (Daniel 1996: 143, 150). Not surprisingly, torture victims find it almost unbearably hard to discuss such doubly desocialising experiences. Telling one's story of persecution involves transforming private experience into public meaning, and thereby constitutes a triumph of 'agency in the face of disempowerment' (Hastrup 2003: 314, citing Arendt 1958 and Jackson 2002). Small wonder that torture victims find such agency beyond them at first, and that even when they achieve it, often with therapeutic or legal help, their accounts are not in vivid technicolor, but mere sketches from which 'all the emotional edges have been eliminated' (Scarry 1985: 32). In court, their 'listlessness', their 'passionless listings of atrocities committed by the torturer', appears unconvincing (Daniel 1996: 143). The very inexpressibility of the pain of torture renders its expression unbelievable.

Second, a recent medical study examined variations in the recounting of traumatic events by Kosovan and Bosnian asylum applicants (Herlihy, Scragg and Turner 2002; cf. Cohen 2001). The discrepancy rate was as high as 30 per cent for descriptions of central elements for both traumatic and non-traumatic events; however, credibility is best judged with regard to peripheral memory, and here there were more discrepancies for traumatic events. Moreover, the longer the delay between interviews, the higher the discrepancy rate for those with Post-Traumatic Stress Disorder. I attended a seminar in which Turner summarised these findings, prior to publication, to an audience of adjudicators. Several were dismayed to discover that one cannot base

4 Skultans (1974) notes that spiritualists in South Wales treat pain as an emotion rather than a sensation, thereby turning it into an experience which can be communicated to and shared with others.

credibility judgments on the consistency of accounts with previous versions, and admitted that they generally did so in coming to their decisions. They gained scant reassurance. Turner confirmed that trauma memories are fragmented, so it is *not* the case that people remember very clearly the details of particularly important events. Discrepancies in recounting past experiences are quite high under any circumstances, but higher for traumatic events; so such discrepancies have no necessary connection with overall credibility.

Scholars working on oral histories and life stories would be far less surprised than these adjudicators by such findings. The sociolinguist Linde, for example, argues that life stories are generally judged on the basis of coherence rather than factuality, coherence being both 'a social demand and an internal, psychological demand' (1993: 220). Whereas psychiatrists like Turner focus on the latter aspect, linguists and social scientists are of course interested primarily in the former. They overlap to some degree however, because ultimately the narration of autobiography is both a cultural artefact and a manifestation of culturally specific views on the nature of personhood (Langness and Frank 1981: 101). For example, by Western convention autobiography is expected to express motivations, emotions, and other elements of the 'inner self', whereas in other cultures it may serve as a vehicle for affirming the public self. In both cases, but especially the latter, its content therefore depends on the social relationship between teller and listener (Rosaldo 1976).

The causal chain in such narratives must also be 'adequate'; that is, the sequence of events narrated must be accounted for in ways acceptable to the listener (Linde 1993: 221). When speakers feel causality to be inadequate, they may present the next step as an accident or 'socially recognized discontinuity' (1993: 221). From a legal standpoint, moreover, it is sometimes necessary to proceed sequentially in order to demonstrate that the witness has the requisite first-hand knowledge of the evidence to be introduced – what lawyers call 'laying a proper foundation'. Such sequencing is, however, related to Western cultural understandings of causality, whereby only events that occur prior in time can cause subsequent events (Conley and O'Barr 1990b: 41). Ultimately, the 'most pervasive and invisible coherence system is common sense – the set of beliefs and relations between beliefs that speakers may assume are known and shared by all competent members of the culture' (Linde 1993: 222). Where asylum narratives are concerned, however, the cultural and experiential differences between teller and listener may be too great for common sense assumptions to be shared to anything like this degree. That is why witness statements are so crucial. They allow asylum applicants' legal representatives to structure their accounts according to the expectations of British culture, and legal culture in particular. Causal adequacy can thereby be assured prior to the hearing, although it may of course begin to unravel once cross-examination starts.

Because *performance* is an intrinsic component of oral expression, the full

meanings of narratives emerge only during their telling. This emergence of meaning is, however, greatly inhibited by the exclusionary rules of evidence prevailing in courts of law. These rules are intended to circumvent 'identifiable practical problems posed by ordinary discourse' (Atkinson and Drew 1979: 8), but one consequence is that 'the rhetorical force of the account' is significantly diminished, making it less involving for the speaker, less dramatic and interesting for the listener, and – often, as a result – less credible for the decision maker (Conley and O'Barr 1990b: 40). Because of the less stringent evidential rules in asylum courts these prohibitions do not all apply to the same extent; on the other hand, the interpolation of interpreters may have similar dampening effects upon the performative force of appellants' utterances (§7.5).

The meaning of a narrative is related to 'the interaction with . . . the audience and its expectations' (Finnegan 1992: 93). In other words, such stories do not lurk in monolithic, immutable form in some subconscious limbo, ready to be regurgitated whole on each appropriate occasion; rather, they are 'realised through performances carried out and mediated by people' (1992: 93–4). For legal anthropologists, therefore, it is a commonplace that accounts by litigants will:

> vary considerably and in relation to the environment and point in the process where they are given. . . . A 'story' does not exist fully developed on its own, but only emerges through a collaboration between the teller and a particular audience . . . a research interviewer asking questions, a judge presiding in an informal court, a lawyer talking with a client (Conley and O'Barr 1990b: 171).

The usual caveat applies of course; some discrepancies and elaborations may indeed indicate untruthfulness, but that decision has to be based on overall credibility, not purely on the discrepancies themselves. Clearly, however, such findings call into question some prevalent 'common sense' assumptions made by asylum decision makers, and exacerbate the difficulties in reaching fair decisions.

8.3 JUDICIAL ASSESSMENTS OF CREDIBILITY

Although the burden of proof in asylum cases lies with applicants (§10.2), the fact that many find it impossible to produce supporting evidence led UNHCR to specify in its *Handbook* (1992: ¶196) that even in the absence of such evidence, applicants whose accounts seem credible should receive the benefit of any doubt. According to UNHCR, credibility means, largely, that their statements are 'coherent and plausible', and do not 'run counter to generally known facts' (¶204).

The Home Office approach to credibility is markedly less generous. Evidence considered by IND in assessing credibility includes applicants' statements, interview records, and other documents, judged against 'an objective assessment of the conditions in the prospective country of return at the time of decision' (IND 2002a: ¶1.2.10; see also §10.2). The fact that applicants may also have economic motives for coming to the UK should not affect their credibility provided they satisfy Convention criteria. Caseworkers are also told not to draw hasty conclusions when families have remained behind; women and children may be less at risk, or the applicant may have been unable to afford to bring them. They are even advised, provided there is evidence of a well-founded fear of persecution, to give applicants the initial benefit of the doubt over falsehoods, discrepancies and exaggerations, as these may reflect a real fear of being returned (2002a: ¶1.2.11). It is impossible to know how all this advice influences their working practices, but in any case it does not apply if 'the account lacks coherence' or 'general credibility is doubtful' (¶1.2.10), and in practice caseworkers nearly always *do* cast doubt on credibility. In the opinion of many asylum lawyers, IND starts from the presumption that applications are 'bogus'.[5]

First appeals are especially crucial where credibility is concerned, because unless adjudicators' assessments are clearly wrong or utterly counter-intuitive, tribunals, in their stock phrase, 'will not lightly overturn' their findings on credibility – and with good reason, for adjudicators do after all hear appellants giving oral evidence and undergoing cross-examination. Adjudicators are told to make their own credibility assessments uninfluenced by the Home Office view, indicating, with reasons, which evidence they accept (§10.5). They are advised that demeanour is an unreliable guide except in extreme cases, but that inconsistencies in appellants' evidence, or between their words and deeds, may be significant (Deans 2000: 120–3, citing *Amin*, *Karanakaran*, and *Chugtai*).[6]

An analysis of asylum decision making in Canada, by a multidisciplinary research team noted that Immigration and Refugee Board members tended to reach credibility assessments by applying their own 'assumptions of a universal Canadian cultural "logic" ' (Rousseau *et al.* 2002: 62). For the researchers, however, the Board's assumption that there existed a single frame of reference in refugee hearings, shared by decision maker and applicant,

5 Embarrassingly, the 1998 White Paper illustrated 'asylum abuse' by citing an applicant who told a 'series of lies' to support his claim and gain income support (Home Office 1998: 10). He was later granted refugee status by the House of Lords (*Salem*), and awarded back-dated benefits in full.

6 See also *MM*, where the tribunal agreed that assessments of appellants' oral evidence and their manner in giving it could be valuable for explaining particular credibility findings, but warned that this was 'an area for real caution' lest they slip over into judgments based on appellants' 'demeanour'.

seemed highly problematic (see also Clifford 1988: 329). While recognising the legal and procedural difficulty of the decision makers' task, they also noted the 'capricious' treatment by Board members of evidence from experts such as doctors and psychologists (Rousseau *et al.* 2002: 55).

Canadian hearings are tape-recorded and transcribed,[7] and study of such tapes revealed not only the effect of psychological trauma on applicants' testimony, as might be expected, but also the extent to which repeated exposure to narratives of torture and rape produced 'massive' avoidance reactions among decision makers themselves, who displayed a high incidence of 'emotional distress', expressed prejudice, and considerable cynicism (Rousseau *et al.* 2002: 64). The report concludes that such behaviour shows 'a very strong emotional reaction, a lack of empathy, and an association of the victim with the aggressor, all symptoms of an inability to cope with the emotional stress created by the hearing' (2002: 59–60). It includes examples of Board members denigrating, discounting, or not even reading psychological reports; discounting cigarette burns on an applicant's body because 'she herself was a smoker'; giving little consideration to objective evidence; and using judicial knowledge in inappropriate ways. In one case, 'the chairwoman stated repeatedly that she did not want to hear a description of the torture suffered by the claimant, and that reading the PIF [Personal Information Form] was sufficient proof regarding that issue. . . . The claim was rejected for lack of credibility' (2002: 58; gloss added). At another hearing, 'a Board Member, showing clearly that he did not believe the story, angrily asked the claimant how he could have asked for help from their torturers; five minutes later, and still angry, he asked how the claimant could have left his companion in the hands of their torturers' (2002: 59).

Such procedural irregularities and combative behaviour would appear quite outrageous in a British hearing, and I never witnessed anything as extreme. However, while I am not qualified to diagnose avoidance or distress, I can certainly say that some adjudicators and tribunal chairs display cynicism about applicants generally, or prejudices in the form of stereotyped views about particular nationalities. It seems common for professionals in stressful occupations to distance themselves from the traumas to which they are repeatedly exposed, through denial, avoidance, minimising the seriousness of situations, and emotive reactions such as anger, lack of empathy, or cynicism (such as gallows humour in operating theatres; Katz 1981), but there are clearly adverse consequences for claimants if such reactions are 'impacting negatively' upon judicial evaluations of their credibility (Rousseau *et al.* 2002: 43).

The most systematic research into how British adjudicators reach credibility decisions was carried out by Jarvis, herself an adjudicator, using

7 See Barsky (1994) for a critique of this process.

questionnaires and follow-up interviews. Adjudicators were asked to rank 27 factors pertaining to credibility in order of importance, distinguishing appeals in which applicants gave oral evidence from those in which, for whatever reason, they did not. Some were factors common to all judicial assessments, such as consistency or a failure to answer questions put, while others were more peculiar to asylum appeals, such as late disclosure of torture or the narrowly procedural matters emphasised by the Immigration Rules (Jarvis 2000: 10). Replies indicated considerable variation in *stated* practice, and showed that many credibility decisions rested on adjudicators' 'gut feelings', their application of common sense (possibly another way of saying the same thing), or recourse to personal experience (2000: 16).

To that extent, as one respondent bluntly put it, the process is 'a lottery' in which the decision depends above all on which adjudicator happens to hear the appeal (Jarvis 2000: 19). Some general conclusions do however emerge, for good or ill, from Jarvis's findings. Thus, appellants have less chance of winning if they choose not to attend, or attend without giving oral evidence. Many judges see oral evidence as essential for establishing credibility, because they cannot see how 'compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions' (Bertha Wilson J, in *Federation of Canadian Sikh Societies*). Others, like Lord Justice Sedley (*Yousaf and Jamil*), are 'less sanguine about the revelatory character of oral evidence, especially where it has to be mediated by an interpreter'. He cautions that:

> Nothing in the experience of our ordinary courts encourages one to think that in the witness box the truth will necessarily out and liars be exposed. If anything, it tends to be documentary material which demonstrates that the unconvincing witness has been telling the truth or the convincing one been deluded or lying.

If this is so when strict rules of evidence apply, there must be even more doubt under the relaxed rules found in asylum appeals, and when witnesses may be traumatised. Nonetheless, adjudicators' responses showed that, in general, the identified factors 'will weigh more heavily against you if you don't attend and give oral evidence than if you do' (Jarvis 2000: 20). Although it is an error of law to make a negative credibility finding on this basis, the fact that it so obviously still happens is perhaps not surprising when one considers that there is generally no other evidence (apart from standard objective sources) bar the appellant's own.

On the other hand, most Home Office reasons for certifying claims (§5.2.2), such as applicants' lack of identity documents or failure to claim asylum in transit, cut little ice with most adjudicators, the one exception being when no claim was made until after removal proceedings were instigated (Jarvis 2000: 17). Similarly, adverse credibility findings are more likely when a claim

is lodged only after that of a family member has been dismissed, though this may disadvantage wives who adhered to cultural norms of dependence, and initially allowed their claims to be subsumed under their husbands' (2000: 21).

Numerous studies show that demeanour is an unreliable guide to credibility in any area of law (Jarvis 2000: 40, and sources therein). This is especially so in asylum courts, given appellants' diverse cultural backgrounds and expectations regarding interpersonal behaviour. One recent tribunal cautioned that 'judging demeanour across cultural divides is fraught with danger' (*'B' [DRC]*), yet it figures importantly in the assessments of many adjudicators (Jarvis 2000: 23, 40). Like other legal decision makers, adjudicators are more inclined to believe appellants who are physically attractive, unless they seem to trade on their attractiveness in a manipulative way (2000: 40–1). Such prejudices may be particularly pernicious when allied to misconceptions about rape as an expression of sexual attraction, as they encourage the propensity to believe that the fears of attractive young ladies are well founded but those of older women are not (§4.3).

Although they are crucial starting points in almost every appeal, credibility assessments are not conclusive: 'an applicant's story may not be credible in the light of the objective circumstances but still the case is established' (*Nimets*). Decisions should be grounded on the existence of future risk, 'as to which the credibility of an account of past events is clearly often highly relevant but not necessarily determinative' (Symes and Jorro 2003: 466). The ultimate issue is the existence of a 'well-founded fear of persecution', evaluated primarily on the basis of 'objective evidence' about the situation in the applicant's home country, so in practice the outcomes of most appeals depend on adjudicators deciding which version of the objective evidence they prefer as regards risk on return. But as the veteran tribunal chair Mr Care pointed out, 'background information is crucial to most findings of plausibility and frequently credibility as well' (*Kanagasundram*). The evidence of country and medical experts may therefore be important for credibility assessments too, yet these experts themselves cannot easily address such matters directly, as we shall now see.

8.4 COUNTRY EXPERTS AND CREDIBILITY ASSESSMENTS

To say that credible statements must be 'coherent and plausible' and not 'run counter to generally known facts' (UNHCR 1992: ¶204), begs the questions of how to assess plausibility, and which facts are generally known. These are the very issues addressed by country experts such as anthropologists, who are generally asked to comment on whether applicants' stories are plausible, consistent with local history, and in accord with the known behaviour of key

individuals and groups. The semantic terrain between 'plausibility' and 'credibility' is, however, a labyrinth for lawyers, and a veritable minefield for expert witnesses.

Because country experts provide and assess key parts of the objective evidence, and are often asked to comment on the plausibility of asylum applicants' accounts, it is hardly surprising if they are also tempted to take what must appear the small further step of commenting on the implications of their assessments for applicants' credibility. Naturally enough, they take for granted their competence to assess the kinds of arguments and evidence with which they deal professionally; for example, anthropologists are fully accustomed to evaluating and interpreting informants' statements. But whereas in academic contexts 'plausibility' and 'credibility' may seem virtually interchangeable terms, in legal circles 'credibility' is a term of art, a judgment which only the court is entitled to make. Whether 'plausibility' enjoys the same status has been a matter for debate.

Thus, Dutton (2003) argues strongly that when assessing credibility, decision makers should not give the Immigration Rules (the kinds of procedural matters leading to 'certification'; §5.2.2) equal weight to the objective evidence. He himself favours the approach adopted by Lee J in the Federal Court of Australia (*W148/00A*), which 'allows the use of common sense but minimises the uncertainty shaped by personal prejudices and sentiments inherent in the subjective approach'. This appeal concerned a Syrian, imprisoned by the intelligence authorities for refusing to go to Iran as a spy. His claim had been rejected by the Australian Refugee Review Tribunal, but Lee J stated that they could not exclude his account from consideration simply by asserting that it was 'implausible'; to qualify for such a description, events must be 'beyond human experience of possible occurrence, that is to say, inherently unlikely'. Dutton sees four advantages in this approach. First, it recognises that an asylum applicant, of all people, is a 'candidate for the unusual', as Schiemann LJ stated in the Court of Appeal (*Adam*). Second, it uses as objective a definition of common sense as possible, based on generalised human experience rather than personal opinions. Third, it 'provides for certainty in that it is a clear method and makes no allowance for individual preconceptions', but, fourth, it also 'enables common sense to reject the most incredulous [sic] and fanciful of accounts' (Dutton 2003).

The tribunal in *MM [DRC]*, chaired by the President, criticised this approach, however, preferring to define 'plausibility' as 'apparent reasonableness or truthfulness'; its assessment might involve judgments 'as to the likelihood of something having happened based on evidence and or inferences'. Background (objective) evidence was often crucial in 'revealing the likelihood of part or the whole of what was said to have happened actually having happened', but plausibility was by no means always conclusive in assessments of credibility:

> A story may be implausible and yet may properly be taken as credible; it may be plausible and yet properly not believed. . . . there is a danger of 'plausibility' becoming a term of art, yet with no clear definition or consistent usage. It is simply that the inherent likelihood or apparent reasonableness of a claim, is an aspect of its credibility, and an aspect which may well be related to background material, which assists in judging it. This danger is reflected in the comment of Lee J which, with respect, we do not find helpful to us. We do not regard 'implausible' or 'inherently unlikely' as meaning 'beyond human experience or possible occurrence', nor do we regard that latter phrase as the relevant benchmark for an adverse conclusion as to plausibility or credibility.

There is, therefore, an important difference between expressing the view that an account is plausible, or consistent with objective evidence; and judging it to be 'credible'. Many experts, ill-advised by their instructing solicitors, simply do not realise that the first two opinions are permissible, even helpful to the court, but the third is not. Conversely, the courts, unaware that this legal nicety is not apparent to others, may devalue reports which they see as attempting to usurp their authority.

The situation is complex, however, because the higher courts have not always entirely ruled out the possibility of decision makers being assisted by expert views on credibility. In his High Court decision in *Ez Eldin*, for example, Mr Justice Blofeld had rejected the argument that a tribunal should have taken account of the views on an Egyptian appellant's credibility expressed in an expert report by George Joffé, then Deputy Director of the Royal Institute of International Affairs. He noted that:

> difficulties arise if an expert . . . attempts himself to assess the credibility of an applicant, and to extrapolate from that his opinions as to what is likely to happen to him. . . . I doubt if an expert's opinion of an applicant's credibility is, in itself, admissible. Credibility is essentially a matter solely for the court or Tribunal that hears the case.

For the subsequent Court of Appeal hearing, Joffé was asked by Ez Eldin's solicitors to comment on Blofeld J's judgment. He responded as follows:[8]

> I, of course, agree that the credibility of the evidence provided by a claimant is solely a matter for the court . . . I must, however, within the context of my expertise, indicate whether or not such statements are consonant with what I know of the objective circumstances [and] I must also comment upon the consequences that would follow if such statements were to be correct – but that . . . is not to determine or comment on their accuracy or veracity. By definition, an expert witness is obliged to provide the court with sufficient information of the objective circumstances of the case in order to aid the court in determining the credibility of the claimant.

8 I am grateful to George Joffé for supplying copies of reports and correspondence.

As this indicates, Mr Justice Blofeld had perhaps lumped two rather different things together. For an expert to purport to assess an applicant's overall credibility is one thing; to express 'opinions as to what is likely to happen to him' if his story is true is another. These opinions are precisely what solicitors hope to elicit when they commission expert reports. For example, my instructions from a leading firm of asylum solicitors included the query: 'Is Mr M likely to be on police records, and would this, combined with his scarring, put him at significant risk of serious mistreatment, if he is obliged to return to Sri Lanka?' In such situations, one first assesses whether the asylum applicant's story is consistent with the objective evidence, 'consistency' being a matter on which experts *are* permitted to comment. On the assumption that the story will be found to be true, one then assesses the objective evidence on how persons of that background are treated. This seems the kind of 'extrapolation' which Blofeld J criticises, but if they cannot draw such conditional inferences it is hard to see the point of experts reporting to the court at all.

Certainly the Court of Appeal seemed sympathetic to Joffé's argument, and Lord Justice Brooke in his leading judgment commented:

> Mr Joffé had set down a number of detailed matters relating to his knowledge of the Egyptian State's concern about . . . Islamic fundamentalism . . . It must be extremely difficult for . . . adjudicators to form their view of credibility in relation to somebody who comes from a culture different from theirs . . . In those circumstances [an] adjudicator always needs all the help that can be given by those who know more about such matters

This exemplifies a long-running difference of opinion (see also *Karanakaran*; §9.6), whereby the Court of Appeal consistently argues for a greater degree of deference towards uncontested expert evidence than the IAT – motivated partly, no doubt, by a desire to maintain its hegemony (§6.2) – seems willing to grant. True to form, some tribunals entered caveats regarding Brooke LJ's comments, but in so doing they sometimes, arguably, exaggerated their own cultural awareness and general expertise on 'humanity' (see also §9.7):

> while it is not on the whole the daily business of Her Majesty's judges in the superior courts to assess and make the appropriate allowances for cultural differences, that is exactly what adjudicators have to be doing every day of their working lives. Some of them are better at it than

> others: all can use help, so long as it is help, properly presented. While those comments are a useful reminder that there are differences between different peoples, modern thinking suggests our common humanity is more important (*Zarour*).

Consequently, despite the occasional sympathy of the higher courts, experts should think twice before bandying about their opinions on credibility. To some extent, though, the position depends upon the stage at which the report is sought. Prior to an adjudicator hearing, credibility is still an open question. IND may well have reached adverse conclusions on the matter, but these are mere assertions by one party in an adversarial process, made with far less professional authority than that underlying the opinions of the expert, who can legitimately disagree with their premises. By the time of tribunal appeals, however, adjudicators have already made credibility findings, so experts may have to allow for the fact that aspects of an appellant's account have already been deemed not credible. When an adjudicator reaches such conclusions for what the expert considers unsustainable factual reasons, the situation is quite delicate. This is another area where improperly instructed experts may get into difficulty. As the legal decision itself is unassailable by them, they must find some way of calling the adjudicator's deployment of objective evidence into question without trespassing onto legal decision making.

In *Nishanthan*, for example, two aspects of the adjudicator's reasoning seemed culturally misguided. First, the appellant's father, a recognised refugee, had been in the UK since 1989. The appellant had said at the hearing that he did not know the details of his father's persecution, which led the adjudicator to conclude: 'That the Appellant does not know what troubles his father faced and that he has not asked him or been told by his mother lacks credibility.' Quite apart from the illogicality of this argument – as his father's legal presence in the UK was not in dispute, what reason could there be for the appellant to *falsely* deny knowing about his father's 'troubles'? – it ignores the patterns of deference which inhibit young Tamil men from interrogating their fathers. Second, the appellant said that his mother paid a bribe to secure his release from army detention, but he had not asked her how much she paid. The adjudicator cast doubt on this too, stating: 'That the Appellant did not ask his mother these details lacks credibility.' This argument too depends upon assumptions about normal behaviour within families which do not take cultural context into account, assumptions all the more questionable concerning secret, shameful matters like paying bribes. In my report I concluded:

> It is not for me, obviously, to address the adjudicator's legal finding on credibility. However, what I do say is that, from my alternative professional standpoint as an anthropologist, if a Tamil research informant were to tell me either of these things, premised as they both are upon the cultural inappropriateness of children interrogating their parents, I would find nothing at all anthropologically unbelievable about either circumstance.

Leave to appeal was granted specifically on the credibility issue, and although I was present to give oral testimony I was not in fact called upon because it was clear as soon as the tribunal arrived in court that they intended to remit the appeal for rehearing. Their written determination stated:

> We do not find it surprising or incredible that the appellant did not know about his father's experiences. His father left Sri Lanka when the appellant was 11 years old. We do not find it surprising or incredible that the appellant did not question his mother about the bribes or know how much was paid and to whom. Dr Good's expert report confirms that the appellant's lack of knowledge about his father and failure to question his mother is consistent with his age and cultural background.

8.5 MEDICAL EXPERTS AND CREDIBILITY

Medical evidence is important in many asylum claims, particularly those allegedly involving torture, because torture occupies a special status in relation to the 1951 Convention and the European Convention of Human Rights. For example, where there is prima facie evidence of torture, asylum claims should not be certified. According to the 1984 UN Convention Against Torture, torture is any act whereby 'severe pain or suffering, whether physical or mental, is intentionally inflicted on a person' for whatever reason, provided that 'such pain or suffering is inflicted by or . . . with the consent or acquiescence of a . . . person acting in an official capacity'. IND also accepts that forcible abortion, sterilisation, and genital mutilation 'probably' count as torture if officially sanctioned (2002a: ¶3.2.2.1).

The decision to cover medical as well as social scientific evidence in this research was based on the assumption that doctors would provide a control group whose legitimate expertise would already be familiar to lawyers, whereas anthropologists would be an unknown quantity, the status of whose evidence might create doubt and misapprehension. Whatever the truth of the second part of this hypothesis, my presumptions about medical evidence were rapidly proved false. When adjudicators learned what I was researching, they often launched into complaints about doctors who 'purported to decide cases for them' by stating that appellants' stories were true.

Criticisms of the kind made by Blofeld J in *Ez Eldin* are, indeed, far more commonly levelled against doctors than country experts. For example, HOPOs often object that doctors' opinions are based only on what applicants tell them: