

**REFUGEE STATUS DETERMINATION,  
NARRATIVE AND THE ORAL HEARING IN  
AUSTRALIA AND CANADA**

by

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# **Refugee Status Determination, Narrative and the Oral Hearing in Australia and Canada**

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A Thesis Submitted for the Degree of Doctor of Philosophy

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### **CERTIFICATE OF ORIGINAL AUTHORSHIP**

I certify that the work in this thesis has not previously been submitted for a degree nor has it been submitted as part of requirements for a degree except as fully acknowledged within the text.

I also certify that the thesis has been written by me. Any help that I have received in my research work and the preparation of the thesis itself has been acknowledged. In addition, I certify that all information sources and literature used are indicated in the thesis.

Signature of Student:

Date: 11 November, 2015

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## **Preface**

This dissertation is formatted in accordance with the regulations of the University of Technology, Sydney and submitted in partial fulfillment of the requirements for a PhD degree awarded jointly by the University of Technology, Sydney and the University of British Columbia. Versions of this dissertation will exist in the institutional repositories of both institutions.

The refugee applicant oral hearings addressed in Chapters Four to Seven were covered by University of British Columbia Behavioural Research Ethics Board, Approval Certificate No H12-01565; and University of Technology Sydney Human Research Ethics Committee, Ethics Reference No 2011-486A.

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## List of Abbreviations

ADJR Act	Administrative Decisions Judicial Review Act
ATI	Access to Information
BOC	Basis of Claim
CCR	Canadian Council for Refugees
CIC	Citizenship and Immigration Canada
CRDD	Convention Refugee Determination Division
Cth	Commonwealth
DCO	designated country of origin
DORS	determination of refugee status
DIBP	Department of Immigration and Border Protection
FOI	Freedom of Information
IAA	Immigration Assessment Authority
IRB	Immigration and Refugee Board of Canada
IRPA	<i>Immigration and Refugee Protection Act</i>
NGO	non-governmental organisation
PIF	personal information form
POE	port of entry
PSG	Particular Social Group
RAD	Refugee Appeal Division
RPD	Refugee Protection Division
RRT	Refugee Review Tribunal
RSD	refugee status determination
RSRC	Refugee Status Review Committees
UMA	unauthorised maritime arrival
UNHCR	United Nations High Commissioner for Refugees
UNTS	United Nations Treaty Series

## **Abstract**

In processes of refugee status determination, the applicant's first person testimony plays a critical role. The applicant's own testimony is often the only evidence available to support the claim being made. This thesis examines the presentation and assessment of refugee applicants' oral testimony before the Canadian Immigration and Refugee Board (IRB) and the Australian Refugee Review Tribunal (RRT). In addressing the conduct of the oral hearing, a central event within refugee status determination processes, it focuses on the critical role played by the form of refugee applicants' oral testimony. Its central question is how does the form of refugee testimony shape assessments of refugee applicants' evidence as credible and thus, influence who may access protection and on what terms. These questions are explored through the close reading of 14 refugee applicants' oral hearings, which took place in Australia and Canada between 2012 and 2014.

In analysing the hearings, this thesis argues that the law's requirement for evidence that is plausible and credible within refugee status determination involves an expectation that applicants present evidence in a compelling narrative form. Using the frameworks of 'law and literature' and narrative theory, with attention to questions of temporality, causation and plot, this thesis demonstrates that a demand for narrative structured the oral hearings. The demand encompassed expectations that applicants present evidence marked by linearity; direct and explicable causal connections; and some sense of both 'plot' and closure. The hearings woven through this thesis trace how decision-makers articulated such demands and explore the extent to which the demand for narrative represents the State's requirement that refugees to narrate themselves as particular kinds of subjects, whose complex histories and experiences of fear or harm resolve in the decision to seek refugee status.

## INTRODUCTION

This thesis is about the oral testimony of refugee applicants seeking protection in Australia and Canada. In particular, it examines the presentation and assessment of refugee applicant testimony within onshore refugee status determination (RSD) processes, enacted in fulfillment of obligations under the 1951 Convention Relating to the Status of Refugees.<sup>1</sup> The central question of this thesis is, what role do narrative and the narrative form play in the presentation and assessment of refugee applicants' testimony? In response to this question, my contention is that in order to access protection within onshore RSD processes in Australia and Canada, refugee applicants must be able to present and explain their evidence in a compelling narrative form. The sites of refugee oral testimony at the centre of my thesis are the closed hearing rooms of the Australian Refugee Review Tribunal (RRT) and the Canadian Immigration and Refugee Board (IRB).<sup>2</sup> My research engages in a detailed, qualitative and narrative-based analysis of 14 refugee applicants' oral hearings, which took place before the RRT or IRB between 2012 and 2014.

For the limited population of refugees who have been able to flee their countries of origin and make an application for asylum in a country where protection under the Refugee Convention is available, RSD processes are critical sites of inclusion or exclusion. Within such applications for refugee status, the applicant's first-person testimony plays a crucial role, as there are often few or no other forms of evidence—such as documents or witnesses—to support the claim being made. Determining applications for refugee status is 'one of the most complex adjudication functions in

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<sup>1</sup> *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) ('Refugee Convention'); as amended by the *Protocol Relating to the Status of Refugees 1967*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) ('1967 Protocol Relating to the Status of Refugees'). For the definition as adopted in Canada and Australia respectively: *Immigration and Refugee Protection Act*, SC 2001, c 27, s 96; *Migration Act 1958* (Cth) ss 5H, 36.

<sup>2</sup> Refugee law and policy are rarely static in either Australia or Canada. As this thesis neared completion in 2015, the Refugee Review Tribunal (along with a series of other Australian tribunals) was amalgamated with the Administrative Appeals Tribunal (AAT), into a 'super tribunal' that deals with all Commonwealth matters of administrative review. Since the hearings I draw on in this research took place before the RRT, I continue to refer to it as such throughout. However, it now exists as the Migration and Refugee Division of the AAT: *Tribunals Amalgamation Act 2015* (Cth). In Canada, hearings before the IRB take place in its Refugee Protection Division (RPD).

industrialized societies.’<sup>3</sup> The complexity of RSD is due to the unique elements of the decision-making process, which not only involves the applicant’s bare first-person testimony as a central source of evidence, but frequently includes the translation of evidence across at least two languages; communication across a significant cultural divide; the requirement that the decision-maker have sufficient knowledge of the cultural, social and political environment of the applicant’s country of origin; and the need for both the applicant and decision-maker to have the ‘capacity to bear the psychological weight’ of potentially distressing evidence of an applicant’s experiences of persecution.<sup>4</sup> In a legal register, the difficulty of the process is often described in relation to the challenge of decision-making, but these difficulties fall just as heavily—if not more so—on the applicant who is seeking protection. In assessing the RSD oral hearing, Audrey Macklin invites us to consider the ‘myriad possibilities for distortion of the communication between asylum seeker and decision maker’ and observes that, ‘[p]rofound differences of culture, class, personal history and political context manifest through unarticulated assumptions and [mis]readings of the Other (which leads to misunderstanding on both sides).’<sup>5</sup>

What drew me to examine the RSD oral hearing and the particular questions that this thesis addresses, questions about refugee status determination and testimony, is the unavoidable fact that in order for refugee applicants to access refugee protection, they must speak. And not only must they speak, they must articulate their claims to protection repeatedly and at length. Most significantly, their ability to speak in an adjudicative setting is necessarily connected to the success or failure of their claim to protection. As Matthew Zagor has put it, ‘the refugee has long been in a situation where protection depends upon the telling of one’s story. Whether she wants to or not, a refugee must speak; and she must speak in a legal context and, preferably, a legal idiom ... speech is a precondition of recognition, protection, and, crucially, legal

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<sup>3</sup> Cécile Rousseau et al, ‘The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board’ (2002) 15 *Journal of Refugee Studies* 43, 43.

<sup>4</sup> Ibid 44.

<sup>5</sup> Audrey Macklin, ‘Asylum and the Rule of Law in Canada: Hearing the Other (Side)’ in Susan Kneebone (ed), *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (Cambridge University Press, 2009) 78, 85.

status.’<sup>6</sup> While the requirement that refugee applicants present testimony in support of their claim is accepted as a necessary fact, this thesis is motivated by concern about the profound burden of speech that this requirement constitutes. As Robert Barsky has argued, refugee applicants must not only *be* refugees, but they must be able to *present* and *construct* themselves as refugees.<sup>7</sup>

In addressing the processes by which refugee applicants’ testimony is presented and tested during the oral hearing for refugee status, my thesis takes as its particular focus the *form* of evidence presented by refugee applicants, and the role of refugee applicants as narrators of their own claims to protection. My thesis question, then, is what role does the narrative form play in governing both the presentation and the assessment of refugee applicants’ testimony *during* the oral hearing. And, following on from this question, if we attend to the form of evidence required of refugee applicants during the oral hearing—and the place of narrative—what does this tell us about the social and cultural standards that govern which refugee applicants are considered ‘credible’ or genuine; how they are expected to speak; and the stories that they must present in order to be afforded protection?

In response to these questions, my thesis builds two central arguments. First, I argue that the legal requirement within RSD processes for evidence that is credible is, in part, a demand for refugee testimony that meets the minimum requirements of the narrative form and, that there is a pressing need to both consider and critique the extent to which the narrative competency of refugee applicants influences judgments regarding their need for protection. The burden of crafting evidence into a narrative form prior to the hearing, in the written application that initiates a claim in both Australia and Canada, is already a heavy one. Having to articulate, explain and account for the narrative qualities of such evidence *in person* during an unstructured oral hearing is considerably more difficult. The RSD process not only demands narrative of those seeking refugee protection when they are formulating their evidence: the demand for narrative pervades the oral hearing. My thesis seeks to

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<sup>6</sup> Matthew Zagor, ‘Recognition and Narrative Identities: Is Refugee Law Redeemable?’ in Fiona Jenkins, Mark Nolan and Kim Rubenstein (eds), *Allegiance and Identity in a Globalised World* (Cambridge University Press, 2014) 311, 323.

<sup>7</sup> Robert F Barsky, *Constructing a Productive Other: Discourse Theory and the Convention Refugee Hearing* (John Benjamins Publishing, 1994).

demonstrate that refugee applicants must be able to justify their claims during the oral hearing in the face of decision-makers' subjective, unpredictable and often idiosyncratic questioning and counter-narratives. Indeed, the applicant must relate complex evidence of a life left behind, of persecution and eventual flight, and must do so in the form of a story that presents events plotted in time, with explicable and linear causative links and most of all, that resolves in the decision to seek refugee status.

Each of the five chapters that form the body of this thesis (mapped out in detail below) constitute one part of the argument that a demand for the narrative form is at the centre of the assessment of refugee testimony, and that this demand places an extreme and often unreachable burden on refugee applicants seeking protection. The four arguments that flow from this claim are that, first, the applicant must present the story of refugee flight in an exemplary narrative form; second, the applicant must not only present evidence in a narrative form, but also explain causal connections within the evidence and contend with the decision-maker's own narrative-based understandings of the world; third, the setting and structure of the oral hearing as a 'narrative occasion' both demands that applicants present narratives and also actively impedes their ability to do so; and finally, this demand for narrative is best explained as demand for evidence in the form of particular literary genres. It is a demand that places normative expectations on the applicant's narrative voice and interiority and that requires a form of narratorial omniscience of refugee applicants.

These core contentions of my thesis form part of a second but related methodological argument, which is that the processes that are used to test and ultimately to assess refugee testimony within Australian and Canadian RSD may be better understood by adopting the methods of analysis found within the field of narrative theory. One of the aims of this thesis is to bring critical insights from the field of scholarship broadly labelled 'law and literature' to bear on how refugee testimony is both presented and assessed within RSD processes. I ask how placing narrative at the centre of an investigation into RSD might reveal dynamics of interaction and processes of judgment that have not been identified in the scholarship to date on the problem of credibility assessment of refugee applicants. The central place of refugee applicants' oral testimony in the RSD process, and its distinctly narrative form make such

testimony an ideal site from which to explore the law's relationship with narrative, and to consider the possibilities of a turn to literature and the narrative form.<sup>8</sup> The final move that this thesis makes is an intrinsically normative one that I hope appears as a consequence of the arguments made throughout the chapters that follow: namely, that the demand for narrative, and the burden this places on refugee applicants' speech, impedes rather than enables refugee applicants to articulate their claims and to access protection.

## Theory, Method and Data

As noted, this thesis conducts a detailed, qualitative analysis of 14 refugee applicants' oral hearings, which took place before the IRB in Canada and the RRT in Australia between 2012 and 2014.<sup>9</sup> Refugee applicants are required to appear before the IRB and RRT in person and present oral testimony. In both settings, a single decision-maker directly questions the applicant in circumstances where the formal rules of evidence do not apply.<sup>10</sup> In Canada, the IRB is responsible for the first-instance determination of the claim. In Australia, the RRT conducts *de novo* administrative review of an initial negative decision, which has been made by a delegate of the Australian Immigration Minister.<sup>11</sup> Although the Canadian and Australian hearings

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<sup>8</sup> Within a refugee law context, this thesis is concerned with onshore processes of RSD, and in particular the reception, testing and assessment of refugee applicants' testimonial evidence. In a law and literature context, this thesis attends to the relationship between the narrative form and the law's processes of interpretation and judgment. I address 'law and literature' as the theoretical basis for this work in detail in Chapter Two; though see especially James Boyd White, *The Legal Imagination* (University of Chicago Press, 2nd ed, 1985); Robert M Cover, 'Foreword: Nomos and Narrative' (1983) 97 *Harvard Law Review* 4; Peter Brooks and Paul D Gerwitz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (Yale University Press, 1996); Guyora Binder and Robert Weisberg, *Literary Criticisms of Law* (Princeton University Press, 2000).

<sup>9</sup> University of British Columbia Behavioural Research Ethics Board, *Approval Certificate No H12-01565*; University of Technology Sydney Human Research Ethics Committee, *Ethics Reference No 2011-4864*. The details of each hearing in the dataset, including the nature, jurisdiction, outcome and year of the hearing, are outlined in the Appendix to this thesis. I note here that all hearings and excerpts have been anonymised and de-identified and that names of all applicants and witnesses have been changed to preserve confidentiality.

<sup>10</sup> *Migration Act 1958* (Cth) ss 420(a)–(b) set out that the RRT is not bound by 'technicalities, legal forms or rules of evidence;' and that it 'must act according to substantial justice and the merits of the case.' The *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 162(2), 170(g) set out that the RPD 'shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit' and that the RPD of the IRB is 'not bound by any legal or technical rules of evidence.'

<sup>11</sup> Note, refugee applicants arriving by boat and without authorisation in Australia have at various times been prohibited from accessing administrative review before the RRT, and have been subject to non-statutory processing regimes, separate from the RSD process available to non-maritime or 'regular'

take place at different stages of the RSD process, in both cases, applicants must be prepared to present and explain their claims orally.<sup>12</sup>

The demand that applicants speak, and construct testimony is central to the RSD process. Jenni Millbank has identified refugee determination ‘the most intensely narrative mode of legal adjudication.’<sup>13</sup> In each jurisdiction, the applicant must initiate the claim with a written application outlining her or his evidence. The written application represents the ‘original’ narrative for the purposes of claiming protection, and in each jurisdiction, the hearing requires the applicant to present the claim again in a setting where decision-makers can test the evidence and the applicant’s credibility, in order to determine the claim. As such, the presentation of oral evidence that my thesis examines is at least the second or third time (in Canada and Australia respectively) that the applicant has been required to construct her or his testimony. As well, each presentation of evidence is compared with and tested against existing versions of the applicant’s evidence, and so the testimony I examine here constitutes one part of the testimony against which the claim is judged.

In analysing this testimony, I focus on the particular jurisdictions of Australia and Canada for a number of reasons. The primary reason is that in Australia and Canada, the oral hearing, and thus the refugee applicant’s direct presentation of oral testimony, is a critical aspect of an application for refugee protection. The additional reasons for my chosen focus are Australia and Canada’s shared status as Commonwealth and common law countries; the common features of each jurisdiction’s legal framework

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arrivals. At the time of writing, so-called ‘unauthorised maritime arrivals’ were not able to seek review of primary decisions before the RRT. This is addressed in Chapter Three, but see in particular Michelle Foster and Jason Pobjoy, ‘A Failed Case of Legal Exceptionalism? Refugee Status Determination in Australia’s “Excised” Territory’ (2011) 23 *International Journal of Refugee Law* 583.

<sup>12</sup> *Migration Act 1958* (Cth) s 425; *Immigration and Refugee Protection Act*, SC 2001, c 27, s 170(b). While advocates may be present in both jurisdictions, the applicant must present her or his evidence directly in response to the decision-maker’s questioning. In Canada, an applicant ‘may, at their own expense, be represented by legal or other counsel,’ though legal aid is available in Ontario, Québec and British Columbia and advocates are permitted to question their clients and make submissions: *Immigration and Refugee Protection Act*, SC 2001, c 27, s 167(1). In Australia, ‘a person appearing before the Tribunal to give evidence is not entitled to be represented before the Tribunal by any other person’ and advocates are generally not permitted to question the applicant at all, though in practice they are permitted to may make submissions at the close of the hearing: *Migration Act 1958* (Cth) s 427(6)(a).

<sup>13</sup> Jenni Millbank, “‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations’ (2009) 21 *International Journal of Refugee Law* 1, 2.



for refugee processing; both countries' status as having ratified and domestically enacted the key obligations under the Refugee Convention; and the fact that each has a semi-independent, administrative decision-making body for the purposes of determining refugee claims. I elected to examine testimony before the IRB and RRT in particular as in both countries, the RRT or IRB constitute the last stage of decision-making where the applicant presents her or his claim in an oral hearing before a decision-maker empowered to make findings of both law and fact.<sup>14</sup>

Through close study of Australia and Canada, I explore the broader question of refugee testimony in Global North refugee-receiving states. My aim in offering these observations is to raise questions that can be constructively asked in other jurisdictions where the presentation and assessment of oral testimony constitutes a central event within the RSD process. While my data spans two jurisdictions, my thesis does not adopt a comparative methodology. The primary aim of the thesis is not to compare the legal frameworks, approaches or culture of RSD in each jurisdiction, but rather to explore my research questions across comparable refugee-receiving jurisdictions. Nonetheless, throughout the thesis I trace relevant points of commonality and divergence between the two jurisdictions. While the thesis treats each hearing as an independent event and qualitative source of data, I take care to point out patterns of difference, especially in Chapter Six, which describes the procedures by which hearings were conducted in each jurisdiction.

The methods of this research include my in-person attendance at the participating refugee applicants' oral hearings, or access to the full audio recordings of participants' hearings, in lieu of attending the hearing. The hearings took place across four cities in Australia and Canada,<sup>15</sup> and for each hearing included in the study, I also had access to the written decision and reasons. This research has generated a dataset

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<sup>14</sup> Unsuccessful applicants before the RRT may seek judicial review only. As of December 2012, applicants who do not succeed before the RPD of the IRB may seek merits review before the Refugee Appeal Division (RAD), but an appeal to the RAD must generally proceed without a hearing. Certain exceptions exist, including if the Minister participates in the hearing and wishes to present evidence; if evidence is presented that arises after the original hearing or that was not available; and if in the Board's opinion the documentary evidence raises a 'serious' and 'central' question with respect to credibility, which would justify the Board allowing or rejecting the claim: *Immigration and Refugee Protection Act*, SC 2001, c 27, s 110(3).

<sup>15</sup> Sydney and Melbourne (Australia); and Montréal and Vancouver (Canada).

that presents a comprehensive picture of the presentation and reception of oral evidence in 14 RSD hearings. Because the transcripts of administrative, oral hearings are not publicly available in either jurisdiction, and the hearings themselves are closed, I accessed this data through the direct participation and consent of the refugee applicants whose hearings are analysed here. Each participant was recruited for this research through research partnerships either with UNHCR, non-governmental refugee advocacy organisations, or with individual refugee lawyers and advocates whose clients were required to appear before the IRB or RRT.

My dataset has permitted me to undertake a qualitative analysis of each hearing and to identify patterns and themes across the hearings. Importantly, the dataset is not so large as to prevent constructive analysis of the data within the confines of a doctoral project. However, I wish to acknowledge from the outset that the empirical aspect of this doctoral research is based on a small pool of decisions, which I engage with as qualitative rather than quantitative sources of information regarding the oral hearing in each jurisdiction. As such, my findings may not be representative. I have taken care to express my arguments as applying to the observed hearings, and the conclusions I draw are suggestive rather than categorical.

My focus on the RRT and the IRB as administrative adjudicative spaces locates the project within a body of important, relatively recent work exploring the written decisions of lower-level refugee decision-makers, with a particular focus on credibility determinations.<sup>16</sup> I place my research in the context of this work in detail below. My exploration of these hearings is a significant contribution to the small field of scholarship that has addressed the presentation and assessment of refugee testimony *during the oral hearing* within Australian, Canadian and international RSD, as well as to scholarship concerned with the assessment of refugee applicants' credibility more generally. Given the limited amount of work that has accessed or

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<sup>16</sup> This scholarship is discussed in detail below, in the section entitled 'Locating the Thesis: RSD, Testimony and Credibility Assessment.'

assessed the oral hearing, the hearings provide a valuable source of data and insight.<sup>17</sup>

### **The Refugee Convention and the Political Context of Seeking Asylum in Australia and Canada**

Processes of RSD in Refugee Convention signatory countries are critical to affording onshore refugees access to protection and to maintaining international legal standards that have created a regime of refugee rights and protections. It is, however, only an exceptionally small percentage of the global refugee population who are able leave their country of origin and make an application under the Refugee Convention in a refugee-receiving state.<sup>18</sup> It is an even smaller segment of people crossing borders and in need of state protection whose experiences of harm bring them within the narrow, individualised and historically specific definition of a refugee, as established by the Refugee Convention and its domestic enactments. There are many refugees, and other people facing persecution, discrimination or economic hardship, who are left out of the legal frameworks addressed by this thesis. In this section, I frame my study on the oral hearing with a critical take on who is left out of existing refugee protection mechanisms. I also briefly place Australian and Canadian RSD processes in their contemporary political context, which is marked by policies that seek to exclude and limit the arrival of onshore refugees. I return to the political context of RSD in Chapter Three, to connect the politics I discuss here with conceptions of the oral hearing as a space that is imagined to ‘keep out’ false claimants and identify ‘genuine’ refugees.

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<sup>17</sup> I provide an overview of this work in Chapter 3, which addresses my research methods and my focus on the oral hearing.

<sup>18</sup> UNHCR’s report on global trends, somewhat imprecisely called ‘World at War,’ reports that in 2014, 59.5 million people were forcibly displaced worldwide, and of that group, 13.9 million people were *newly* displaced in 2014. Those recognised as refugees, in that they were outside the country of origin, numbered 19.5 million people, and 1.8 million people were seeking asylum. Of the 1.47 million new asylum claims filed at first instance in 2014, 245,700 were registered with the UNHCR, and the remaining applications for refugee protection were made in other ‘refugee-receiving’ states: UNHCR, ‘Global Trends: Forced Displacement in 2014’ (2015) 2–3 <<http://www.unhcr.org/556725e69.html>>. In Australia, 11,740 new asylum claims were submitted in 2013; and 8,960 in 2014. In Canada, 10,380 asylum claims were submitted in 2013; and 13,450 in 2014: UNHCR, ‘Asylum Trends 2014: Levels and Trends in Industrialized Countries’ 19 <<http://www.unhcr.org/551128679.html>>. While these numbers are depersonalising, undifferentiated, and in many ways incomprehensible, they reveal the significant but small minority of those with new protection needs who travelled to and lodged protection applications in refugee-receiving states.

In order to access protection under the Refugee Convention, refugee applicants must be outside their country of origin; hold a well-founded fear of persecution on the basis of her or his race, religion, nationality, membership of a particular social group or political opinion; and be unable or, owing to such fear, unwilling to avail herself or himself of the protection of that country.<sup>19</sup> Where a person is shown to meet these criteria, the receiving state has a duty not to *refoule* that person to the place or places where that person would face persecution.<sup>20</sup> The negative right not to be returned, of *non-foulement*, is the key protection for those seeking asylum under Australia and Canada's domestic enactment of the Refugee Convention.

The Refugee Convention was a post-World War II initiative.<sup>21</sup> It sought to ensure that those who were outside of their country of origin, with a well-founded fear of individualised persecution in their home state, would be able to seek protection. Indeed, the terms of the original Convention only applied to persecution arising from events occurring in Europe prior to 1951, although these geographic and temporal limitations were removed by an optional protocol, to which both Australia and Canada have acceded.<sup>22</sup> The Convention is state-centric.<sup>23</sup> It outlines the obligations

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<sup>19</sup> *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) art 1A(2). The Refugee Convention as modified by the 1967 Protocol defines a refugee as a person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

For those without a nationality, the definition sets out that they must be outside their country of former habitual residence.

<sup>20</sup> Ibid art 33. See also the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 3; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 99 UNTS 171 (entered into force 23 March 1976), arts 6, 7. I note here that this research does not address the assessment of claims to complementary protection, which is available in both jurisdictions. Claims to complementary protection were not addressed separately to applicants' claims to refugee status in any of the hearings included in the dataset.

<sup>21</sup> For details of the history of the Refugee Convention, as well as its immediate precursors: see BS Chimni, *International Refugee Law: A Reader* (SAGE Publications, 2000) (especially Part One); Laura Barnett, 'Global Governance and the Evolution of the International Refugee Regime' (2002) 14 *International Journal of Refugee Law* 238; Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) 16–23, 35–7.

<sup>22</sup> *Protocol Relating to the Status of Refugees 1967*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

<sup>23</sup> As Robyn Lui puts it, the international refugee regime has 'as its "core business" the preservation of the value of the nation-state form and the institution of national citizenship', which constitute the subject of the refugee via 'a set of interventions that produces norms and principles that affirms the

of signatory states vis-à-vis the ‘problem’ of onshore refugees, ahead of providing structural or systemic solutions or durable resettlement rights for global refugee populations or asylum seekers on the move.<sup>24</sup> As James Hathaway explains, the development of contemporary refugee law was motivated by the need for refugee-receiving states to respond to and manage the ‘problem’ of flows of refugees post-World War II and during the Cold War period—rather than by a need to provide solutions for the people fleeing risk or harm.<sup>25</sup> Indeed, due to the historical and contextual specificity of who may qualify for protection under the Refugee Convention (as well as due to contemporary State attitudes to ‘irregular’ or undocumented migrants), refugee law serves ‘fewer and fewer people, less and less well.’<sup>26</sup> Patricia Tuitt in particular critiques the Refugee Convention’s ‘controlling notion of the refugee as one who is displaced in the primary physical sense’<sup>27</sup> and argues that ‘to determine the meaning of refugeehood according to spatial concepts,’ as we presently do, ‘is to render refugees unique occupiers and controllers of space which accords ill with the reality of the everyday existence of the majority,’ and

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state-citizen order.’ Robyn Lui, ‘Governing Refugees 1919-1945’ (2002) 1 *Borderlands* [5]–[6] <[http://www.borderlands.net.au/vol1no1\\_2002/lui\\_governing.html](http://www.borderlands.net.au/vol1no1_2002/lui_governing.html)>.

<sup>24</sup> See Thomas Alexander Aleinikoff, ‘State-Centered Refugee Law: From Resettlement to Containment’ (1992) 14 *Michigan Journal of International Law* 120.

<sup>25</sup> James C Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, 2005) xxv. See also Catherine Dauvergne’s account of refugee law and policy as it operates in Australia and Canada. Dauvergne notes that the Refugee Convention was drafted to ensure that Western traditions of granting asylum to those fleeing the Eastern bloc prevailed and that the two telling ideological limitations of the Convention are the individualised nature of protection and the requirement of persecution as the key factor for gaining protection: Catherine Dauvergne, *Humanitarianism, Identity, and Nation: Migration Laws of Australia and Canada* (UBC Press, 2005) 84–85. Contemporary literature arguing for an expansion of refugees’ rights in line with international human rights law, or at the very minimum, for states to comply with their Refugee Convention obligations is critical of language used to describe ‘undocumented’ migrants and onshore refugees. In particular, this work has critiqued state-centric rhetoric that casts onshore arrivals using metaphors such as floods and waves in order to justify the need to control and defend state boundaries. As Coddington et al note, in using terms like floods or waves ‘[s]tates employ narratives that dehumanise refugees before they arrive, depicting individual stories of displacement, movement, and resilience in disembodied terms’ which frequently ‘rely on metaphors of uncontrollable natural forces, justifying securitised discourses of border regulation that protect the home front from fearsome threats’: Kate Coddington et al, ‘Embodied Possibilities, Sovereign Geographies and Island Detention: Negotiating the “Right to Have Rights” on Guam, Lampedusa and Christmas Island’ (2002) 6 *Shima: The International Journal of Research into Island Cultures* 27, 29.

<sup>26</sup> Hathaway, above n 25, xxv.

<sup>27</sup> Patricia Tuitt, ‘Rethinking the Refugee Concept’ in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press, 1999) 106, 106; and see also Patricia Tuitt, *False Images: Law’s Construction of the Refugee* (Pluto Press, 1996).

especially with women and children requiring protection.<sup>28</sup> As well, the contemporary conception of the refugee *in flight* and as the subject of the host state's benevolence fails to acknowledge—or, as Barsky argues, actively obscures—the structural inequalities caused by the history of imperialism and the 'international system of national boundaries and class divisions,' that create the need for protection in the first place.<sup>29</sup>

Beyond the Refugee Convention's definitional constraints on who may access protection, the contemporary political context of onshore refugee programs in Global North countries, including in Australia and Canada, has rendered RSD processes even more inaccessible and out of reach for many in need of protection. In particular, globalised attempts to prevent the arrival of onshore refugee claimants and so-called undocumented migrants, in which Australia and Canada directly participate, aim to limit the population of asylum seekers who are able to seek protection or indeed access an oral hearing to determine their status under the Refugee Convention definition.<sup>30</sup> This political context has included the securitisation and criminalisation of 'unlawful' migration (including migration by those seeking asylum); increasingly extreme actions taken by wealthy, Global North states to physically deter or prevent the arrival of onshore asylum seekers; the limiting or truncating of asylum seekers' access to existing onshore RSD mechanisms; and nation-states stripping back existing onshore refugee programs or resiling from previous commitments to obligations set out under the Refugee Convention.<sup>31</sup> As such, my analysis of the oral hearings takes place as access to any kind of hearing for onshore refugees is being either curtailed or

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<sup>28</sup> Tuitt, 'Rethinking the Refugee Concept', above n 27, 115–6.

<sup>29</sup> Robert F Barsky, *Arguing and Justifying: Assessing the Convention Refugees' Choice of Moment, Motive and Host Country* (Ashgate, 2000) 78. Indeed, in his critique of terms on which refugee applicants must justify their claims, Barsky aims to question 'glib assumptions about our First World generosity towards refugees': at 19.

<sup>30</sup> However, even as 'Global North' states expand and intensify attempts to prevent and deter the arrival of 'irregular migrants,' the number of people seeking asylum continues to grow each year: see UNHCR, 'Asylum Trends 2014: Levels and Trends in Industrialized Countries', above n 18.

<sup>31</sup> See especially Alice Edwards, 'Human Rights, Refugees, and The Right "To Enjoy" Asylum' (2005) 17 *International Journal of Refugee Law* 293; Audrey Macklin, 'Disappearing Refugees: Reflections on the Canada-US Safe Third Country Agreement' (2005) 36 *Columbia Human Rights Law Review* 365; Jennifer Hyndman and Alison Mountz, 'Another Brick in the Wall? Neo-Refolement and the Externalization of Asylum by Australia and Europe' (2008) 43 *Government and Opposition* 249; Alison Mountz, *Seeking Asylum: Human Smuggling and Bureaucracy at the Border* (University of Minnesota Press, 2010).

denied.<sup>32</sup> This means that the refugee status decision-making I examine in this research takes place in the shadow of the politics of the securitisation of migration, border control, and of the 'tightening' of RSD mechanisms, whereby Catherine Dauvergne has argued that the onshore refugee applicant is understood as a subject of exclusion, seeking to exploit refugee law's (albeit limited) exception to state sovereignty.<sup>33</sup>

A vast literature within the broader field of refugee law has addressed the challenges facing the international regime of refugee protection, critiqued the protectionist stance taken by Global North states vis-à-vis undocumented migrants, and exposed the Global North's denial of responsibility for the persecution from which asylum seekers flee.<sup>34</sup> Canada and Australia are by no means immune to these critiques. Nevertheless, this thesis seeks to highlight the ongoing importance of RSD processes and credibility assessment for refugee applicants who do manage to access onshore RSD systems,

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<sup>32</sup> Such means have included the tightening of border controls, the expansion of the infrastructure of border protection, and implementation of immigration controls beyond the borders of the territorial state, amongst others. As well, Australia aggressively interdicts boats on the high seas in order to deflect potential refugees before they reach territorial waters: see Macklin, 'Disappearing Refugees', above n 31, 368; and see generally Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press, 2011). Governments have also sought to deter onshore refugee applicants through the redefinition of sovereign territory as being 'outside' of the nation-state, or by requiring refugee applicants to be returned to 'safe third countries,' which I discuss in detail in Chapter Four. Exclusion via the procedural reform of determination processes should be understood as another dimension of these deterrence policies: applicants who *do* reach Refugee Convention signatory countries face acute challenges in preparing and presenting a claim as RSD processes are increasingly fast-tracked, applicants are given limited or no access to free legal assistance, and status determinations are subject to limited review mechanisms: Mary Anne Kenny and Nicholas Procter, 'The Fast Track Refugee Assessment Process and the Mental Health of Vulnerable Asylum Seekers' [2015] *Psychiatry, Psychology and Law* (advance access DOI 10.1080/13218719.2015.1032951); Thomas Spijkerboer, 'Stereotyping and Acceleration: Gender, Procedural Acceleration and Marginalised Judicial Review in the Dutch Asylum System' in Gregor Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martin Nijhoff Publishers, 2005); Millbank, "'The Ring of Truth'", above n 13.

<sup>33</sup> Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press, 2008). It is hard to resist Macklin's pithy summary of contemporary RSD and onshore refugee policy more generally, when she argues that states manage the contradiction of having voluntarily signed the Refugee Convention against their disdain for onshore asylum applicants by 'doing everything possible' to repel the spontaneous arrival of those migrants who may seek asylum. Macklin notes that the designation of 'illegal' migrants as outlaws 'exceeds the particular violation of migration' to assume a totalizing existential character, such that they are simply known as 'illegals': Macklin, 'Disappearing Refugees', above n 31, 367.

<sup>34</sup> See especially Prem Kumar Rajaram and Carl Grundy-Warr, *Borderscapes: Hidden Geographies and Politics at Territory's Edge* (University of Minnesota Press, 2007); Leanne Weber and Sharon Pickering, *Globalization and Borders: Death at the Global Frontier* (Palgrave Macmillan, 2014); Susan Kneebone, Dallal Stevens and Loretta Baldassar, *Refugee Protection and the Role of Law: Conflicting Identities* (Routledge, 2014).

however diminished and limited the systems are or will become. Indeed, a critical contention in favour of the importance of this particular project is that the frenetic political context of international refugee policy cannot fully account for or determine the course of decision-making within the institutional spaces of RSD.<sup>35</sup> Here, the literature on credibility comes into play; it attends to individual decision-makers' assessments of refugee applicants' evidence and testimony. This literature is one of the key conversations with which my thesis seeks to engage. It has also formed and guided the questions that my thesis investigates.

### **Locating the Thesis: RSD, Testimony and Credibility Assessment**

Conversations about credibility assessment within refugee decision-making have taken place across refugee-receiving states for over 25 years. These conversations have centred on the challenges posed by credibility assessment and have formed the basis of what is now a sustained, multi-jurisdictional critique of existing standards and practice. The *Beyond Proof: Credibility Assessment in EU Asylum Systems*—an immense, multi-agency report aimed at improving credibility assessment within the European Union—attests to ongoing and arguably urgent concerns about the quality and basis of credibility assessment.<sup>36</sup> The literature addressing credibility assessment has been undertaken mainly, though not exclusively, by legal scholars.<sup>37</sup> Indeed, as

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<sup>35</sup> Matthew Zagor makes a similar point when he writes that, 'Refugee law' writ large may have an alienating gate-keeper function that operates to protect sovereignty and define 'otherness', but practitioners and the individual asylum-seeker must live within and attempt innovatively to employ the law as codified and interpreted through various legislative, administrative and judicial processes.

Zagor, above n 6, 316.

<sup>36</sup> UNHCR, 'Beyond Proof: Credibility Assessment in EU Asylum Systems: Full Report' (May 2013) ('Beyond Proof'). The written report, produced by UNHCR, is based upon the empirical research and work of the CREDO Project, which was undertaken by the Hungarian Helsinki Committee, in partnership with the UNHCR Regional Bureau for Europe; the International Association of Refugee Law Judges; and the UK refugee advocacy organisation, Asylum Aid (and financially supported by the Refugee Fund of European Commission). The report is roughly 300 pages long and based on research carried out in Belgium, the Netherlands and the United Kingdom between October 2011 and August 2012. As the report notes, 'A distinctive feature of this research was its focus on the implementation of the credibility assessment in practice by first-instance decision-makers': at 9.

<sup>37</sup> See especially Walter Kälin, 'Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing' (1986) 20 *International Migration Review* 230; Audrey Macklin, 'Truth and Consequences: Credibility Determination in the Refugee Context' in International Association of Refugee Law Judges (ed), *The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary* (International Association of Refugee Law Judges, 1998) 134; Susan Kneebone, 'The Refugee Review Tribunal and the Assessment of Credibility: An Inquisitorial Role' (1998) 5 *Australian Journal of Administrative Law* 78; Juliet Cohen, 'Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers' (2001) 13



the importance of credibility assessment within RSD has become apparent, research on the challenges of assessing refugee testimony has also been undertaken within the fields of sociology, gender and cultural studies, anthropology, linguistics and discourse analysis, psychology and psychiatry.<sup>38</sup> In this section, I sketch out the key themes of the credibility literature, situate the contribution of this thesis within that body of work, and outline how the existing literature has shaped the questions and framework of this research.<sup>39</sup>

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*International Journal of Refugee Law* 293; Michael Kagan, 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination' (2002) 17 *Georgetown Immigration Law Journal* 367; Rousseau et al, above n 3; Guy Coffey, 'The Credibility of Credibility Evidence at the Refugee Review Tribunal' (2003) 15 *International Journal of Refugee Law* 377; Gregor Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martin Nijhoff Publishers, 2005); Robert Thomas, 'Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined' (2006) 8 *European Journal of Migration and Law* 79; Millbank, "'The Ring of Truth'", above n 13; Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom' (2009) 13 *The International Journal of Human Rights* 391; James A Sweeney, 'Credibility, Proof and Refugee Law' (2009) 21 *International Journal of Refugee Law* 700; Jaya Ramji-Nogales, Andrew I Schoenholtz and Philip G Schrag (eds), *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (New York University Press, 2009); Robert Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Hart, 2011) (especially chapter 5). It is important to delineate this work from scholarship on 'refugee law' more generally, which is not the subject of this thesis. Such scholarship within the discipline of law primarily examines the content and interpretations of the Refugee Convention, the incorporation of international standards into domestic state law, and its substantive interpretation in both case law and policy. For core texts, see James C Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2014); Hathaway, above n 25; Goodwin-Gill and McAdam, above n 21.

<sup>38</sup> For representative examples of the cross-disciplinary nature of credibility research, see Barsky, *Constructing a Productive Other*, above n 7; Barsky, *Arguing and Justifying*, above n 29; Jan Blommaert, 'Investigating Narrative Inequality: African Asylum Seekers' Stories in Belgium' (2001) 12 *Discourse & Society* 413; Laurence J Kirmayer, 'Failures of Imagination: The Refugee's Narrative in Psychiatry' (2003) 10 *Anthropology & Medicine* 167; Anthony Good, *Anthropology and Expertise in the Asylum Courts* (Routledge-Cavendish, 2007); Jane Herlihy and Stuart W Turner, 'The Psychology of Seeking Protection' (2009) 21 *International Journal of Refugee Law* 171; Sharalyn R Jordan, 'Un/Convention(al) Refugees: Contextualizing the Accounts of Refugees Facing Homophobic or Transphobic Persecution' (2011) 26 *Refuge: Canada's Journal on Refugees* (online); Jill Hunter et al, 'Asylum Adjudication, Mental Health and Credibility Evaluation' (2013) 41 *Federal Law Review* 471; Hanna Wikström and Thomas Johansson, 'Credibility Assessments as "Normative Leakage": Asylum Applications, Gender and Class' (2013) 1 *Social Inclusion* 92; Rachel A Lewis and Nancy A Naples, 'Introduction: Queer Migration, Asylum, and Displacement' (2014) 17 *Sexualities* 911; David AB Murray, 'The (not So) Straight Story: Queering Migration Narratives of Sexual Orientation and Gendered Identity Refugee Claimants' (2014) 17 *Sexualities* 451; and for a hard-to-categorise but fascinating semi-fictional look into some of the challenges of RSD and credibility, see Peter Showler, *Refugee Sandwich: Stories of Exile and Asylum* (McGill-Queen's Press, 2006).

<sup>39</sup> There is a small amount of research addressing the nature of RSD as it is conducted by UNHCR under its mandate. This literature does not focus on credibility assessment within UNHCR status determination procedures as such (which occurs in over 70 countries) but certainly points to the need for further scrutiny of and inquiry into UNHCR's own RSD processes: see Michael Kagan, 'The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination'

### *Core themes and findings within the credibility literature*

In determining a refugee applicant's credibility, decision-makers must generally decide whether the applicant's account of her or his evidence is coherent, plausible and consistent.<sup>40</sup> These criteria are drawn from the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees, which sets out that an applicant's statements 'must be coherent and plausible, and must not run counter to generally known facts.'<sup>41</sup> Although the Handbook is a UNHCR document, first produced in 1979 in response to requests from Convention signatory countries for guidance on RSD procedures, Convention signatories have generally adopted a version of the criteria of consistency, coherence and plausibility as determinants of credibility.<sup>42</sup> This is true at least in Australia and Canada, where the criteria of consistency, plausibility and coherence have been adopted as the means of determining credibility, primarily within credibility guidelines and case law.<sup>43</sup> A precise formulation of what amounts to credibility, though, is elusive.

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(2006) 18 *International Journal of Refugee Law* 1; M Alexander, 'Refugee Status Determination Conducted by UNHCR' (1999) 11 *International Journal of Refugee Law* 251.

<sup>40</sup> UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees' (HCR/IP/4/Eng/REV1, 3rd ed, 2011) [204] <<http://www.unhcr.org/3d58e13b4.html>> ('the Handbook').

<sup>41</sup> Ibid. In its Note on Burden and Standard of Proof, UNHCR adds that: 'Credibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed.' UNHCR, 'Note on Burden and Standard of Proof in Refugee Claims' (1998) [11]. As well, the Handbook sets out that, '[a]llowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant': UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', above n 40, [197]. Chapter Five addresses in detail other, more recent engagements with and reports on credibility assessment criteria and approaches.

<sup>42</sup> The Handbook was released by the UNHCR as part of its supervisory responsibility under the Refugee Convention (Articles 35 and 36) and the 1950 Statute of the UNHCR (paragraph 8). It represents the 'accumulated views of the UNHCR, State practice, Executive Committee Conclusions, academic literature and judicial decisions' at national and international levels. The Handbook was rereleased in 1992 and 2011. In 1992 and 2011 editions, the content of the Handbook remains unchanged from the original version, in order to 'preserve its integrity.' The 2011 edition, however, contains an updated list of annexes, which includes eight of the UNHCR's *Guidelines on International Protection*, which are intended to 'complement and update the Handbook and should be read in combination with it': UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', above n 40, 1–2.

<sup>43</sup> In addition to these criteria, the controversial criterion of demeanour persists as a credibility standard in Australia and Canada. While it is increasingly regarded as an unreliable and inaccurate indicator of credibility, demeanour remains a factor that decision-makers may rely on with caution. As the *Beyond Proof* report sets out: 'A determination of credibility by reference to demeanour has a subjective basis

The starting point for much of the literature on credibility assessment, as for this thesis, is the persistent observation that the majority of asylum applications are denied or determined on the basis of evidentiary and credibility assessment rather than on issues of law.<sup>44</sup> This fact places credibility determinations at the heart of RSD and of refugee applicants' ability to access protection. I suggest that, read as a whole, there are three themes that define the credibility literature. I outline them here, and articulate how this thesis contributes to work that has grappled with the challenges of credibility assessment and critiqued the existing frameworks for credibility assessment.

The first theme is the remarkably consistent observation across refugee-receiving states that refugee decision-making is marked by a culture of disbelief towards applicants. Literature exploring credibility assessment has repeatedly described the spaces of refugee determination as characterised by 'adversarial posturing',<sup>45</sup> a 'culture of disbelief',<sup>46</sup> or a 'presumptive scepticism'.<sup>47</sup> RSD hearings across

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that will inevitably reflect the views, prejudices, personal life experiences, and cultural norms of the decision-maker': UNHCR, 'Beyond Proof: Credibility Assessment in EU Asylum Systems: Full Report', above n 36, 186. The Australian RRT Guidelines on credibility set out that, '[t]he Tribunal should also be aware of the effect of cultural differences on demeanour and oral communication' and that the RRT should exercise particular care if it relies on demeanour in 'circumstances where a person provides oral evidence through an interpreter or where a person is not before the Tribunal and can only be observed via a video-link.' Administrative Appeals Tribunal Migration and Refugee Division, 'Guidelines on the Assessment of Credibility' (2006, updated 2015) [6.1]. The Canadian Guidance on the Assessment of Credibility in Claims for Refugee Protection directs decision-makers not to rely solely on demeanour because it 'is not an infallible guide as to whether the truth is being told, nor is it determinative of credibility.' However, the document nonetheless goes on to state that:

[i]n assessing demeanour, the decision-maker ought not to form impressions based on the physical appearance or political profile of a witness, *but on objective considerations that flow from the witness's testimony*, such as the witness's frankness and spontaneity, whether the witness is hesitant or reticent in providing information, and the witness's attitude and comportment (behaviour).

Immigration and Refugee Board, 'Assessment of Credibility in Claims for Refugee Protection' (Legal Services, 2004) [2.3.7] (emphasis added); see also Hunter et al, above n 38, 483.

<sup>44</sup> See Noll, above n 37; Kagan, above n 39; UNHCR, 'Beyond Proof: Credibility Assessment in EU Asylum Systems: Full Report', above n 36.

<sup>45</sup> Kneebone, above n 37, 94.

<sup>46</sup> James Souter, 'A Culture of Disbelief or Denial? Critiquing Refugee Status Determination in the United Kingdom' (2011) 1 *Oxford Monitor of Forced Migration* 48, 48. Souter traces the use of this term in relation to RSD in the UK and suggests the idea of a 'culture of disbelief' has become and a 'sound-bite' and argues that alongside a 'culture of disbelief' there is a 'culture of denial' within RSD in the UK, and that the term denial more accurately describes the refusal of decision-makers to recognise refugee status: at 49. See also Sweeney, above n 37, 703; Millbank, "'The Ring of Truth'", above n 13, 16.

<sup>47</sup> Rosemary Byrne, 'Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals' (2007) 19 *International Journal of Refugee Law* 609, 607.

jurisdictions have been critiqued as being adversarial in nature, in spite of most refugee status decision-making bodies being formally defined as inquisitorial, and accordingly, the stipulation that while it is generally the applicant's duty to substantiate the applicant, the adjudicator 'shares the duty to ascertain and evaluate all the relevant facts.'<sup>48</sup> These critiques certainly have been made of Australia and Canada, where like other jurisdictions, the problem of credibility assessment endures despite institutional responses that seek to guide this aspect of RSD processes, not to mention a host of scholarly work arguing for and proposing reforms.<sup>49</sup> The endurance of 'cultures of disbelief' is surely linked to the broader political context discussed above, in which receiving states 'disappear' genuine refugees by fortifying borders and discrediting claimants who do gain access to sovereign territory.<sup>50</sup>

One of the critical consequences of the 'culture of disbelief' and of 'refusal mindsets' within RSD is that the criteria governing credibility determinations have been applied to refugee testimony in a manner that is unduly harsh. As noted, in both Australia and Canada, an applicant's credibility is measured against the standards of consistency, coherence and plausibility.<sup>51</sup> Credibility assessment as a whole, however, has not taken sufficient account of the profound difficulties applicants face in gathering, presenting and explaining evidence for the purposes of their claim;<sup>52</sup> nor has it met

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<sup>48</sup> UNHCR, 'Note on Burden and Standard of Proof in Refugee Claims', above n 41; and for a full discussion of the at times limited manner in which this principle has been incorporated into domestic jurisprudence, see UNHCR, 'Beyond Proof: Credibility Assessment in EU Asylum Systems: Full Report', above n 36, at Chapter Four. In one of the earliest pieces on credibility assessment before the RRT, Susan Kneebone observed that there was very little in the day-to-day practice of the RRT that fulfilled the inquisitorial duties or functions of the Tribunal, such as the right to make independent or joint inquiries; the holding of informal case conferences with the applicant to ascertain the evidence; or replacing the adversarial testing of evidence with a more informal approach: Kneebone, above n 37.

<sup>49</sup> See Immigration and Refugee Board, above n 43; Administrative Appeals Tribunal Migration and Refugee Division, above n 43; and on suggestions for reform, see Rousseau et al, above n 3; Millbank, 'From Discretion to Disbelief', above n 37; Canadian Council for Refugees, 'The Experience of Refugee Claimants at Refugee Hearings at the Immigration and Refugee Board' (2012) <[http://ccrweb.ca/files/irb\\_hearings\\_report\\_final.pdf](http://ccrweb.ca/files/irb_hearings_report_final.pdf)>.

<sup>50</sup> Macklin, 'Disappearing Refugees', above n 31.

<sup>51</sup> UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', above n 40, [204]. The requirement of consistency relates both to the internal consistency of applicant testimony, and 'external' consistency, with available independent 'country information' about conditions within the applicant's country of origin.

<sup>52</sup> Cohen, above n 37, 294. In particular, Juliet Cohen shows the extent to which existing understandings of autobiographical memory challenge the foundational assumption of credibility assessment, that 'memories are detailed, accurate and consistent across successive reports.' In line with much of the research on memory and trauma in asylum seekers, she also shows that refugee applicants

the requirement that credibility determinations be based on evidence interpreted ‘as a whole.’<sup>53</sup>

One of the recurring problems with existing approaches has involved decision-makers’ expectations that credible applicants will be able to present highly coherent and accurate accounts of past events, particularly in relation to difficult or traumatic events;<sup>54</sup> this has included interpreting minor internal discrepancies or inconsistencies across retellings in an applicant’s testimony as evidence of a lack of credibility;<sup>55</sup> and interpreting an applicant’s failure to disclose ‘all’ evidence at the earliest opportunity as evidence of a lack of credibility. Problems raised in these existing approaches to credibility are compounded by failures to make allowances for the difficulties raised by the barriers of language and the processes of linguistic and cultural translation.<sup>56</sup> And, a key theme in the literature is the extent to which the credibility criteria are particularly inappropriate when applied to claims made on the basis of gender related

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are frequently affected by psychological conditions, such as post-traumatic stress disorder, which directly affect recall and the ability to give testimony. See also Herlihy and Turner, ‘The Psychology of Seeking Protection’, above n 38; Jane Herlihy and Stuart Turner, ‘Should Discrepant Accounts given by Asylum Seekers Be Taken as Proof of Deceit?’ (2006) 16 *Torture: Quarterly Journal on Rehabilitation of Torture Victims and Prevention of Torture* 81; Hilary Evans Cameron, ‘Refugee Status Determinations and the Limits of Memory’ (2010) 22 *International Journal of Refugee Law* 469.

<sup>53</sup> UNHCR, ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’, above n 40, [201]. In one of the few studies addressing the conduct of first instance asylum interviews, Nienke Doornbos found that officers frequently tested applicants in regards to peripheral or minor details, which led to communication ‘breakdowns’ and the applicant being unable to articulate her or his claim: Nienke Doornbos, ‘On Being Heard in Asylum Cases: Evidentiary Assessment Through Asylum Interviews’ in Gregor Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martin Nijhoff Publishers, 2005) 103.

<sup>54</sup> This includes associating plausibility with an applicant’s ability to remember exact dates, times, place and events accurately, even where the applicant has presented evidence of trauma or mental illness, as well as failing to account for how the context of RSD and the setting of the oral hearing may affect applicants’ capacity to give evidence, and in particular neglecting to account for questions of trust/distrust of authorities: Evans Cameron, above n 52; Hunter et al, above n 38.

<sup>55</sup> See Kagan, above n 37, 386; Coffey, above n 37, 388–90. Kagan clearly articulates the issue when he writes that ‘emerging research calls for a re-examination of how inconsistencies are considered in credibility assessment’, since:

[t]he underlying assumption that liars contradict themselves may be true, but it is not true that all people who contradict themselves are lying. At the very least, only substantial, pervasive contradictions at the heart of a refugee claim that are not subject to any convincing innocent explanation should be used to justify negative credibility findings.

Kagan, above n 37, 289.

<sup>56</sup> See Kälén, above n 37; Robert F Barsky, ‘The Interpreter as Intercultural Agent in Convention Refugee Hearings’ (1996) 2 *The Translator* 45; Sonja Pöllabauer, ‘Interpreting in Asylum Hearings’ (2004) 6 *Interpreting* 143; Barsky, *Arguing and Justifying*, above n 29 (especially Chapter Three: Interpreting and Transcribing the Other).

harms or sexuality. Gender and sexuality-based claims both amplify the existing critiques of credibility assessment and give rise to new ones, as a consequence of the challenges raised by the shame, secrecy, difficulties of disclosure, prurient and inappropriate questioning and the intensely personal nature of evidence in such claims—as well as the lack of cross-cultural understanding or sensitivity in relation to these claims.<sup>57</sup>

Even in this preliminary assessment of the literature, the relevance of the narrative form starts to become clear. The issues identified above are fundamentally about *how* refugee applicants present testimony, about what form it takes, what it includes, what it leaves out and how well it persuades. As such, this literature guided my approach to the observation of refugee testimony in the hearings. Indeed, the criterion of plausibility arguably points with two hands towards the form of narrative. As well, these existing critiques of credibility assessment motivated the design of this research and its focus on how credibility assessment plays out *during* the hearing. Most significantly, the literature’s careful critique of RSD decision-making led me to query the gap between accounts of hearings authored by decision-makers in written reasons and the reception and testing of oral evidence *outside* of the decision-maker’s retelling. As noted, only a limited number of studies have focused on the hearing itself, rather than on the findings outlined in written decisions.<sup>58</sup> These studies have often been undertaken by refugee-related NGOs and advocacy organisations, working

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<sup>57</sup> See Hana Cheikh Ali, Cristel Querton and Elodie Soulard, ‘Gender-Related Asylum Claims in Europe: A Comparative Analysis of Law, Policies and Practice Focusing on Women in Nine EU Member States (GENSEN)’ (May 2012) <[http://www.asylumaid.org.uk/data/files/Genderrelated\\_asylum\\_claims\\_in\\_Europe.pdf](http://www.asylumaid.org.uk/data/files/Genderrelated_asylum_claims_in_Europe.pdf)>; Helen Baillot, Sharon Cowan and Vanessa E Munro, “‘Hearing the Right Gaps’: Enabling and Responding to Disclosures of Sexual Violence within the UK Asylum Process’ (2012) 21 *Social & Legal Studies* 269; Helen Baillot, Sharon Cowan and Vanessa E Munro, ‘Reason to Disbelieve: Evaluating the Rape Claims of Women Seeking Asylum in the UK’ (2014) 10 *International Journal of Law in Context* 105; Debora Singer, ‘Falling at Each Hurdle: Assessing the Credibility of Women’s Asylum Claims’ in Efrat Arbel, Catherine Dauvergne and Jenni Millbank (eds), *Gender in Refugee Law: From the Margins to the Centre* (Routledge, 2014) 98; Nicole LaViolette, “‘UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity’: A Critical Commentary’ (2010) 22 *International Journal of Refugee Law* 173; Laurie Berg and Jenni Millbank, ‘Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants’ (2009) 22 *Journal of Refugee Studies* 195; Millbank, ‘From Discretion to Disbelief’, above n 37; Thomas Spijkerboer (ed), *Fleeing Homophobia: Sexual Orientation, Gender and Asylum* (Routledge, 2013); Toni AM Johnson, ‘On Silence, Sexuality and Skeletons: Reconceptualizing Narrative in Asylum Hearings’ (2011) 20 *Social & Legal Studies* 57.

<sup>58</sup> For a full outline of the details and methods employed in research that has directly addressed the RSD oral hearing, see Chapter Two, 3–4.

at the coalface of RSD and motivated by recurring concerns about procedural fairness and credibility assessment within RSD processes and during the oral hearing.<sup>59</sup>

The second theme within the credibility literature, after the theme of disbelief towards refugee applicants and the harsh application of credibility criteria, is critical reflection upon RSD decision-makers' raced and gendered understandings of how the world works, of who refugees are and how they ought to behave in order to receive protection. Here, questions of the decision-makers' subjectivity and wide discretion, particularly in relation to claims made on the basis of gender and sexuality, have led to critical insights into the cultural biases, stereotypes and assumptions at play in credibility assessment more generally.<sup>60</sup> The literature calls attention to minimally reviewable discretion held by decision-makers, as well as to the power of the host country's and the decision-makers' cultural norms to define who is a credible, what is plausible and who is a 'worthy' recipient of protection.<sup>61</sup>

Related to questions about the normative values of the decision-maker are critical accounts of the figure of the refugee as an 'other,' and as an object of the liberal state's charity and benevolence more generally, rather than as an agent and rights-holder under the Refugee Convention.<sup>62</sup> Postcolonial critiques of the regime of international refugee protection and the refugee-as-suppliant have been put forward as part of the problem of credibility assessment.<sup>63</sup> This work has also involved

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<sup>59</sup> For a list of relevant research, which I return to throughout the thesis, see Chapter Two, 5–6 (especially footnote 12).

<sup>60</sup> On the problems of wide, unreviewable decision-maker discretion see Ramji-Nogales, Schoenholtz and Schrag, above n 37; Trish Luker, 'Decision-Making Conditioned by Radical Uncertainty: Credibility Assessment at the Australian Refugee Review Tribunal' (2013) 25 *International Journal of Refugee Law* 502; Arthur Glass, 'Subjectivity and Refugee Fact-Finding' in Jane McAdam (ed), *Forced Migration, Human Rights and Security* (Hart Publishing, 2008) 213; Sean Rehaag, 'Troubling Patterns in Canadian Refugee Adjudication' (2008) 39 *Ottawa Law Review* 335; and on decision-makers' culturally specific and subjective approaches to plausibility see Jenni Millbank, 'Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia' (2002) 26 *Melbourne University Law Review* 144; Berg and Millbank, above n 57; Spijkerboer, above n 32; Wikström and Johansson, above n 38; Hilary Evans Cameron, 'Risk Theory and "Subjective Fear": The Role of Risk Perception, Assessment, and Management in Refugee Status Determinations' (2008) 20 *International Journal of Refugee Law* 567; Rousseau et al, above n 3.

<sup>61</sup> For an overview, see Macklin, 'Truth and Consequences: Credibility Determination in the Refugee Context', above n 37.

<sup>62</sup> See Barsky, *Constructing a Productive Other*, above n 7; Dauvergne, above n 25.

<sup>63</sup> For some of these foundational critiques, see Liisa H Malkki, 'Refugees and Exile: From "Refugee Studies" to the National Order of Things' (1995) 24 *Annual Review of Anthropology* 495; Liisa H Malkki, 'Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization' (1996) 11

reflections about the political context of RSD, as discussed above, which has characterised refugee decision-making as playing a ‘gate-keeping’ role: keeping ‘illegal’ or ‘bogus’ claimants out and letting ‘genuine’ refugees in. Sherene Razack is one of a number of scholars who has argued that asylum cases often turn on a simplistic understanding of asylum seekers' countries of origin as barbaric; of the liberal nation-state as saviour; and of refugees as 'victims' in need not only of protection but of saving.<sup>64</sup> This work is particularly relevant to my own questions about what narrative and narrative genres reveal about the form and content of refugee stock narratives (in Chapter Five) and the *style* of testimony the applicant must present to be accepted as credible (in Chapter Seven).

This existing literature, particularly its dominant concern with the subjectivity of refugee decision-making, led me to question how the narrative form might feature in already deeply subjective determinations of ‘plausibility’ as one of the credibility criteria. The existing work is insightful because it not only highlights the problem of ‘cultural difference’ in determining what evidence is credible, but also asks, as Macklin does, ‘whose culture poses the problem?’<sup>65</sup> Credibility assessment tends to cast the applicant as the ‘problem’ where she or he cannot live up to the decision-maker’s culturally specific ideas of a credible testimony-giver, and indeed of a genuine refugee. It is not only the credibility of an applicant’s behaviour (the content of evidence), but also our sense of what credible testimony sounds like that is culturally and contextually determined. My thesis question, about the role of narrative in the hearing, seeks to add another means by which to interrogate how decision-makers’ own subjectivity, cultural stereotypes and experiences become, in the hearings, stand-ins for what is credible, true or good.

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*Cultural Anthropology* 377; Makau Mutua, ‘Savages, Victims, and Saviors: The Metaphor of Human Rights’ (2001) 42 *Harvard International Law Journal* 201.

<sup>64</sup> Sherene Razack, ‘Domestic Violence as Gender Persecution: Policing the Borders of Nation, Race, and Gender’ (1995) 8 *Canadian Journal of Women and the Law* 45. Razack argues that ‘[t]he simplest and most effective means’ for women to gain protection on the basis of gender ‘is to activate in the panel members an old imperial formula of the barbaric and chaotic Third World and by implication, a more civilized First World’: at 69. See also Audrey Macklin, ‘Refugee Women and the Imperative of Categories’ (1995) 17 *Human Rights Quarterly* 213; Jacqueline Bhabha, ‘Internationalist Gatekeepers? The Tension Between Asylum Advocacy and Human Rights’ (2002) 15 *Harvard Human Rights Journal* 162; Susan Musarrat Akram, ‘Orientalism Revisited in Asylum and Refugee Claims’ (2000) 12 *International Journal of Refugee Law* 7.

<sup>65</sup> Macklin, ‘Truth and Consequences: Credibility Determination in the Refugee Context’, above n 37, 139.



In articulating the framework of this research, Robert Barsky's application of discourse and literary theories to Canadian refugee hearing transcripts has been particularly influential. His scholarship is closest to my own not only in its ideology and aims but also in its methods. Barsky's two books, which are among the few works that deal directly with the RSD oral hearing in Canada, 'focus on oral testimony through direct and indirect reference to language theory designed to unearth some of the prejudices, givens, biases and predispositions that are present in the system as presently constructed.'<sup>66</sup> In his text *Constructing a Productive Other: Discourse Theory and the Convention Refugee Hearing*, he argues that the refugee hearing acts primarily as a test of the claimant's ability to construct an appropriate image of a 'Convention refugee' and to become a productive other — in line with constructions of a refugee set out within particular political and cultural discourses of the receiving state and of government decision-makers.<sup>67</sup> He argues that it is not the veracity of the claim that is tested, but rather the claimant's competency in requirements of the determination process and in performing the style of speech and argumentation that the process requires. As I do in this thesis, Barsky focuses on how the form of the refugee hearing and refugee testimony (and the discourses that shape that form) influence who is given access to protection. As such, I refer to his work, particularly insofar as it has focused on literary aspects of the hearing, throughout the following chapters.

The third and final theme throughout the credibility literature is the out-and-out difficulty of credibility assessment, even under the best circumstances—a problem that is compounded by the previous two themes of the harsh application of existing credibility standards and decision-maker's subjectivity and discretion. Marita Eastmond best describes the problem of credibility standards *as such* in her argument that neither an asylum seeker's experiences (life as lived), nor her or his subsequent accounts of them (life as told), can necessarily meet the expectations that RSD places upon the applicant's testimony.<sup>68</sup> One of the constant refrains within the literature is

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<sup>66</sup> Barsky, *Arguing and Justifying*, above n 29, 19; Barsky, *Constructing a Productive Other*, above n 7.

<sup>67</sup> Barsky, *Constructing a Productive Other*, above n 7, 5–6.

<sup>68</sup> Marita Eastmond, 'Stories as Lived Experience: Narratives in Forced Migration Research' (2007) 20 *Journal of Refugee Studies* 248, 249. As Evans Cameron puts it:

that the criteria for credibility assessment represent unreasonable and unrealistic expectations of refugee applicants' testimony, as well as of autobiographical testimony in general. Indeed, the UNHCR Handbook and commentaries, the host of domestic, regional and international guidelines on credibility, as well as hard won guidance on gender and sexuality all attempt to deal with the difficulties faced by applicants in piecing together and then presenting autobiographical testimony, as well as the challenges of assessing claims based solely or predominantly on oral testimony.

Research from within the disciplines of psychology and psychiatry has been deeply critical of the expectations placed on asylum seekers in relation to 'remembering and retelling.'<sup>69</sup> This work highlights the way in which even the most basic standards for credibility testing (coherence and consistency) are at odds with what is known about how we access and present autobiographical memories, as well as with psychiatric research about the effects of trauma and autobiographical memory.<sup>70</sup> Jane Herlihy and Stuart Turner have argued that common assumptions about the relationship between particular kinds of testimony and credibility within RSD processes are incorrect. Herlihy and Turner belong to a group of researchers seeking to demonstrate that 'psychologists practicing and researching in the field of autobiographical memory hold a wealth of knowledge that is relevant to the process of deciding asylum claims.'<sup>71</sup> Collectively, this work not only charts how experiences of persecution and trauma affect the ability to create narrative and to give testimony, particularly testimony that is detailed, internally consistent and coherent.<sup>72</sup> It also challenges the

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Refugee status decision makers typically have unreasonable expectations of what and how people remember. Many assume that our minds record all aspects of the events that we experience, and that these memories are stored in our brains and remain unchanged over time. Decades of psychological research has demonstrated, however, that our memories are neither so complete nor so stable, even setting aside the effects on memory of trauma and stress... Many decision makers must fundamentally readjust their thinking about claimants' memories if they are to avoid making findings that are as unsound as they are unjust.

Evans Cameron, above n 52, 469.

<sup>69</sup> Herlihy and Turner, 'The Psychology of Seeking Protection', above n 38, 175.

<sup>70</sup> See especially Hunter et al, above n 38; Kirmayer, above n 38; Jane Herlihy and Stuart W Turner, 'Asylum Claims and Memory of Trauma: Sharing Our Knowledge' (2007) 191 *The British Journal of Psychiatry* 3.

<sup>71</sup> Jane Herlihy, Laura Jobson and Stuart Turner, 'Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum' (2012) 26 *Applied Cognitive Psychology* 661, 661.

<sup>72</sup> Herlihy and Turner, 'The Psychology of Seeking Protection', above n 38, 173. One key assumption that the authors challenge is that 'an experience of severe violence or torture will be so important that it will be remembered very clearly over the long term': at 73. See also David B Pillemer, *Momentous Events, Vivid Memories* (Harvard University Press, 1998).

‘assumption that people can reliably, consistently and accurately recall autobiographical memories’ and that applicants who give discrepant or inconsistent accounts of their experiences are necessarily fabricating evidence.<sup>73</sup> Indeed, this literature has, amongst other things, highlighted that ‘research over the last fifty years has provided compelling evidence to suggest that autobiographical remembering is not an exact replaying of an event.’<sup>74</sup> This is aside from the significant complicating factors of RSD, including the requirement that applicants recount potentially distressing events in a high-stress and cross-cultural adjudicative context.

My research shares these concerns about credibility assessment. My argument about the pervasive demand for narrative contributes to critiques that credibility standards *as such* place an expectation on testimony that is unreachable in relation to the presentation of autobiographical events, let alone in the complicated context of the refugee hearing. Read as a whole, the literature reflects serious concerns about the standards that govern credibility; the application of those standards within cultures of disbelief and gate-keeping; the failure of the RSD institutions to approach credibility assessment in a non-adversarial, inquisitorial manner that takes seriously the role of the decision-maker as jointly ascertaining the facts of the claim; and the unchecked subjectivity of credibility assessment, and minimal oversight or judicial review of these findings.

Throughout the thesis, I return to legal framework governing the oral hearing, credibility determinations and assessment of refugee testimony. In this part of the Introduction, though, I situate the thesis as contributing to scholarly conversations about credibility assessment, and one of my aims to add the elements of narrative and narrative form to these discussions. That narrative and literary theory might add something to conversations about credibility assessment seems an almost inexorable conclusion, given that ‘plausibility,’ coherence and consistency are the elusive criteria of credibility assessment.

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<sup>73</sup> Herlihy, Jobson and Turner, above n 71, 662; Herlihy and Turner, ‘Should Discrepant Accounts given by Asylum Seekers Be Taken as Proof of Deceit?’, above n 52.

<sup>74</sup> Herlihy, Jobson and Turner, above n 71, 662.

## **Thesis Overview and Chapter Summary**

### ***Chapters One and Two: Theoretical Framework, Methods and Methodology***

Chapter One introduces my use of a ‘law and literature’ framework to address the questions posed by this thesis. Specifically, it draws on law and literature scholarship to make a theoretical argument in favour of the use of narrative and literary theory in evaluating the presentation and assessment of refugee testimony. As well, this chapter articulates a critical view of the interdisciplinary project of ‘law and literature’ and of the intersection of law with literature. In making a case for the use of narrative methods in the assessment of RSD processes, I critique aspects of the ‘law and literature’ project that present literature and narrative as potentially ‘saving’ or improving law. I argue that in so doing, various endeavours in law and literature have overlooked the many ways in which literature and narrative are already part of the law, and ways they are implicated law’s means of persuasion and of establishing authority. Finally, this chapter establishes working definitions of ‘narrative’ and ‘narrativity’ for analyses of the narrative form in the oral hearings.

Attending refugee hearings in person or listening to recordings of RSD oral hearings in full are the means by which I have explored questions about the presentation and assessment of refugee testimony in Australia and Canada. In so doing, I have encountered the cases of 14 refugee applicants, each applicant at a moment when he or she is required to orally explain and account for her or his claim. I have listened to these hearings and engaged in a close reading of each event using a grounded theory approach.<sup>75</sup> Chapter Two outlines and explicates my research design and the methods I employed to gather and analyse the original data for the thesis. It explains the limitations of this thesis's methods, dataset and findings. While my findings are not presented as representative, I do cross-reference them throughout the thesis and compare them with the limited body of work that has accessed and analysed oral hearings within RSD processes. The chapter also recounts the difficulties I

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<sup>75</sup> Barney G Glaser and Anselm L Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine Publishing, 1967); Barney Glaser, *Theoretical Sensitivity: Advances in the Methodology of Grounded Theory* (Sociology Press, 1978); Kathy Charmaz, *Constructing Grounded Theory: A Practical Guide Through Qualitative Analysis* (Sage Publications, 2006).

encountered in accessing the refugee oral hearings, particularly in Australia, and reflects on the inaccessibility of refugee testimony in juridical settings.

### ***Chapter Three: A History of the Oral Hearing in Australian and Canadian RSD***

One of the foundational claims of this thesis is that the oral hearing in Australia and Canada, and the presentation of testimony within it, is a critical event within RSD. The course of the hearing and the assessment of the applicant's oral testimony frequently determine the success or failure of a refugee applicant's claim. This was not always so. In both Australia and Canada, the history of a statutory, semi-independent onshore RSD process, which incorporates an oral hearing before a decision-maker, is a relatively recent one. In this chapter, I discuss how and when the oral hearing came to be such a critical event within onshore RSD in Australia and in Canada. This account charts the history of the oral hearing up to its introduction in each jurisdiction, and it sets the scene for the analysis of the dataset and refugee testimony in the IRB and RRT from 2012 to 2014.

This chapter argues that attending to the emergence and entrenchment of the oral hearing reveals that the hearing was, from its outset, conceived as a space to sort 'genuine' from false claimants via the oral testing of evidence. This is the case even though the introduction of the oral hearing is primarily presented as a purely positive reform: as conceding procedural rights and providing an opportunity for the applicant 'to be heard.' This chapter demonstrates that the conduct of the oral hearing is shaped by the Australian and Canadian States' historical conception of it as a space that could achieve a fairer RSD process *and* maintain efficient government control over the admission of onshore refugee applicants.

### ***Chapters Four, Five and Six: Narrative Form, Counter-Narratives and Fragmentation***

Chapters Four, Five and Six form a trio of chapters dedicated in different ways to putting narrative theory to work in an analysis of the oral hearings. In Chapter Four, I argue that the form of refugee applicants' evidence, alongside its content, is critical to its assessment as plausible, and therefore as credible. The chapter demonstrates the claim that refugee applicants are required to present evidence in narrative form by focusing on one particular 'stock story' that featured throughout the observed

hearings. This story, which I name the ‘narrative of becoming a refugee,’ is one of refugee departure, flight and arrival and it exemplifies Patricia Ewick and Susan Silbey's three elements of successful narratives. These criteria are a selective appropriation of past events and characters; a temporal ordering of the events within the narrative; and characters and events that are related to one another and to an overarching structure, a criterion that can be called an emplotment.<sup>76</sup> I argue that the ‘narrative of becoming a refugee’ acted, both implicitly and explicitly, in both form and content, as a normative standard (or story) against which refugee applicants’ evidence was judged.

Chapter Five shifts from examining the demand for a particular narrative during the hearings, to considering the role of narrative in the testing of evidence. It explores how decision-makers tested and contested refugee applicants' evidence and presents a key finding from the data: that frequently, when decision-makers tested evidence during the hearings, they did this by engaging in a form of narrative contest with the applicant, that is, by presenting counter-narratives to applicants and demanding the applicant account for *why* the evidence (or story) did not unfold in the precise manner put to them by the decision-maker. This chapter builds on the argument that the narrative form is central to the presentation and assessment of refugee testimony by focusing on how decision-makers use their own narratives and counter-narratives to test evidence during the oral hearing. This chapter demonstrates that, when engaging in these narrative contests, decision-makers’ narrative-based expectations often reflected highly subjective, personal views about the way the world works, such that the narrative expectations are difficult to attach to broader stock stories or meta-narratives and are best described as idiosyncratic, shifting and at times impulsive. Applicants needed a significant degree of narrative competence to be able to engage in these decision-maker-led contests.

Chapter Six then takes up narrative theory's attention to audience and context. In the hearings, the decision-maker is both the key 'audience' for the applicant's narrative

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<sup>76</sup> Patricia Ewick and Susan S Silbey, ‘Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative’ (1995) 29 *Law & Society Review* 197, 200; David Herman, *Basic Elements of Narrative* (John Wiley & Sons, 2011).

and the figure charged with judging its credibility. This chapter examines the conduct of the hearings to ask: to what extent were applicants—in the hearings I observed—able to ‘be heard’ and to present their evidence? In this chapter, I argue that applicants’ testimony was frequently, severely fragmented due to the control exercised by decision-makers, and the manner and style of questioning in the hearings. The process of narrative fragmentation that I track in this chapter leads to the troubling finding that, in the majority of hearings I observed, the applicant was both expected to present in narrative form and then actively impeded from doing so. The evidence was frequently driven and directed by the decision-maker. Where applicants displayed confidence and an ability to present evidence in a narrative form, and to ‘argue and justify’<sup>77</sup> their own story, this was done in spite, of rather than because of, the structure and setting of the hearing.

### ***Chapter Seven: The Genre of Refugee Testimony***

Chapter Seven is the final chapter of the thesis. In it, I return to my argument from Chapter One, namely, that the interdisciplinary endeavour of ‘law and literature’ is particularly productive when ‘literary’ methods are used to analyse and account for forms of legal argument and authority. In this chapter I argue that alongside the use of the narrative form to explain what kinds of stories refugees must tell and how they must tell them, another useful concept is that of genre. Genre allows for the identification of the specific style, tone and structure of certain narratives and for such narratives to be culturally located. By closely attending to the form and style of narratives expected of refugee applicants in the observed hearings, I argue that the concepts of narrative voice, interiority and narratorial omniscience were critical factors in the presentation and assessment of refugee testimony. This chapter also demonstrates that literature addressing the ‘genre’ of human rights law and discourse is relevant to the genre required of testimony within RSD processes. Like the ‘genre’ of human rights discourse, which relies on a particular version of an enlightened citizen/subject, RSD demands teleological narratives of refugee applicants, which are marked by self-possession, self-knowledge and autonomy.

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<sup>77</sup> Barsky, *Arguing and Justifying*, above n 29.

## Notes on the Nature of Refugee Testimony and the Presentation of the Hearings in this Thesis

### *The Impossibility of 'pure' refugee testimony*

The testimony presented during the oral hearings is highly mediated. As Laurie Berg and Jenni Millbank succinctly put it, '[h]ow the asylum claim is articulated depends on the relational interaction between advocate or decision-maker and asylum seeker at every stage of the process; it is a story told and received in highly mediated ways.'<sup>78</sup>

In addition to the advocate and decision-maker, the interpreter also plays a key role before and during the hearing. As the applicant's claim is repeatedly interpreted and rearticulated by advocates, decision-makers, and interpreters, even the most faithful reproductions of an applicant's evidence are still third-party versions that may not reflect either the applicant's meaning or intent.<sup>79</sup>

I describe the subject of this research as refugee applicants' oral testimony presented *for the purposes* of gaining access to refugee protection, rather than refugee testimony as such. This distinguishes the testimony analysed here from work on refugee testimony in non-adjudicative spaces, and I hope highlights the profoundly mediated nature of refugee applicant speech in this instance. Further, before the intermediary roles of advocate, decision-maker and interpreter are considered, the original application form structures and constrains the applicant's evidence: in both Australia and Canada, these forms place testimony squarely within an adjudicative context, where testimony is *for the purpose of* making a protection claim.<sup>80</sup>

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<sup>78</sup> Berg and Millbank, above n 57, 196–97.

<sup>79</sup> Lisa Sarmas describes these issues particularly well, with respect to interpreting the narratives recorded in court transcripts. She maintains that the trial transcript and included evidence are 'a very limited source from which to construct a story' as '[t]he evidence which comes out at a trial is structured by a restrictive process of selection and construction, a process determined by the way the legal issue is framed, by the way in which lawyers structure their clients' cases, and by rules of evidence, particularly relating to what is "legally relevant": Lisa Sarmas, 'Story Telling and the Law: A Case Study of Louth v Diprose' (1993) 19 *Melbourne University Law Review* 701, 726; see also Sean Rehaag, 'The Role of Counsel in Canada's Refugee Determinations System: An Empirical Assessment' (2011) 49 *Osgoode Hall Law Journal* 71.

<sup>80</sup> In the body of the former Canadian written application form, the Personal Information Form (PIF), which I address in Chapter 6, the requirement for narrative was expressed directly. Under the heading 'Why you are claiming refugee protection in Canada?' is a section entitled 'Narrative.' After this, there are two blank, lined pages. At the top of the blank pages are the words, 'Print or type your narrative in the space provided below': Immigration and Refugee Board of Canada, 'Personal Information Form': <[http://resources.lss.bc.ca/pdfs/pubs/personalInformationForm\\_eng.pdf](http://resources.lss.bc.ca/pdfs/pubs/personalInformationForm_eng.pdf)> (this is a copy of the former PIF, archived by the Legal Services Society of British Columbia).



In light of the above I note that a significant limitation of the research is that it did not access the refugee applicant's testimony at each stage of its production, and it cannot account for or analyse the role played by advocates and interpreters in shaping each applicant's testimony. Important work has been done on the effects of translation in legal proceedings generally, and within RSD proceedings specifically.<sup>81</sup> This literature highlights the fact that interpretation within RSD is not merely linguistic but also involves 'cultural' interpretation.<sup>82</sup> The way in which refugee applicant testimony is mediated by RSD prior to and during the hearing are critical questions that warrant further investigation.<sup>83</sup> As well as these concessions, in Chapter Two I seek to account for how processes of transcription and my role as a researcher have affected the testimony I present here.<sup>84</sup>

### *Presenting the Hearings and Representing Refugee Testimony*

Each hearing included in my dataset involved an interpreter, even though at times the applicant spoke in the language of the Board or Tribunal (English or French). In the hearing excerpts reproduced here, I have edited out all speech not conducted in English, but attempted to preserve the presence of the interpreter by indicating where the applicant is speaking directly and where the interpreter is speaking on behalf of the applicant. In each excerpt, I use the term 'Applicant' to denote where the interpreter is speaking for the applicant; 'Applicant in person' to denote where the applicant is speaking directly; and 'Interpreter' where the interpreter is speaking directly. The terms 'Member' and 'Advocate' are used in their ordinary sense. In this research, I present segments from individual hearings after contextualising them in relation to the applicant's claim, and where relevant, in relation to the conduct

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<sup>81</sup> For relevant literature see above n 57.

<sup>82</sup> See Barsky, 'The Interpreter as Intercultural Agent in Convention Refugee Hearings', above n 56; Gregor Noll, 'Asylum Claims and the Translation of Culture into Politics' (2006) 41 *Texas International Law Journal* 491.

<sup>83</sup> In their work exploring RSD hearings in Sweden, Wikström and Johansson describe the various factors that influence asylum-seeker testimony as 'transformative filters' and note that in the Swedish context '[t]he interpreter, the case officer, and the applicant's lawyer are all (sometimes quite significantly) 'transformative filters,' and that other filters are 'the applicant's experience of the situation, and his/her ability to understand the importance of mastering certain ways of narrating and constructing the story': Wikström and Johansson, above n 38, 95.

<sup>84</sup> Matthew Zagor, 'Recognition and Narrative Identities: Is Refugee Law Redeemable?' in Fiona Jenkins, Mark Nolan and Kim Rubenstein (eds), *Allegiance and Identity in a Globalised World* (Cambridge University Press, 2014) 311, 321.

and sequence of the hearing. I note that the excerpts from the hearings do, in some instances, tend towards the longer side. I agonised over whether to include substantial excerpts and how I could do so without burdening the reader. Ultimately, the longer extracts are included because I aim to present at least part the hearings as they took place, preserving as much as possible of the affect and tone of the exchanges—and more to the point, avoiding further summaries or interpretations of the dialogue.<sup>85</sup> Of course, ‘preserving’ the hearing is not possible (especially given the editing out of the interpreter’s non-English translations) but hopefully in the longer exchanges something more than the mere text is apparent, and something of value is added to the existing small archive of published, written decisions. These written decisions sometimes include some extracts from the hearings, but generally the hearing is summarised by the decision-maker and where applicant testimony is referred to, it is condensed and paraphrased.

Finally, when presenting excerpts from individual hearings in the body of this thesis, I have tried to avoid framing the excerpts initially or only by reference to the framework established by the Refugee Convention and the statutory definitions of a refugee. This is because the testimony I observed during the hearings often exceeded or at very least did not always conform to the strictures of the refugee definition under Australia and Canadian law. Indeed, in spite of the presence of an advocate in all hearings, at times this definitional framing did not come up in the hearing until its very end, if at all. I do outline in an Appendix the fundamental elements of each claim, including the applicant’s country of origin, gender, alleged grounds of persecution and the hearing outcome, and I refer to the Appendix throughout. Although the absence of a detailed context for included dialogue may initially seem disorientating, my hope is not to reduce the dialogue in each hearing to the grounds upon which the applicant sought protection or to the decision-maker’s factual and legal findings in regards to the applicant’s testimony, as expressed in the ultimate determination of the claim.

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<sup>85</sup> I also note that I have included non-verbal aspects of the hearing, including pauses and some interpretations of tone and emphasis, in square brackets within the dialogue. While transcription conventions advise one not to ‘interpret’ tone (ie, to denote ‘laughter’ rather than ‘nervous laughter’), at times I have included my own interpretations—both because these struck me as valuable details as I observed the hearings and because a ‘pure’ representation of dialogue and tone is beyond my reach in any event.

Like much writing in the field of migration, in this research the choice of language and in particular of labels for individuals is laden with meaning and power. I primarily refer to the people included in this study as ‘refugee applicants,’ as a consequence of my narrow focus on their experience of institutional, onshore RSD processes. I also refer at times to ‘irregular’ or undocumented migrants, but do with an awareness of adopting a state-centric perspective in using such labels.<sup>86</sup> And lastly, I also use the modifier ‘onshore’ to refer to all refugee applicant participants in my research. In Canada, those who seek status within Canadian territory are often called ‘inland’ (or sometimes ‘point of entry’) claimants. In Australia, they are called onshore applicants. I have preferred the Australian terminology for the sake of consistency and clarity throughout the thesis.

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<sup>86</sup> Elspeth Guild, ‘Who Is an Irregular Migrant?’ in Barbara Bogusz (ed), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Martinus Nijhoff Publishers, 2004) 3.

# CHAPTER ONE. THE THEORETICAL FRAME: LAW, LITERATURE AND NARRATIVE

## Introduction

The theoretical claims and framework of law and literature scholarship have shaped the questions in this thesis and guided my approach to the dataset. My core argument is that the expectation that refugee applicants present evidence in a narrative form is a central element of onshore refugee status determination processes. In this initial chapter, I locate my argument within the scholarship that falls under the banners of ‘law and literature’ and ‘law and narrative,’ and I outline how the thesis contributes to the scholarship and debates surrounding law’s relationship with literature and narrative. In so doing, I provide both an overview of these fields’ theoretical claims and contributions, as well as a critical assessment of certain approaches that have been associated with the law and literature movement.

Law and literature is, like most interdisciplinary pursuits, a broad church; my own research is located within a particular subset of law and literature studies that calls for attention to narrative *forms* and genres within the law, as a means of approaching and evaluating modes of legal reasoning and rhetoric. In this chapter, I argue that the theoretical framework of law and literature must avoid viewing literature as somehow completing or saving law, or as inherently more just or more virtuous than law. Moreover, because part of my argument is that literary forms are deeply implicated in law and its demands of refugee applicants, I maintain that law and literature scholarship must proceed from the foundational claim that law is not distinct from fields of knowledge that are normatively understood as belonging to the humanities or to literature. Rather, in advocating for the inclusion of ‘literary’ methods in assessing Australian and Canadian requirements of refugee applicants, it is crucial to adopt an account of law as a social as well as a cultural and literary phenomenon, as developed within critical socio-legal scholarship.<sup>1</sup> My argument is that narrative and literature

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<sup>1</sup> This, of course, locates my thesis within the still-broader field of ‘law and society’ scholarship, which fundamentally rejects law ‘as an unchanging discipline comprised of a body of unassailable rules and principles, which collectively determine the truth of things,’ instead approaching law as ‘social

are already part of the processes of refugee status determination, and I use the methods of law, literature and narrative scholarship to explore this claim.<sup>2</sup>

As such, Part One of this chapter locates my method within the interdisciplinary field of ‘law and literature.’ Part Two constructs a framework for my thesis’s critical interdisciplinarity and argues that it matters *how* the fields of ‘law’ and ‘literature’ and literary studies are understood when calling for law and legal scholars to pay greater attention to literary modes of analysis. In particular, I argue that certain kinds of law and literature scholarship (and their associated theoretical claims) have reinscribed the disciplinary boundaries between law and literature—boundaries that this project seeks to open up and interrogate. Finally, Part Three synthesises the above insights into an explanation of my methodology, which makes use of narrative forms and theory. In particular, drawing on the work of Susan Silbey, Patricia Ewick and David Herman, I establish a working definition of narrative and the elements of narrative theory that I will employ throughout the thesis in my analysis of refugee testimony. Concisely stated, the definition of narrative that I adopt conceives of narratives as constituted by three core elements: some form of selective appropriation of past events and characters; a temporal ordering of the events within the narrative; and a relationship between characters and events and to some overarching structure, ‘often in the context of opposition or struggle,’ a criterion that is otherwise called

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phenomena, located and determined by historical context and embedded in social life’: Austin Sarat, ‘Vitality Amidst Fragmentation: On the Emergence of Postrealist Law and Society Scholarship’ in Austin Sarat (ed), *The Blackwell Companion to Law and Society* (John Wiley & Sons, 2008) 7. I also note here that Michel Foucault’s critique of disciplinarity as key to the theoretical foundations of law and society scholars, especially his claim that disciplines are not sites of ‘unique intellectual practice’ but instead ‘discursive formations,’ which are the result of relationships between knowledge and power. The unity of discourse is such that ‘the so-called autonomy of disciplines is not an autonomy of unique methods of analysis, practice or research; nor an autonomy of a distinct “field of knowledge,” but only an effect produced by discursive conventions and the institutions in which they are expressed, both of which are formed in specific historical conditions’: Michel Foucault, *The Archaeology of Knowledge* (Pantheon Books, 1972) 12. See also Clifford Geertz, who argues that the ‘facts’ of law are the result of complex local interactions between the behavioural, verbal and conceptual practices, whereby meaning is shaped by local knowledge, practice and symbols: Clifford Geertz, *Local Knowledge: Further Essays In Interpretive Anthropology* (Basic Books, 1983) 184.

<sup>2</sup> It is important to note here the mischief of these categories and of so-called ‘fields’ of scholarship in general. My thesis and its theoretical framework are also guided by and arguably also belong to the areas of research identified as ‘law and language,’ ‘law and aesthetics,’ and ‘law and rhetoric.’ Indeed, I draw on texts from across these fields. That said, because my work is most firmly grounded in narrative construction and the role of narrative in law, the most significant and productive (though not hermetic) frames for the project are those of ‘law and literature’ and ‘law and narrative.’

emplotment or ‘relationality of parts.’<sup>3</sup> I return to these elements throughout this thesis, as well as explain and critique this approach in detail later in this chapter.

## **Part One. On Law and Literature**

In 1996, Paul Gerwitz wrote of the law and literature movement that, as with ‘so many young movements, political or scholarly, it remains an open question whether the participants ... really have a common purpose.’<sup>4</sup> While the law and literature movement is no longer officially ‘young,’ it still comprises exceptionally diverse theoretical approaches and subjects of inquiry. In 1996 Gerwitz also noted that despite law and literature’s heterogeneity, there was at least a group of scholars who did not disclaim the common label. This remains true of ‘law and literature’ scholars and scholarship today.<sup>5</sup>

In mapping the scholarship that has been undertaken under the banner of ‘law and literature,’ a helpful starting point is to describe two common formulations used to divide the approaches taken within the field: ‘law *in* literature’ and ‘law *as* literature.’<sup>6</sup> In ‘law and literature’ scholarship, the *in/as* distinction does not necessarily signify a sharp debate about the relationship of law to literature; rather, the distinction is often used in a non-oppositional way to describe the subject matter and methods adopted by those writing in this area.<sup>7</sup> There is a historical alliance

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<sup>3</sup> Patricia Ewick and Susan S Silbey, ‘Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative’ (1995) 29 *Law & Society Review* 197, 200.

<sup>4</sup> Paul Gerwitz, ‘Narrative and Rhetoric in the Law’ in Peter Brooks and Paul Gerwitz (eds), *Law’s Stories: Narrative and Rhetoric in the Law* (Yale University Press, 1998) 3.

<sup>5</sup> Ibid. There are now many established law and literature journals, associations and annual conferences, as well as law school ‘law and literature’ courses. These institutional mechanisms, as much as anything else, hold up the idea of a common field of work and allow work to be categorised as ‘law and literature’ scholarship.

<sup>6</sup> The formulation was first used by Robert Weisberg in the first issue of the *Yale Journal of Law & the Humanities*: Robert Weisberg, ‘The Law-Literature Enterprise’ (1989) 1 *Yale Journal of Law & the Humanities* 1. The distinction is also made in many texts seeking to introduce the field of ‘law and literature,’ particularly those written after the field had established itself to some extent: See, for example: Peter Brooks and Paul D Gerwitz (eds), *Law’s Stories: Narrative and Rhetoric in the Law* (Yale University Press, 1996); Jack Balkin and Sanford Levinson, ‘Law and the Humanities: An Uneasy Relationship’ (2006) 18 *Yale Journal of Law & the Humanities* 155; Karen-Margrethe Simonsen and Ditlev Tamm, *Law and Literature: Interdisciplinary Methods of Reading* (Djoef Publishing, 2010).

<sup>7</sup> For a rather more heated debate over prepositions, See Laura Nader, *Law in Culture and Society* (University of California Press, 1997) 8–9. Nader tracks the debate about law’s confrontation with other disciplines as it has occurred in the law and society movement. She argues that the resistance to

between those writing in these two loosely grouped areas, in that initially some of the scholarship from each category was produced in ‘direct response to the burgeoning law and economics movement,’ in order to contest its reinvigoration of a perceived scientific and abstracted approach to law and legal reasoning.<sup>8</sup>

Law *in* literature scholarship principally involves research about works of literature that deal with law, lawyers, and questions of justice. This kind of scholarship has arguably developed an informal, orthodox canon of its own, one that often includes works such as Melville’s *Billy Budd*, Kafka’s *The Trial*, Sophocles’ *Antigone* and Dickens’ *Bleak House*.<sup>9</sup> Such ‘law in literature’ scholarship proceeds on the assumption that works of literature and literary representations can illuminate important aspects of the law and of legal subjects that are not available in accounts of these topics within the discipline of law and legal writing. Simultaneously, the claim that law must attend to literary texts generally (even those that are not ostensibly about legal systems) is motivated by the contention that these cultural products will

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law *in* society and the preference for law *and* society is a result of the implication, made by law *in* society, that law as a system is not independent of broader society and culture. Nader argues that resistance to this approach comes primarily from legal scholars concerned with professionalism.

<sup>8</sup> Martha-Marie Kleinhans, ‘Rewriting Outsider Narratives: A Renaissance of Revolutionary Subjectivities’ (2007) 2 *Charleston Law Review* 185, 206.

<sup>9</sup> Scholarship is not always restricted to these canonical texts. See, for example, Maria Aristodemou, *Law and Literature: Journeys from Her to Eternity* (Oxford University Press, 2000) where she analyses, amongst other texts, Angela Carter’s *The Bloody Chamber* and Gabriel Garcia Marquez’s *Chronicle of a Death Foretold*; and see also Robin West’s discussion of Toni Morrison’s work in ‘Communities, Texts, and Law: Reflections on the Law and Literature Movement’ (1988) 1 *Yale Journal of Law & the Humanities* 129. For other examples, see Desmond Manderson, ‘From Hunger to Love’ (2003) 15 *Law & Literature* 87; Jeffrey C Kinkley, *Chinese Justice, the Fiction: Law and Literature in Modern China* (Stanford University Press, 2000); René Provost, ‘Magic and Modernity in Tintin Au Congo (1930) and the Sierra Leone Special Court’ (2012) 16 *Law Text Culture* 183. As well, ‘anything by Coetzee’ seems to be a staple within contemporary law and literature scholarship; some examples of relevant scholarship on Coetzee include Elizabeth S Anker, *Fictions of Dignity: Embodying Human Rights in World Literature* (Cornell University Press, 2012); Thomas P Crocker, ‘Still Waiting for the Barbarians’ (2007) 19 *Law & Literature* 303; and a number of chapters within Karin Van Marle and Stewart Motha (eds), *Genres of Critique: Law, Aesthetics and Liminality* (Sun Press, 2014). And finally, it is worth noting, or lamenting, that texts by female and other ‘outsider’ authors are not often part of the de facto ‘law and literature’ canon, although 18<sup>th</sup>- and 19<sup>th</sup>-century novelists are something of an exception to this observation. For a critical reflection on law’s canons more generally, see Sanford Levinson and Jack Balkin (eds), *Legal Canons* (New York University Press, 2000).

‘be less reductive of the world’s varied meanings’ than legal sources, and that they can supplement or improve law’s account of certain subjects.<sup>10</sup>

Law *as* literature, by contrast, examines legal texts with the tools provided by literary theory and literary criticism, treating law as literature and analysing it as such.

Conceiving of law *as* literature has involved claims that legal argument and rhetoric deploy processes and methods similar to those traditionally associated with literary studies. Law, however, uses these rhetorical processes less openly and less explicitly in constructing its arguments and claims. Peter Goodrich persuasively articulates this view when he writes that:

[l]aw is a literature which denies its literary qualities. It is a play of words which asserts its absolute seriousness...it is a language which hides its indeterminacy in the justificatory discourse of judgment; it is procedure based on analogy, metaphor and repetition and yet it lays claim to be a cold or disembodied prose.<sup>11</sup>

My work, in its argument that attention to narrative theory affords insights into the processes of evidence-giving and evidentiary assessment within RSD, both supports and draws on the theoretical claims of law *as* literature. In the treatment of law *as* literature, literary theory is relevant insofar as it might provide insights into the ‘way legal rhetoric construct[s] and conceal[s] political power and authority’ and into methods of legal interpretation and constructions of meaning.<sup>12</sup> Indeed, law and literature analyses have often been applied to legal hermeneutics and in particular, to acts of judicial interpretation.<sup>13</sup> In this research, I apply narrative theory to legal

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<sup>10</sup> Aristodemou, above n 9, 9.

<sup>11</sup> Peter Goodrich, *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (Taylor & Francis, 2002) 112.

<sup>12</sup> Balkin and Levinson, above n 6, 182.

<sup>13</sup> See especially Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985); Ronald Dworkin, *Law’s Empire* (Harvard University Press, 1986); Sanford Levinson and Steven Maillouz, *Interpreting Law and Literature: A Hermeneutic Reader* (Northwestern University Press, 1988); though work in this area has also made the critical point that literary and legal interpretation are not in fact the same, since many legal interpretations are backed by sovereign power and can give rise to the exercise of (possibly) lethal force; see Robin West, ‘Adjudication Is Not Interpretation: Some Reservations about the Law-as-Literature Movement’ (1986) 54 *Tennessee Law Review* 203; Robert M Cover, ‘Violence and the Word’ (1986) 95 *The Yale Law Journal* 1601.



interactions, and to the forms of speech used by refugee decision-makers and by the refugee applicants appearing before them.<sup>14</sup>

Within the field of ‘law as literature’ exists scholarship addressing the role of narrative *within the law*. Work focusing on narrative within the law treats law as literature, using the concepts and tools of narrative theory and criticism to analyse legal texts.<sup>15</sup> This body of work has engaged with narrative in diverse ways. In ‘outsider storytelling’ scholarship, it has focused on stories told by or about marginalised or ‘outsider’ groups as powerful tools for challenging the law’s exclusion of these perspectives.<sup>16</sup> It has explored the role of narrative in the construction of legal rhetoric; and it has critiqued existing, hegemonic narratives about law and sovereignty that are relied upon to legitimise power and control.<sup>17</sup> The different approaches to law as literature scholarship have, however, been unified by the claim that the narrative form is a useful tool for exploring how the law constructs

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<sup>14</sup> Although I do not take a sociolinguistic approach, see Diana Eades, *Sociolinguistics and the Legal Process* (Multilingual Matters, 2010); John M Conley and William M O’Barr, *Just Words: Law, Language, and Power* (University of Chicago Press, 2005).

<sup>15</sup> See generally the introductions in Brooks and Gerwitz, above n 6, 2–22.

<sup>16</sup> See Symposium, ‘Legal Storytelling’ (1989) 87 *Michigan Law Review* 2073; and in particular, see Richard Delgado, ‘Storytelling for Oppositionists and Others: A Plea for Narrative’ (1989) 89 *Michigan Law Review* 2411; Kim Lane Scheppelle, ‘Foreword: Telling Stories’ (1989) 87 *Michigan Law Review* 2073; Mari J Matsuda, ‘Public Response to Racist Speech: Considering the Victim’s Story’ (1989) 87 *Michigan Law Review* 2320. Note also that the term ‘outsider jurisprudence’ was coined by Mari Matsuda in the above. And for critical perspectives, see Mark Tushnet, ‘Degradation of Constitutional Discourse, The’ (1992) 81 *Georgetown Law Journal* 251; Jane B Baron, ‘The Rhetoric of Law and Literature: A Skeptical View’ (2004) 26 *Cardozo Law Review* 2273. And for more sympathetic critiques of law as literature, see Daniel Farber and Suzanna Sherry, ‘Telling Stories out of School: An Essay on Legal Narratives’ (1992) 45 *Stanford Law Review* 807; Sherene Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (University of Toronto Press, 1998) 36, especially ‘The Gaze from the Other Side: Storytelling for Social Change’; and Robert F Barsky, *Arguing and Justifying: Assessing the Convention Refugees’ Choice of Moment, Motive and Host Country* (Ashgate, 2000) especially ‘Chapter Six Conclusion: Theorizing the Obstacles to Female Claims.’ And for legal texts that use storytelling as a technique, see, for eg: Patricia J Williams, *The Alchemy of Race and Rights* (Harvard University Press, 1991); Derrick A Bell, *And We Are Not Saved: The Elusive Quest For Racial Justice* (Basic Books, 1987); Derrick A Bell, *Faces at the Bottom of the Well: The Permanence of Racism* (Basic Books, 1992).

<sup>17</sup> Lisa Sarmas notes that [a]lthough there is a considerable degree of diversity amongst those engaged in ‘legal storytelling,’ a number of themes can be identified in their work, including that ‘its adherents are drawn predominantly from the ranks of critical race and feminist scholars who emphasise the role of narrative in legal analysis, that is the stories told and untold in law, rather than its abstract rules and principles’: Lisa Sarmas, ‘Story Telling and the Law: A Case Study of *Louth v Diprose*’ (1993) 19 *Melbourne University Law Review* 701, 702.

meaning and authority.<sup>18</sup> They have, in various ways, taken up the Peter Brooks' claim that the 'narrativity of the law needs analytic attention.'<sup>19</sup>

It is within this vein of law *as* literature that, I argue, refugee status determination processes should be read. Specifically, these processes should be read with attention to narrative *as a form* and to the kinds of narratives that RSD processes demand of refugee applicants. In particular, I use narrative theory combined with close readings of RSD hearings in order to ask: what are the narrative qualities that feature within refugee determination processes, either as a requirement for giving testimony and or as a standard for assessing it?

## **Part Two. Law, Literature and Narrative: A Critical Interdisciplinary Approach**

In this part, I locate my methodology within the law and literature movement, as well as provide a critical account of the relationship between law, literature and narrative. Following work that has analysed questions of form in legal language,<sup>20</sup> my argument is that a focus on linguistic and narrative forms within the law is a highly productive way of bringing literature and literary theories into conversation with law and legal analysis. My thesis attempts to put into practice—in relation to refugee testimony—a set of claims about *how* the law should relate to narrative and literature.

The manner in which so-called 'law and literature' or 'law and narrative' scholarship is conducted matters. The failure to articulate a critical understanding of 'disciplines of knowledge' can lead to a number of drawbacks. First, there is the danger of

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<sup>18</sup> Patricia Ewick and Susan Silbey, for example, note that narrative has been celebrated on two grounds: first on an epistemological ground, that is a different and better way of knowing as compared to non-narrative, abstract forms; and second, on political grounds, that it allows certain silenced voices to speak and that these narrative voices will have a subversive or transformative potential: Ewick and Silbey, above n 3, 199.

<sup>19</sup> Peter Brooks, 'Narrative in and of the Law' in James Phelan and Peter J Rabinowitz (eds), *A Companion to Narrative Theory* (Blackwell Publishing, 2005) 415.

<sup>20</sup> See especially Guyora Binder and Robert Weisberg, *Literary Criticisms of Law* (Princeton University Press, 2000); Wai Chee Dimock, *Residues of Justice: Literature, Law, Philosophy* (University of California Press, 1997); Desmond Manderson, *Kangaroo Courts and the Rule of Law: The Legacy of Modernism* (Routledge, 2012); Van Marle and Motha, above n 9. Binder and Weisberg analyse law as interpretation, narration, rhetoric, language, and culture and trace the history of each of these approaches in both legal and literary theory. In their focus on law as an arena for composing and contesting identity, status, and character, both authors express a loud aversion to sentimentalised accounts of law and literature scholarship: Binder and Weisberg, 9–17.

reinscribing the disciplinary boundaries between law and the humanities, treating them as autonomous fields of knowledge and reinforcing the idea that these disciplines deal with distinct subject matter in distinctive ways. A further drawback is the tendency among certain forms of law and literature scholarship to sentimentalise the humanities, especially literature and narratives, as a source of superior and ‘nuanced’ truth and as necessarily providing a better and more accurate account of social phenomena than the law. And related to these sentimental and universalising claims about literature is law’s readiness to ‘colonise’ and instrumentalise ‘other’ forms of knowledge (including literature), without a critical approach to the methods and insights of these other disciplines. I briefly address each of these critiques and explain how I apply them to my adoption of ‘law, literature and narrative’ as a theoretical framework.

*i. Critiquing the Separation of Law from Literature and Narrative*

One of the foundational claims of some law and literature scholarship is that law ‘needs’ literature to best understand its own exercise of power, or indeed to ‘save’ or complete the law.<sup>21</sup> The argument that law needs literature implies that the law itself is not literary, that it must seek out ‘literature’ and literary methods from an external source, and reinscribes the social boundaries of each discipline.<sup>22</sup> Jane Baron, a self-identified ‘sceptic’ of law and literature scholarship, critiques the movement along these lines, objecting to its construction of both law and literature as separate, autonomous entities.<sup>23</sup> As Baron sees it, one of the main claims of the ‘law and literature’ scholars is that literature is a rich source of certain forms of knowledge that the law ‘is either missing entirely or could use a whole lot more of.’<sup>24</sup> The kinds of knowledge that law needs include understandings of ‘human nature in its nuanced complexity’ and modes of reasoning that are emotional, intuitive and contextual.<sup>25</sup>

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<sup>21</sup> Manderson, *Kangaroo Courts and the Rule of Law*, above n 20, 20; Baron, above n 16; Mark Antaki, ‘Genre, Critique, and Human Rights’ (2013) 82 *University of Toronto Quarterly* 974.

<sup>22</sup> Austin Sarat et al, ‘The Concept of Boundaries in the Practices and Products of Sociolegal Scholarship: An Introduction’ in Austin Sarat et al (eds), *Crossing Boundaries: Traditions and Transformations in Law and Society Research* (Northwestern University Press, 1998).

<sup>23</sup> Baron, above n 16.

<sup>24</sup> On terminology and its discontents, note that Baron does not use the term ‘movement’ because she finds the work in this field too heterogeneous to be classed as a movement: *ibid.*

These qualities are then counter-posed to law, which is viewed to be ‘detached, logical, and abstract.’<sup>26</sup>

The approach that Baron is critiquing supports a widely accepted discourse that law as a discipline is a ‘largely empty domain composed mainly of rules, a barren realm of technocratic doctrinal manipulation.’<sup>27</sup> These particular accounts of ‘the legal’ are decidedly limited in scope as they fail to take into account critical renegotiations of ‘what the “legal” realm comprises.’<sup>28</sup> Robert Weisberg expresses this view especially sharply:

[M]uch of the law-literature scholarship has produced skimpy intellectual results because it combines overly conventional readings of literature with a complacent understanding of law, sometimes masking itself in the self congratulatory tones of broad cultural understanding.<sup>29</sup>

By constructing the law as ‘missing’ qualities that can be found within literature and literary criticism, scholars of ‘law and literature’ disregard or ignore law’s status as a discourse that relies (as has been commonly observed) on language, rhetoric and persuasion.<sup>30</sup> Baron observes that the claims about literature’s importance for law are formulated along the lines of ‘literature, unlike law ...’, asserting ‘likenesses and unlikeness’ as a basis for engagement.<sup>31</sup> This line of argument is directly at odds with the foundational assumption of law *as* literature scholarship, which holds that ‘structural commonalities’ across the disciplines ‘provide the ground for a fruitful critique of the law.’<sup>32</sup> Indeed, there is nothing natural about classifying legal discourse

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<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid 2775.

<sup>28</sup> Kleinhans, above n 8, 188. Much ‘law and literature’ scholarship focuses not only on state law, but on state law at its highest levels—and conspicuously, often on the judgments of superior courts. For one such offender, see David Ray Papke, ‘Preface’ in David Ray Papke (ed), *Narrative and the Legal Discourse: A Reader in Story Telling and the Law* (Deborah Charles, 1991) 1, where Papke writes that ‘if the courtroom is the prototypical forum for legalistic storytelling, the appellate opinion is the prototypical legal text.’ See also Martha-Marie Kleinhans and Roderick A Macdonald, ‘What Is a Critical Legal Pluralism?’ (1997) 12 *Canadian Journal of Law and Society* 25.

<sup>29</sup> Weisberg, above n 6, 2–3.

<sup>30</sup> For a clear discussion of law and literature’s common interest in and reliance upon rhetoric, see James Boyd White, ‘Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life’ (1985) 52 *University of Chicago Law Review* 684; see also Balkin and Levinson, above n 6.

<sup>31</sup> Baron, above n 16, 2776.

<sup>32</sup> Kleinhans, above n 8, 203.

apart from the realm of the humanities; as Balkin and Levinson note, 'law's thoroughly rhetorical nature' strongly connects it to the traditions of the humanities.<sup>33</sup> Yet such a connection is frequently disavowed because it undermines the law's use of scientism and 'technocratic forms of discourse that draw more on the social and natural sciences than on the humanities' in order to 'to establish its authority and to legitimate particular acts of legal and political power.'<sup>34</sup>

Thus, my argument in favour of adopting literary methods of critique and theories of narrative aims in part to address these critiques of 'law and literature' scholarship. One way to frame this response is to focus on the forms of language and argument that are common to both law and literature, and to highlight the way in which disciplinary divisions and claims to 'unique' knowledge are not neutral or value-free: they are determined by particular 'social, political and economic conditions, patterns of institutional organisation, and structures of power of many kinds.'<sup>35</sup> Here, I argue that one structure of power and argument worth attending to is that of the narrative form.<sup>36</sup>

At this juncture it is critical to note that, while some 'law and literature' scholarship has failed to adopt a critical approach to disciplinary knowledge, much of it has proceeded with an acute awareness of the implications of claiming that law 'needs' literature. Gerwitz, for example, notes that the label 'law and literature' may mislead

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<sup>33</sup> Balkin and Levinson, above n 6, 184.

<sup>34</sup> Ibid 182.

<sup>35</sup> Roger BM Cotterrell, 'Law and Sociology: Notes on the Constitution and Confrontations of Disciplines' (1986) 13 *Journal of Law and Society* 9, 10. For Thomas Kuhn's pioneering account of how these 'disciplinary formations' or paradigms function to achieve collective self-validation within the natural sciences, see Thomas S Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press, 3rd ed, 1996).

<sup>36</sup> In advocating for a greater awareness of the theoretical bases of 'interdisciplinarity,' Austin Sarat argues that the 'and' of law and society represents both a desire to bridge the divide between disciplines, as well as the paradoxical limitation of such an enterprise. For Sarat, the paradox involved in 'law and...' endeavours is that before boundaries can be bridged or crossed, they must first be identified, thus making them more tangible and consequential. Sarat et al, above n 22, 1–2. See also Sarat, above n 1, 8. In many ways, the concession of the social fact of 'disciplines' is unavoidable within the methodological discourse of interdisciplinarity; although, as Manderson and Mohr note, these institutional structures are not inevitable but rather result from the development of disciplinary structures of thinking within universities since the 19<sup>th</sup> century, which occurred as part of the movement towards professionalisation and specialisation: Desmond Manderson and Richard Mohr, 'From Oxymoron to Intersection: An Epidemiology of Legal Research' (2002) 6 *Law Text Culture* 159.

as much as it assists because many legal scholars writing in the ‘law and narrative field’ have no particular literary expertise and ‘do not see themselves as using techniques of literary criticism in their analysis of legal subjects.’<sup>37</sup> Instead, ‘law and narrative’ authors, who are critical of law’s claims to autonomy, deal with the *legal* subjects of rhetoric and storytelling, and argue for a self-consciousness about these subjects that is not essentially literary or external to law as a discipline.<sup>38</sup> It is this way of framing law’s relationship with narrative that I think is most productive, and in particular the focus on law’s rhetorical modes and styles of argument, which can both include and exclude narrative forms.<sup>39</sup>

## ii. *Refusing Sentimental and Instrumentalising Approaches to Literature*

Like law, literature and literary studies are constituted by particular ideologies and disciplinary norms.<sup>40</sup> While ‘law and literature’ scholarship has risked constructing law as merely ‘instrumental, rational, non-emotional, mechanical, and seriously doctrinal,’<sup>41</sup> it has simultaneously been guilty of constructing the literary as unconditionally good – and of instrumentalising the ‘insights’ of literature and literary theory.

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<sup>37</sup> Gerwitz, above n 4, 4. Many works proceed with this awareness and echo critiques of the term ‘interdisciplinary’ to describe law and literature projects. Indeed, the works often presented as founding the law and literature movement were fundamentally concerned with reiterating law’s historical and contemporary place within the humanities and its deep connection to literature and rhetoric: see, eg James Boyd White, *The Legal Imagination* (University of Chicago Press, 2nd ed, 1985); Robert M Cover, ‘Foreword: Nomos and Narrative’ (1983) 97 *Harvard Law Review* 4. And for a general critique of ‘interdisciplinarity,’ see: Sarat et al, above n 22.

<sup>38</sup> Gerwitz, above n 4, 4; see also Aristodemou, above n 9, 6.

<sup>39</sup> Brooks captures the central but frequently unacknowledged place of narrative in law:

The place and status of narrative in the law and in legal studies strike me as uncertain and ambiguous. On the one hand, trial advocates have known, presumably, since antiquity—that success in the court of law depends upon telling an effective and persuasive story ... On the other hand, one looks in vain in legal doctrine, and in judicial opinions, for any explicit recognition that “narrative” is a category for adjudication: that rules of evidence, for instance, implicate questions of how stories can and should be told.

Peter Brooks, ‘Inevitable Discovery: Law, Narrative, Retrospectivity’ (2003) 15 *Yale Journal of Law & the Humanities* 71, 71.

<sup>40</sup> On this point, see Goodrich, above n 11; and for an application of Goodrich and a critique of the novel as a form, see Patricia Tuitt, ‘Literature, Invention and Law in South Africa’s Constitutional Transformation’ in Karin Van Marle and Stewart Motha (eds), *Genres of Critique: Law, Aesthetics and Liminality* (Sun Press, 2014) 75.

<sup>41</sup> Weisberg, above n 6, 16; and Baron, above n 16, 2775.

Those writing in the ‘law *in* literature’ field have at times accepted the humanistic notion that one is morally improved by exposure to and encounters with great art.<sup>42</sup> As Kevin Crotty puts it, the assumption here is that law is governed by the insensitive application of legal rules; that it is ‘inherently fussy, petty and repressed and needs to be supplemented and corrected by the humane values of literature.’<sup>43</sup> Law and literature projects have relied on the universalised claim that literature can give us a better ‘sense of the complex nature of the human condition’ through its depiction of human nature in ‘great’ books.<sup>44</sup> This claim, explicit or implicit within ‘law and literature’ scholarship, is problematic. Crotty rightly asks, why assume that literature is ‘an especially privileged source of moral illumination?’<sup>45</sup> Assuming literature’s ‘humanising potential’ ignores the interpretative and disciplinary processes at play both in the creation and the use of literary texts as sources of knowledge. This view of literature as monolithic and monolithically good gives literature a claim to ‘good authority’, similar to claims that law, as a scientific and rational form of knowledge, is also a source of good authority.<sup>46</sup>

Scholarship that treats all literature as humanising or as teaching a ‘better’ morality sets about searching for unity and coherence in the discipline of literature and resolving the text’s complex and contradictory meanings into a singular and stable one.<sup>47</sup> As Maria Aristodemou points out, the humanist assumption that literary texts

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<sup>42</sup> Balkin and Levinson, above n 6, 182–3. One rather florid expression of this notion is Papke’s claim that ‘narrative is a crucial tool for comprehending human existence and for placing ourselves in a history and a cosmos. Narrative order deepens and enriches our lives, and narrative surfaces in all human products’: Papke, above n 28, 1.

<sup>43</sup> Kevin Crotty, *Law’s Interior: Legal and Literary Constructions of the Self* (Cornell University Press, 2001) 14.

<sup>44</sup> For Manderson, such work reflects a tendency among law and literature scholars to cling to a ‘time before the crisis of modernity shook literature’s claims to a determined and complete textuality’: Manderson, *Kangaroo Courts and the Rule of Law*, above n 20, 20.

<sup>45</sup> Crotty, above n 43, 14.

<sup>46</sup> Manderson, *Kangaroo Courts and the Rule of Law*, above n 20, 20–22; see also Desmond Manderson, ‘Mikhail Bakhtin and the Field of Law and Literature’ (2012) 8 *Law, Culture and the Humanities* 1. Manderson calls this law and literature’s ‘romantic fantasy’, namely that literature is salvific and can ‘complete’ law: *Kangaroo Courts* at 20.

<sup>47</sup> Terry Eagleton, *Literary Theory: An Introduction* (Blackwell Publishing, 1996) 30. Richard Posner expresses a similar criticism of the potential of literature to ‘humanise’ its readers, and members of the legal profession in particular. Posner originally rejected the value of the enterprise of ‘law and literature’ for law, since (to put it crudely) law is about rules and such rules are determined by economics, whereas literature is neither about rules nor economic forces. Over the course of 20 years

can illuminate our moral experiences ‘invites criticism that the humanist critics imposed their *own* coherent understanding on the text.’<sup>48</sup> Further, it seems both idealistic and dangerous to assume that lawyers immersed in literature will have a greater capacity to identify and apply moral and political values.<sup>49</sup> Aristodemou explains that the value of literature varies from one theorist to the next:

Marxist critics see in texts a perpetuation of middle class ideology, feminists see a preference for the male over the female, gay critics a compulsory heterosexuality, post-colonial critics a preferences for the European master...<sup>50</sup>

What is more, we must also recognise the unspoken biases at play in assessments of what ‘counts’ as literature and in how the label of literature is applied. What forces, or which people, let some text exists as ‘literary’ and worthy of study and exclude other texts from our attention? What are the cultural and historical origins of ‘narrativity’ as described within ‘narrative theory,’ and how do ‘accepted’ storytelling practices vary depending on culture, context and place? That the status of literature is attributed to some texts and not others must depend on a combination of ‘historical, economic, legal and political factors’, which vary across culture, time and place.<sup>51</sup> Indeed, as I argue in the final chapter of this thesis, we should not only attend to the narrative form that is demanded of refugee applicants, but also to the genre of the narrative. In so doing, I seek to locate ‘narratives’ and particular narrative forms within their cultural and social contexts. In this case, the context of RSD is one that belongs to the decision-maker and the institution of refugee decision-making, rather than to the object of the decision-making, the refugee applicant.

Within the law and literature movement, ‘outsider storytelling’ scholarship has at times been particularly guilty of instrumentalising narrative forms. I briefly address

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Posner revised what he calls his ‘negative tone’ and his defence of his own ‘academic specialty’ of law and economics to argue that law and literature is a ‘promising field’ but only insofar as its focus is on the literary canon and not on texts which Posner has deemed as having ‘no literary character.’ Clinging to the ‘canon’ as the only literature worth attending to, in the most recent version of his book, *Law and Literature*, Posner bemoans the ‘pervasive left-liberal political bias’ of law and literature and presents his own text as ‘not quite a treatise, but [as] the closest that the law and literature movement has come to producing one’: Richard A Posner, *Law and Literature* (Harvard University Press, 3rd ed, 2009) xv, 6–7.

<sup>48</sup> Aristodemou, above n 9, 5.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid 6. See also Edward W Said, *Culture and Imperialism* (Vintage Books, 1993).

<sup>51</sup> Aristodemou, above n 9, 7.



treatments of narrative within outsider storytelling scholarship here because they exist in instructive contrast to my approach to narrative in the following chapters. Law and outsider storytelling scholarship—alongside critical race studies and feminist legal theory—has highlighted the narrative voices and narrative styles that have long been ignored, marginalised or actively discredited by the law and legal epistemologies.<sup>52</sup> However, the claim that storytelling is a ‘powerful’ method of engagement for outsiders can lead to the uncritical representation of stories ‘as sentimental, personal and individual’ and ‘true,’ as opposed to law, which is objective, universal, and limitless.<sup>53</sup> A troubling aspect of such approaches is that they problematically attribute the assumed qualities and epistemology of storytelling to women, the ‘other’ of man, or to ‘natives’ and racial minorities, the ‘others’ of the West.<sup>54</sup> Certain outsider scholarship also puts much store in the social-change or transformative potential of narratives and ‘telling stories,’ at times obscuring the fact that power relations define who can speak and when, and whose stories will be listened to and on what terms.<sup>55</sup>

Though, in articulating a critical approach to law and narrative, the contribution of outsider storytelling scholarship to critical understandings of the law, and to the forms of argument and language it adopts, should not be dismissed. Outsider storytellers’

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<sup>52</sup> See Kathryn Abrams, ‘Hearing the Call of Stories’ (1991) 79 *California Law Review* 971.

<sup>53</sup> Delgado, for example, writes that ‘[s]tories humanize us. They emphasize our differences in ways that can ultimately bring us closer together. They allow us to see how the world looks from behind someone else’s spectacles. ... Hearing stories invites hearers to participate, challenging their assumptions, jarring their complacency’: ‘Storytelling for Oppositionists and Others: A Plea for Narrative’ in David Ray Papke (ed), *Narrative and the Legal Discourse – A Reader in Storytelling and the Law* (Deborah Charles Publications, 1991) 289, 312. For perspective on and critiques of the ‘truth’ or particular ‘voice’ of outsider narratives see, for eg, Farber and Sherry, above n 16; Barsky, above n 16, Chapter 6; Abrams, above n 52.

<sup>54</sup> Razack, above n 16, 37. Razack draws on the work of Trinh T Minh-Ha, ‘Not You/Like You: Post-Colonial Women and the Interlocking Questions of Identity and Difference’ in Gloria Anzaldúa (ed), *Making Face, Making Soul = Haciendo Caras: Creative and Critical Perspectives by Feminists of Color* (Aunt Lute Foundation Books, 1990) 373.

<sup>55</sup> Ewick and Silbey explain this approach most succinctly: ‘[s]ome scholars contend that narratives have significant subversive or transformative potential. ... By allowing the silenced to speak, by refusing the flattening and distorting effects of traditional logico-scientific methods and dissertative modes of representation, narrative scholarship participates in rewriting social life in ways that are, or can be, liberatory’: Ewick and Silbey, above n 3, 199. Yet not all ‘storytelling’ scholarship rests on the claim that stories will directly transform or unsettle law’s assumptions and modes of reasoning; as Ewick and Silbey also note, ‘[a] central, if not the central, concern underlying narrative studies ... is to give voice to the subject: to collect, interpret, and present materials about human experiences that preserve this voice of the subject’: at 199.

analyses of the narratives and arguments sanctioned by law-makers and decision-makers call into question the law's presentation of particular raced, classed and gendered perspectives as 'common sense,' to the exclusion of the experiences of those 'outside' of the power to endorse particular versions of events as true and reasonable. Indeed, this scholarship has highlighted law's reliance on 'stock stories,' a concept that Brooks defines as common, culturally accepted and sanctioned stories about how and why things function in the world, and which I address in detail in Chapter Four, concerning the stock story of refugee flight.<sup>56</sup>

The attention to the narrative form that is inherent in outsider storytelling scholarship also challenges the adoption of an 'objective writing style to espouse legal doctrine,'<sup>57</sup> since objectivity and so-called rationality are not the only methods by which law constructs its authority.<sup>58</sup> Equally, the use of storytelling and narratives, which are associated with a 'call to context,' have the capacity to expose the extent to which legal rules and arguments embed particular judgments (or narratives) about the subjects that they regulate and control. Outsider storytelling scholarship shows that certain narrative forms reveal the nuances of experiences, even if they cannot lay claim to truth or to universality.<sup>59</sup> My methodological approach, while critical of certain 'law and narrative' scholarship, seeks to show that the turn to literature and narrative as sources of knowledge for *or* about law need not involve flattening the meaning of texts and narratives into a 'single, monolithic voice,' nor does it require the instrumentalising of this knowledge.<sup>60</sup>

Constructions of literature as necessarily humanising, and as a source of truth less governed by social forces than law, lack a careful approach to this particular form of 'non-legal' knowledge. According to Balkin and Levinson's provocative argument, it is *inevitable* that 'lawyers, judges, and legal scholars are drawn to use what they

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<sup>56</sup> Brooks, 'Narrative in and of the Law', above n 19, 415. On the stock story, see Delgado, above n 16; Peter Brooks, 'Narrative Transactions: Does the Law Need a Narratology?' (2006) 18 *Yale Journal of Law & the Humanities* 1; Roland Barthes, *The Rustle of Language* (University of California Press, 1989).

<sup>57</sup> Kleinbans, above n 8, 192.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid* 201.

<sup>60</sup> *Ibid* 192.

borrow from the humanities or the social sciences as means of producing authority,’<sup>61</sup> and if that borrowed work does not enhance the law’s authority, it will be re-crafted so that it does.<sup>62</sup> I disagree that this is an inevitable consequence of law’s engagement with other disciplines, as Balkin and Levinson claim, but it is certainly a danger. For example, the use of ‘outsider’ narratives as untroubled sources of information about marginalised groups can, at times, pay insufficient attention to the conditions in which such texts are produced, and to the power relations involved in who must ‘tell’ these stories versus who gets to listen and decide whether to accept the stories as factual.<sup>63</sup> Stories, too, may be ‘inauthentic, atypical or untrue.’<sup>64</sup> Readings of individual pieces of literature are contested, just as there are ‘many truths present in the various perspectives provided by different narrating voices.’<sup>65</sup>

Desmond Manderson identifies an approach in law and literature studies along these lines, which he argues treats ‘stories’ in novels as an ‘unproblematic vehicle for information about people’s lives, and for the truth of their particular perspective.’<sup>66</sup> He identifies certain approaches to the novel as ‘the realisation of particular perspectives’ and argues that a more ‘evidential approach to literature could hardly be imagined.’<sup>67</sup> Indeed, the use of literature or testimony as a source of ‘truthful’ and authentic accounts of experience must acknowledge Hayden White’s commonly cited argument that narrative as a form inevitably ‘fictionalises’ or distorts the events that it seeks to depict.<sup>68</sup>

All of the above relates to the project at hand. In my turn to narrative and narrative forms in this thesis, I self-consciously seek to avoid claims that narrative will empower or bring justice to so-called outsider groups merely by virtue of its form or its expression. My methodology characterises the narrative form required of refugee

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<sup>61</sup> Balkin and Levinson, above n 6, 180.

<sup>62</sup> Ibid.

<sup>63</sup> Razack, above n 16, 36.

<sup>64</sup> Kleinbans, above n 8, 198; see also Farber and Sherry, above n 16, 830.

<sup>65</sup> Kleinbans, above n 8, 198.

<sup>66</sup> Manderson, ‘Mikhail Bakhtin and the Field of Law and Literature’, above n 46, 7.

<sup>67</sup> Ibid.

<sup>68</sup> Hayden White, *The Content of the Form: Narrative Discourse and Historical Representation* (Johns Hopkins University Press, 1987) 26–7. See also Kleinbans, above n 8, 200.

applicants as a culturally specific version of storytelling and autobiography. And, following work by Manderson, Binder and Weisberg, as well as Barsky's critical approach to the form of argument within refugee testimony, I argue that a focus on the form rather than the content of narrative is a means to avoid presenting certain literary narratives as instrumentalised truths.<sup>69</sup> As I express throughout the thesis, it is not difficult, in the context of the RSD oral hearing, to remain sceptical of the view that narrative forms are necessarily redemptive or that they always undermine the power of law's rule and norms. For refugee applicants, the experience of the hearing and the radically uneven power of the applicant vis-à-vis the decision-maker immediately signals that the chance to speak and construct a narrative neither necessarily empowers the speaker nor contests the law's authority.

A better formulation for the enterprise of law and literature, more sound than certain outsider storytelling approaches, is that it is worth engaging 'people from different disciplines to confront problems of common interest.'<sup>70</sup> Such encounters should be 'discomfiting,' or in Clifford Geertz's words, 'discomposing.'<sup>71</sup> A firm premise for a critical engagement across law, literature and narrative theory is Weisberg's remark that these disciplines 'are parallel linguistic phenomena concerned with ambiguity and meaning,' a view that comports with the anthropological tenet that 'both law and literature are part of the formal archaeology of a culture.'<sup>72</sup>

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<sup>69</sup> See Manderson, *Kangaroo Courts and the Rule of Law*, above n 20; Binder and Weisberg, above n 20; Robert F Barsky, *Constructing a Productive Other: Discourse Theory and the Convention Refugee Hearing* (John Benjamins Publishing, 1994); Barsky, above n 16 especially Chapter 6; see also James Boyd White, 'Law as Language: Reading Law and Reading Literature' (1981) 60 *Texas Law Review* 415. Certainly, in my review of law and literature scholarship I have observed a move away from instrumentalised presentations of literature (that is, reading literature for the lessons it straightforwardly presents about law and justice) and towards a critical conception of the social context of literary texts and literary theories. Such approaches see the *jurisprudential* value of such texts, as sources for debate, rather than as sources of 'evidence', didactic legal lessons or rules. And, of course, at its outset 'law and literature' scholarship was motivated by the two disciplines' common *forms* rather than a turn to literary texts as sources of necessary edification.

<sup>70</sup> Gerwitz, above n 4, 4.

<sup>71</sup> Weisberg, above n 6, 3; citing Geertz, above n 1, 19–35. Geertz writes that interdisciplinary work should not aim to establish an 'interdisciplinary brotherhood,' but to produce a 'conceptual wrench,' or 'a sea change in our notion not so much of what knowledge is but of what it is we want to know': at 35.

<sup>72</sup> Weisberg, above n 6, 45.

### **Part Three. Narrative as Methodology for Assessing Refugee Testimony**

This final part of the chapter presents a critical definition of narrative and an explanation of how I aim to use narrative theory to examine the presentation and assessment of refugee testimony. By way of an introduction to my approach in the following chapters, I engage here with literary and narrative theory, as well as law and narrative scholarship, in order to highlight the theoretical concepts I deploy to read and critique the refugee oral hearings in Australia and Canada. The definitional elements of narrative that I outline here frame my analysis throughout the thesis, and I return to them in each chapter. In the following paragraphs, I explore the definitions and ‘minimum conditions’ for narrative, as well as the characteristics of a ‘stock story,’ which I then put to work in my examination of applicant testimony and decision-makers’ responses in RSD oral hearings.

The narrative of narrative theory is defined in a range of ways and across of a range of disciplines. Peter Brooks, writing at the intersection of law and literature, claims that narrative is our literary sense of how certain stories go together, and our expectations of their beginnings, their middles and their ends.<sup>73</sup> Patricia Ewick and Susan Silbey describe narrative as a sequence of statements ‘connected by both a temporal and moral ordering,’ which ‘depend for their production and cognition on norms of performance and content’,<sup>74</sup> such that social norms and context establish what constitutes a ‘successful’ narrative.<sup>75</sup> Often, scholars compare the narrative form to a range of other non-narrative forms, in order to effectively reveal what distinguishes or defines a narrative.<sup>76</sup>

Narrative theorists have observed the tendency for narrative ‘to cover a wider and wider territory, taking in ... an ever-broadening range of subjects for inquiry,’ moving from its original home in literary studies to, amongst other places, history, politics,

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<sup>73</sup> Brooks, ‘Narrative in and of the Law’, above n 19, 415.

<sup>74</sup> Ewick and Silbey, above n 3, 198.

<sup>75</sup> Ibid 207.

<sup>76</sup> For example, Hayden White compares narrative-based histories to annals and chronicles, which he argues are (to varying degrees) non-narrative forms: White, above n 68. Bruner uses syllogistic statements as his non-narrative examples: Jerome S Bruner, *Actual Minds, Possible Worlds* (Harvard University Press, 1986).

film, art, law and medicine.<sup>77</sup> Contemporary narrative theory is marked by claims that narrative is ‘everywhere’; that it is ‘bound up with power, property and domination’; and that we not only tell stories but that they ‘tell’ and constitute us.<sup>78</sup> Narrative theory as an approach in law has been unified by the claim that the narrative form is a useful tool when exploring how the law constructs meaning and authority. As stated, these applications of narrative theory have treated legal texts as legitimate subjects of literary criticism and as well as treated narrative as a form of legal rhetoric.<sup>79</sup> Critically, narrative theorists interrogate how the narrative form reorganises stories ‘to give them a certain inflection and intention, a point.’<sup>80</sup> These scholars also consider narratives as *making-up* law’s normative world and claim to authority. And, as Robert Cover so persuasively argues, no legal institution or prescription ‘exists apart from the narratives that locate it and give it meaning,’ such that, ‘for every constitution there is an epic, for every decalogue a scripture.’<sup>81</sup>

What narrative is, though, has at times been taken for granted by legal academics seeking to put narrative to work.<sup>82</sup> Such scholars have also been guilty of defining narrative in a purely oppositional mode, as ‘not legal argument’ or ‘not abstract reasoning’; and as loosely associated with the specific, the personal and the contextual.<sup>83</sup> I do not think this approach is sufficient when attending to the law’s narrative forms, and indeed, this binary definition is not readily accepted within scholarship produced by narrative theorists or within narrative theory, where the

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<sup>77</sup> James Phelan and Peter J Rabinowitz, *A Companion to Narrative Theory* (Wiley, 2005) 2.

<sup>78</sup> Andrew Bennett and Nicholas Royle, *An Introduction to Literature, Criticism and Theory* (Pearson Longman, 3rd ed, 2004) 41. See also Martin McQuillan (ed), *The Narrative Reader* (Psychology Press, 2000) 4; Martin Cortazzi, *Narrative Analysis* (Routledge, 2014).

<sup>79</sup> Brooks, ‘Narrative in and of the Law’, above n 19, 415; see generally Brooks and Gerwitz, above n 6.

<sup>80</sup> Brooks and Gerwitz, above n 6, 17.

<sup>81</sup> Cover, above n 37, 4. Or as Bruner puts it, narrative is the principle by which ‘people organize their experience in, knowledge about and transactions with the social world’: Jerome S Bruner, *Acts of Meaning* (Harvard University Press, 1990) 35. And for an example of treating non-legal narratives as law, see Desmond Manderson, ‘Desert Island Discs (Ten Reveries on Pedagogy in Law and the Humanities)’ (2008) 2 *Law and Humanities* 255.

<sup>82</sup> For example, the relationship between ‘story’ and ‘narrative,’ used interchangeably in legal scholarship, is a vexed issue within narrative theory; see McQuillan, above n 78, 3–6. See also Balkin and Levinson, above n 6.

<sup>83</sup> See, for example, Gerwitz, above n 4, 135.

content, definition and history of narrative is the subject of inquiry and debate.<sup>84</sup>

These debates are expansive and in many ways map onto much broader histories of classicism, modernism and post-modernism within literary theory, but they prove useful when seeking to understand what the demand for narrative forms within the law might entail.

The question of what constitutes a narrative is a vexed one.<sup>85</sup> A precise definition of the narrative form is particularly difficult to determine when attempting to answer the threshold question of ‘when is a text not a narrative?’ Interrogating standard definitions of narrative, Martin McQuillan critiques the place of the novel as ‘paradigmatic of all narrative production,’ particularly within ‘theories of narrative,’ writing that ‘reliance of narrative models upon the form of the novel is a consequence of the discipline of narrative theory’s beginnings within departments of literature in the French, and later Anglo-American academy.’<sup>86</sup> In contrast to definitions drawn from culturally-located, ‘model’ narrative forms, McQuillan argues that narrative is any minimal linguistic act that depends for its meaning on an inter-subjective use of language. In this way, he proposes that ‘pass the salt’ may be considered to be a narrative because it depends on context for its meaning, involves an inter-subjective experience and potentially describes ‘events existent in a chain of temporal causality or at least contingency.’<sup>87</sup>

Distilling the definition of narrative to its bare essence provides a way to consider ‘unconventional’ narratives as narratives nonetheless—and allows us to ask questions about the *kinds* of narrative that are demanded of particular legal subjects. It also reveals those aspects of narrative that belong to ‘model’ or novel-based narrative forms as opposed to less standard narratives. For example, literary authors who deliberately disrupt orthodox narrative structures as a storytelling device are nonetheless producing narratives, even if the narratives are non-linear or disorienting.

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<sup>84</sup> For a potted but very lucid history of narrative, narratology and narrative theory within the discipline of literary criticism, see David Herman, *Basic Elements of Narrative* (John Wiley & Sons, 2011) 22–32.

<sup>85</sup> McQuillan, above n 78, 4.

<sup>86</sup> Ibid 9.

<sup>87</sup> Ibid 8; Seymour Benjamin Chatman, *Coming to Terms: The Rhetoric of Narrative in Fiction and Film* (Cornell University Press, 1990).

A wide range of linguistic acts may fall into the category of narrative, but as McQuillan argues, there are still certain narratives that are held up as model forms, and such narratives carry weight by virtue of their status as ‘standard’ or recognisable narratives.

Thinking about narratives in terms of style and genre is productive for the questions I explore in this thesis, as it allows me to take up the idea that a particular kind of narrative is required of refugee applicants. Thus, a critical part of my argument is that particular *genres* of narrative (as opposed to the pure narrative form) guide expectations in the refugee hearing. At the same time, careful consideration of the definition of narrative helps to avoid constructions of legal rhetoric and ‘the law’ as being devoid of narrative. Recognising the place of narrative within the law, as that which constitutes and constrains what may be said, makes it much more difficult to romanticise narrative as a categorically higher or better form than the law, or indeed as something that that law ‘needs.’ Equally, recognising narrative’s place within the law allows research that employs narrative to critique the particular genres of narrative at play within the law and legal decision-making. Exploring how a demand for narrative influences the reception of testimony involves examining why certain stories are deemed to be compelling and noticing the ways in which actors ‘rely on narrative forms in interpreting and making sense of their worlds.’<sup>88</sup>

*i. Finding a Critical, Working Definition of Narrative*

As stated in the Introduction, I rely in this thesis on Ewick and Silbey’s definition of the narrative form, and their synthesis of a number of theories of narrative, to express three core elements of narrative.<sup>89</sup> As opposed to theorists who offer a very broad definition of what can constitute narrative, Ewick and Silbey suggest that ‘successful’ narratives have definite characteristics. Their definition is compelling because its criteria do not limit what constitutes a narrative to ‘model’ narrative forms or

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<sup>88</sup> Ewick and Silbey, above n 3, 202.

<sup>89</sup> I note here that the three elements of narrative I rely on here do not engage with the history, central debates and differing approaches to narrative study within narrative theory. While these subjects are beyond the scope of my project, for a solid treatment of the history of narrative from Russian formalism to structuralist and scientific theories of narratology, and through to poststructuralism (and for a critique of this linear history), see Herman, above n 84, 23–33; McQuillan, above n 78, ix–xii; White, above n 68.



particular literary genres. In their piece ‘Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative,’ they contend that three core elements constitute successful narratives: some form of selective appropriation of past events and characters; a temporal ordering of the events within the narrative; and characters and events that are related to one another and to some overarching structure, ‘often in the context of opposition or struggle,’ a criterion that is otherwise called emplotment or ‘relationality of parts.’<sup>90</sup> As Ewick and Silbey explain, the requirements of ‘temporal and structural ordering suggest both “narrative closure” and “narrative causality”: in other words, a statement about how and why the recounted events occurred.’<sup>91</sup> In my argument about narrative in refugee testimony, I present the demand for testimony as according with this understanding of the narrative form but also as calling for *direct* causative relationships, a chronological ordering and a linear relationship between events and their outcomes.

Narrative analyses and narrative-based methodologies take many forms and occur across disciplines. The method of narrative analysis that I adopt from primarily within literary theory, for example, looks rather different from methods of narrative analysis within psychology, sociolinguistics or anthropology.<sup>92</sup> In a careful reflection on the ‘proliferating interest’ in narrative within academic research, Ewick and Silbey provide a ‘sociology’ of how narrative has been used within sociolegal scholarship in particular,<sup>93</sup> identifying three ways in which narrative-based methodologies have entered scholarship. The first is where narrative is the object of inquiry, encompassing research that focuses on how narratives function in mediating reality and constituting identities.<sup>94</sup> Second, narrative may be the method of inquiry, whereby scholars collect or examine existing narratives in relation to a particular subject, as a method of

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<sup>90</sup> Ewick and Silbey, above n 3, 200.

<sup>91</sup> Ibid.

<sup>92</sup> But for a summative account of each one of these, see Cortazzi, above n 78.

<sup>93</sup> Ewick and Silbey, above n 3, 201.

<sup>94</sup> Ibid 202. Ewick and Silbey include here research that addresses how actors rely on narrative to communicate and make sense of their worlds; some of this research also explores the ‘conditions of narration’ and how these conditions may give rise to reasonable, appropriate or persuasive narratives in a particular setting.

‘accessing or revealing some other aspect of the social world.’<sup>95</sup> Finally, narratives may also be the product of research. Here, social researchers act *as* story-tellers and produce accounts of everyday life or particular phenomena.<sup>96</sup> Indeed, even in fields where scholars are not self-consciously creating narrative, sociolegal and sociological scholarship nonetheless produces narratives about an area or topic of inquiry.<sup>97</sup>

The above reflections on narrative as a method provide a landscape in which to locate my use of narrative and narrative theory. Following Ewick and Silbey’s taxonomy of narrative within sociolegal research, my work primarily focuses on narrative as the *object of inquiry*, and asks how narrative and narrative forms mediate reality and shape meaning in the RSD hearing room.<sup>98</sup> Where the narrative form is the object of inquiry, as in this thesis, part of such a project involves explicating a working definition of narrative and the elements of narrative theory used, beyond thin claims that narratives are *not* legal principles or arguments. The definitions offered in this chapter are only a beginning, and they will be developed and critiqued throughout the following chapters.

Alongside the much-contested definitional elements of narrative, one of the important insights of narrative scholarship is that narratives acquire their meanings as a consequence of the context in which they are produced. Narratives, then, ‘are socially organized phenomena which, accordingly, reflect the cultural and structural features of their production.’<sup>99</sup> This insight not only brings to the fore the motivations for narrative production and the setting in which narratives are performed or conveyed as key interpretative factors; it also suggests that narratives take on different meanings

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<sup>95</sup> Ibid. Such work need not focus on what constitutes a particular narrative or the ways in which narratives are produced; it involves a sociological study through narrative, rather than dealing with narrativity as the object of inquiry.

<sup>96</sup> Ibid 203.

<sup>97</sup> Ibid 204. As Riessman explains, where researchers draw together data, they create a ‘metastory’ about what happened, which tells the reader what the data signifies, and edits and reshapes what was told and turns it into a ‘hybrid document.’ Catherine Kohler Riessman, *Narrative Analysis* (Sage Publications, 1993) 12.

<sup>98</sup> Equally, my thesis falls into the category of scholarship that produces narrative as a product of its inquiry, insofar this research involves reading, analysing and representing the narratives of the project’s participants. In so doing, I unavoidably create a new, subjective set of narratives about the participating refugee applicants, as well as the events upon which their claims to protection are based. I discuss this further in Chapter Two.

<sup>99</sup> Ewick and Silbey, above n 3, 200.

and forms in different settings. This call to context and situatedness has shaped my approach to analysing refugee testimony in this thesis, particularly my focus on the context of narrative production and analysis of the hearing room as a specific ‘narrative occasion.’<sup>100</sup>

In analysing the relationship between narrative settings and narrative production, David Herman’s definition of narrative and approach to narrative analysis is particularly helpful. Herman defines narrative as first involving a ‘representation that is situated in—must be interpreted in light of—a specific discourse context or occasion for telling.’<sup>101</sup> Although his definition of narrative is very similar to that of Ewick and Silbey, it draws our attention much more directly to the ‘discourse context’ or ‘occasion for telling,’ which I argue is, alongside the narrative form, a valuable contribution that narrative theory can make to analyses of the law and legal forms of reasoning, speech and argument.<sup>102</sup>

## Conclusion

One aim of this chapter has been to set out how a methodology that is informed by a critical approach to law and literature studies will be brought to bear on the presentation and assessment of onshore refugee applicants’ testimony. In this chapter, I have established the theoretical basis for using literature and literary theory to frame my analysis of RSD. This has involved articulating a critical approach to the relationship between law, literature and narrative, and making the argument that literature and narrative are already a central part of the law and its normative world. While there are many incarnations of ‘law and literature’ studies, this particular project answers the call within law and literature scholarship for attention to the *form* of argument and reason in law, and in particular, to the role of the narrative form.

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<sup>100</sup> Herman, above n 84, 17–8.

<sup>101</sup> Ibid 14. In Herman’s analysis, the remaining elements of narrative (which largely map onto Ewick and Silbey’s approach) are that the representation must relate to ‘a structured time-course of particularized events’; that these events ‘introduce some sort of disruption or disequilibrium into a storyworld involving human or human-like agents’; and that ‘[t]he representation also conveys the experience of living through this storyworld-in-flux, highlighting the pressure of events on real or imagined consciousnesses affected by the occurrences at issue’: at 14.

<sup>102</sup> Ewick and Silbey, above n 3, 198.

For the purposes of this thesis, it matters *how* the fields of ‘law’ and ‘literature’ and literary studies are understood when calling for law and legal scholars to pay greater attention to literary modes of analysis. This becomes amply clear in Chapters Four, Five, Six and Seven, which analyse the ways in which narrative influences and shapes the RSD oral hearing. The argument that law *needs* narrative or is apart from it cannot be sustained in my reading of the oral hearing, which is replete with narrative, and as I argue in Chapter Seven, with particular genres of narrative—all of which highlight the unavoidably literary character of the presentation and assessment of refugee testimony.

This discussion of the narrative form and development of a working definition of narrative provides a framework for later chapters’ close reading and qualitative analysis of the 14 hearings included in this thesis. This framework chapter also points toward three of the thesis’s core questions: What is the discursive context of refugee oral hearing? How is the narrative implicated in the hearing? And how do questions of the genre of narrative feature in the hearing? Having outlined here my theoretical assumptions and bases, in the next chapter I explain how I have used this framework to design the empirical elements of this thesis, and to assess the hearing data I have collated.

## **CHAPTER TWO. RESEARCH METHODS AND DESIGN**

### **Introduction**

Chapter One explained the theoretical framework that I am using to interrogate how refugee testimony is presented and tested during the oral hearing. It set out how the theoretical questions raised by law and literature scholarship have influenced the aims of this thesis, and its attention to the form of testimony that refugee applicants are required to give during their oral hearings. It also articulated the extent to which my theoretical approach belongs to a subset of ‘law and literature’ scholarship, which has focused on the form of legal argument and rhetoric in order to reject views of law and literature as entirely separate, bounded realms of knowledge. In that chapter, I argued that a critical approach to the role of narrative within the law is productive in understanding the terms upon which refugee testimony is presented and assessed.

At the outset of my thesis, I decided that access to the full RSD oral hearing was critical to understanding the nature of testimony required of refugee applicants, and to investigating how the conduct of the oral hearing influences, or even determines what kinds of testimony refugee applicants are able to give. The empirical element of this research was propelled by what seemed to be something of an urgent question: given the chorus of criticism regarding credibility determinations evidenced within written decisions, how does credibility assessment play out during the hearing? How do refugee applicants respond when decision-makers ‘test’ evidence and credibility? One of the key conclusions of this thesis is that the way in which evidence is received and tested during the IRB and RRT oral hearing is critical to the process of RSD and to determinations of credibility. The corollary of this point is that the conduct of the entire oral hearing is important, even when parts of the oral hearing do not ‘make it’ into the final decision or do not form the basis of significant credibility or factual findings. The aim of the empirical element of this research was therefore to access RSD oral hearings in full in Australia and Canada and assess their conduct in each jurisdiction.

As noted in the Introduction, the use of empirical data drawn from RRT and IRB hearings locates the project within a body of important, recent work exploring lower-

level refugee decision-making, with a particular focus on credibility determinations. However, the focus on the *proceedings of the oral hearing*, and the presentation and testing of evidence during the hearing, also complements research that has focused on primarily written decisions in this jurisdiction.<sup>1</sup> This chapter outlines the methods I adopted to carry out this research. It presents the contents of the final pool of RSD oral hearings that I refer to as ‘the dataset’ and outlines the methods I used to access those oral hearings. Next, it explains the approach taken to the analysis of the hearings and the nature of the research findings. Finally, this chapter outlines the limitations of both the dataset and my findings, as well as the difficulties encountered in accessing the data. The dataset aims to present a picture of how the refugee applicants present their testimony during the hearing, and how the decision-makers receive, respond to and test this testimony.<sup>2</sup> I also note here that preserving confidentiality was a key concern in the design and execution of the project. Maintaining confidentiality has included anonymising all research participant data and the omission of any identifying information from hearing excerpts and descriptions of claims.

Alongside the use of ‘law and literature’ and narrative theory to theoretically frame the thesis, my approach to both the design and analysis of the dataset have been informed by qualitative research methods.<sup>3</sup> A qualitative approach to the data is well suited to a methodology that builds on law and literature scholarship. Both approaches support a close reading of the hearings *as individual texts* and of each individual text

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<sup>1</sup> See the Introduction to this thesis, at n 38 for an overview of this literature.

<sup>2</sup> As I have noted from the outset, this project does not directly address the role played in the hearings by lawyers or interpreters because my focus is on interactions between decision-makers and applicants. Lawyers and interpreters are of course key figures in these exchanges; however, as I explain later in this chapter, due to the language barriers and the focus of the project, I could not fully assess their roles. This is one of the limitations of my method.

<sup>3</sup> In particular, I draw on qualitative research methods that critique positivist approaches to knowledge and the notion that ‘there exists a fixed and unchanging social reality, or some truth lying ‘out there’ to be discovered’ via objective, value-free tools of empirical observation: Abigail Brooks and Sharlene Nagy Hesse-Biber, ‘An Invitation to Feminist Research’ in Sharlene Nagy Hesse-Biber and Patricia Leavy (eds), *Feminist Research Practice* (Sage Publications, 2007) 1, 13. Instead I adopt an approach to qualitative research guided by what Dorothy Smith has called an ‘alternative way of thinking,’ which involves recognition of the role of interpretation, subjectivity and emotion in all research and ‘knowledge-building’ processes: Dorothy E Smith, *The Conceptual Practices of Power: A Feminist Sociology of Knowledge* (Northeastern University Press, 1990).

as a value source of data and insight.<sup>4</sup> The qualitative analysis methods that I have adopted, along with the size of the dataset and the non-random means by which hearings were accessed, entail that my findings cannot be understood as necessarily representative of either jurisdiction. The dataset, however, is valuable given the small amount of existing empirical research addressing the conduct of the oral hearing. Indeed, a limited body of scholarship has studied the RSD oral hearing through observations or transcripts of the hearing in full.<sup>5</sup> As well, prior empirical research has generally been required to draw conclusions from small hearing samples, due to the difficulties involved in accessing refugee status determination hearings, which I discuss further below.<sup>6</sup> Throughout my analysis, I engage with this existing research

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<sup>4</sup> As Brooks and Hesse-Biber put it, rather than viewing the ‘specific experiences and situated perspectives’ found in qualitative texts as barriers to the objective truth, the subjective qualities of both researchers and research participants may ‘become a tool for knowledge building and ... understanding’: Brooks and Hesse-Biber, above n 3, 13.

<sup>5</sup> See Robert F Barsky, *Constructing a Productive Other: Discourse Theory and the Convention Refugee Hearing* (John Benjamins Publishing, 1994); Walter Kälin, ‘Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing’ (1986) 20 *International Migration Review* 230; Thomas Spijkerboer, *Gender and Refugee Status* (Ashgate, 2000); Cécile Rousseau et al, ‘The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board’ (2002) 15 *Journal of Refugee Studies* 43; Catherine Dauvergne, *Humanitarianism, Identity, and Nation: Migration Laws of Australia and Canada* (UBC Press, 2005); Nienke Doornbos, ‘On Being Heard in Asylum Cases: Evidentiary Assessment Through Asylum Interviews’ in Gregor Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martin Nijhoff Publishers, 2005) 103; Helen Baillot, Sharon Cowan and Vanessa E Munro, ‘Seen but Not Heard? Parallels and Dissonances in the Treatment of Rape Narratives across the Asylum and Criminal Justice Contexts’ (2009) 36 *Journal of Law and Society* 195; Helen Baillot, Sharon Cowan and Vanessa E Munro, ‘“Hearing the Right Gaps”: Enabling and Responding to Disclosures of Sexual Violence within the UK Asylum Process’ (2012) 21 *Social & Legal Studies* 269; Toni AM Johnson, ‘On Silence, Sexuality and Skeletons: Reconceptualizing Narrative in Asylum Hearings’ (2011) 20 *Social & Legal Studies* 57; Hanna Wikström and Thomas Johansson, ‘Credibility Assessments as “Normative Leakage”: Asylum Applications, Gender and Class’ (2013) 1 *Social Inclusion* 92.

<sup>6</sup> Barsky, above n 5: Barsky’s study is based on transcriptions of two Convention refugee claimant hearings in Canada, supplemented by excerpts from other hearing decisions handed down in 1987, as well as a 1987 Federal Court appeal decision. Rousseau et al, above n 5: Rousseau et al’s study was one of the larger studies of RSD hearings. The team examined 40 Canadian case files, referred to them by different professionals associated with RSD in Canada. Of those case files, they accessed and studied 10 audio recordings of the oral hearing in full. Most of the cases examined (87.5 per cent) were of claimants who arrived between 1995 and 1998. Kälin, above n 5: This very early study was based on the author’s observations when acting as a legal representative in Swiss asylum hearings between 1980-83. The precise number of hearings included is not stipulated. Spijkerboer, above n 5: Spijkerboer accessed 252 case files, and analysed six of these files, which included transcript of interview, in detail; Baillot, Cowan and Munro, ‘“Hearing the Right Gaps”’, above n 5: Baillot et al’s UK study drew on the largest-ever sample of RSD oral hearings, with their research analysing 48 tribunal observations, with 12 of these including case file analyses, along with 104 semi-structured interviews with stakeholders between 2009-10. One reason for the large sample may be the public nature of the British Asylum and Immigration Chamber of the First-tier Tribunal hearing. Baillot, Cowan and Munro, ‘Seen but Not Heard?’, above n 5: This was a pilot study for the Baillot et al piece

on the RSD oral hearing in refugee-receiving states, both to contextualise my observations and to highlight where my observations supplement or correspond with the studies of the RSD oral hearing to date.<sup>7</sup>

## Part One. The Dataset

In Australia and Canada, the RRT and the IRB respectively represent the decision-making stage where the applicant must give a full and typically lengthy oral account

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referred to above. It was based on the observation of one hearing only, along with interviews with six legal representatives who had extensive experience in representing female asylum claimants, one asylum seeker and four workers in the UK asylum-support sector. The authors noted that '[g]aining access to individual asylum cases was difficult particularly given the constraints of time and locality' (205). Johnson, above n 5: Johnson does not specify how many hearings were included in the study and does not make extensive, direct reference to the hearings in this piece. The research did, however, involve observation of 'the Asylum and Immigration Tribunals at Taylor House in Islington (London) for a period that spanned three to four months' and interviews with ten advocates and six NGOs (63); Wikström and Johansson, above n 5: this piece focuses on two hearings of male applicants from 2009-10 in Sweden. Although the authors did not access or attend the hearings in full, the case files contained what in Sweden are called the 'hearing protocols.' The protocols are written in question/answer form and produced by the officer during the hearing. The piece is drawn from a broader project, which accessed 100 anonymised case files of applicants appearing before the Swedish Migration Board.

<sup>7</sup> Another area of scholarship that is relevant to this project are studies that have focused on key actors' experience of the RSD oral hearing via interviews either with applicants or decision-makers: Robert F Barsky, *Arguing and Justifying: Assessing the Convention Refugees' Choice of Moment, Motive and Host Country* (Ashgate, 2000); Cécile Rousseau and Patricia Foxen, 'Constructing and Deconstructing the Myth of the Lying Refugee: Paradoxes of Power and Justice in an Administrative Immigration Tribunal' in Els van Dongen and Sylvie Fainzang (eds), *Lying and Illness: Power and Performance* (Het Spinhuis, 2005); Jan Blommaert, 'Investigating Narrative Inequality: African Asylum Seekers' Stories in Belgium' (2001) 12 *Discourse & Society* 413; Connie G Oxford, 'Acts of Resistance in Asylum Seekers' Persecution Narratives' in Rachel Ida Bluff (ed), *Immigrant Rights in the Shadows of Citizenship* (New York University Press, 2008) 40; Diana Bögner, Jane Herlihy and Chris R Brewin, 'Impact of Sexual Violence on Disclosure during Home Office Interviews' (2007) 191 *The British Journal of Psychiatry* 75; Diana Bögner, Chris Brewin and Jane Herlihy, 'Refugees' Experiences of Home Office Interviews: A Qualitative Study on the Disclosure of Sensitive Personal Information' (2010) 36 *Journal of Ethnic and Migration Studies* 519; Trish Luker, 'Decision-Making Conditioned by Radical Uncertainty: Credibility Assessment at the Australian Refugee Review Tribunal' (2013) 25 *International Journal of Refugee Law* 502; Trish Luker, 'Performance Anxieties: Interpellation of the Refugee Subject in Law' (2015) 30 *Canadian Journal of Law and Society* 91; Sharalyn R Jordan, 'Un/Convention(al) Refugees: Contextualizing the Accounts of Refugees Facing Homophobic or Transphobic Persecution' (2011) 26 *Refuge: Canada's Journal on Refugees* (online); Claire Bennett, 'Lesbians and United Kingdom Asylum Law: Evidence and Existence' in Efrat Arbel, Catherine Dauvergne and Jenni Millbank (eds), *Gender in Refugee Law: From the Margins to the Centre* (Routledge, 2014) 138. Of these studies, Barsky's text *Arguing and Justifying* is of particular significance; while his research is not based on hearing *observations*, the text draws in detail on in-depth interviews with 56 refugee claimants who arrived in Montreal in 1992, and addresses how applicants negotiated their encounters with RSD processes. Barsky focuses closely on the oral hearing and how applicants negotiated narratives of refugee departure, flight and arrival. Also, the two pieces by Trish Luker listed above drew on a dataset she constructed through attendance at ten RRT hearings conducted between 2010-12. However, her research and analysis focuses on interviews conducted with seven RRT decision-makers, with only limited reference made to the hearings themselves.



of his or her claim.<sup>8</sup> As a result, these two adjudicative settings are the focus of the project. It is important to recall that the IRB and the RRT do not undertake decision-making at the same stage of the RSD process. In Canada, the IRB undertakes first-instance determinations, and in Australia, the RRT performs full administrative merits review of first-instance determinations made by a civil servant acting on the delegated authority of the Immigration Minister.<sup>9</sup> In Canada, the IRB is the site where applicants present by far the fullest oral account of their evidence. In Australia, prior to the RRT hearing, the applicant must generally also present oral evidence at the first instance before a departmental officer.<sup>10</sup> A sizeable proportion of all initial determinations are appealed and reheard before the RRT.<sup>11</sup> However, the interview at first instance is even less accessible to a third party than the RRT hearing: departmental delegates of the Minister have historically made initial determinations quite quickly, and the Australian Department of Immigration and Border Protection (DIBP) would be required to approve and facilitate access. Significantly, no research

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<sup>8</sup> *Migration Act 1958* (Cth) s 425; *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 100(1), 100(4.1), 170. A hearing is not required before either the IRB or RRT if a decision in the applicant's favour can be made via the paper application: *Migration Act 1958* (Cth) s 425(2)(a); and in Canada: *Immigration and Refugee Protection Act*, SC 2001, c 27, s 170(f).

<sup>9</sup> *Migration Act 1958* (Cth) s 415; note that conditions of RSD and review differ for 'unauthorised maritime arrivals,' (UMA) who may not make a valid visa application (including a valid protection visa application) unless granted written permission by the Minister to do so: *Migration Act 1958* (Cth) ss 46A(1)-(2). An 'unauthorised maritime arrival' is primarily defined as a person who has 'entered Australia by sea' and who was an 'unlawful non-citizen at the time of entry' and who is not excluded under the Act: *Migration Act 1958* (Cth) ss 5AA(1). For the application of this section to children born of unauthorised maritime arrivals, see *Migration Act 1958* (Cth) ss 5AA(1A)-(1AA).

<sup>10</sup> *Migration Act 1958* (Cth) s 54(3). While the Minister 'must, in deciding whether to grant or refuse to grant a visa, have regard to all of the information in the application,' a first instance decision 'to grant or refuse to grant a visa may be made without giving the applicant an opportunity to make oral or written submissions.'

<sup>11</sup> In 2013–14, a total of 6,863 matters were lodged in the RRT; in the same year, there were 10,624 protection visa applications. This means that an application for review was made in roughly 65 per cent of determinations. This figure is high compared to previous years. The inflated figure is due to the 'large number of applications for RRT review of unauthorised maritime arrival cases' and because 'of a higher number of refusals of unauthorised maritime arrival protection visa applications by delegates of the Minister.' Migration Review Tribunal-Refugee Review Tribunal, 'Annual Report 2013-14' (2014) 15, 21 and Table 17. <<http://www.mrt-rrt.gov.au/AnnualReports/ar1314/index.html>>; Department of Immigration and Border Protection, 'Department of Immigration and Border Protection Annual Report 2013–14' (2014) 110. In 2012–13, 25 per cent of applicants sought review of the departmental decision; and in 2011–12, 22 per cent: Of those cases on hand with the RRT in 2013–14 (of which there were 5,251), only 3,585 were finalised, and 22 per cent of negative determinations were set aside and remitted. In 2012–13, 37 per cent of a total of 3,757 determinations were set aside; in 2011–12, 27 per cent of a total of 2,804 determinations were set aside. By way of comparison, in 2013–14, 0.8 per cent of RRT decisions were set aside by judicial review: Migration Review Tribunal-Refugee Review Tribunal, 2013–14, Table 2 and Table 19.

has ever involved observations of this first stage of decision-making in Australia.<sup>12</sup> Thus, alongside the RRT's status as the final avenue of merits review and as a site of substantial oral testimony, considerations of accessibility informed my selection of the RRT as the site of analysis in Australia.<sup>13</sup>

In Canada, I attended the oral hearings of six refugee applicants in person. These hearings took place in Montréal and Vancouver between January 2013 and July 2013. In Australia, I observed two oral hearings in person and accessed the full audio

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<sup>12</sup> Some research does exist on first-instance screening interviews and decision-making, much of which has been undertaken in the UK by NGOs and advocacy organisations, most recently the *Beyond Proof* report addressing first instance decision-making in Belgium, the Netherlands and the UK: UNHCR, 'Beyond Proof: Credibility Assessment in EU Asylum Systems: Full Report' (May 2013). But see also: Heaven Crawley, 'Breaking down the Barriers: A Report on the Conduct of Asylum Interviews at Ports' (Immigration Law Practitioners' Association, 1999) <<http://www.ilpa.org.uk/resource/4111/breaking-down-the-barriers-a-report-on-the-conduct-of-asylum-interviews-at-ports>>; Human Rights Watch, 'Fast-Track Unfairness: Detention and Denial of Women Asylum Seekers in the UK' (2010) <<http://www.hrw.org/reports/2010/02/24/fast-tracked-unfairness-0>>; Amnesty International and Still Human Still Here, 'A Question of Credibility: Why so Many Initial Asylum Decisions Are Overturned on Appeal in the UK' (April 2013) <[http://www.amnesty.org.uk/sites/default/files/a\\_question\\_of\\_credibility\\_final\\_0.pdf](http://www.amnesty.org.uk/sites/default/files/a_question_of_credibility_final_0.pdf)>; also Nienke Doorbos' research analyses first instance interviews in the Netherlands: Doorbos, above n 5. One of the most significant reviews of and attempts to reform first instance decision-making was undertaken in the UK, by UNHCR in partnership with the Government: from 2004 to 2009 UNHCR ran the Quality Initiative project, which aimed to positively influence the quality of first instance decision-making and produced six reports reviewing decision-making by the United Kingdom Border Agency. For all reports and key findings, see UNHCR, *Quality Initiative and Integration Project* (2004-2009) <<http://www.unhcr.org.uk/what-we-do-in-the-uk/quality-initiative-and-integration.html>>. See especially UNHCR, *Quality Initiative Project: Third Report to the Minister* (London, 2005-2006); *Quality Initiative Project: Fourth Report to the Minister* (London, 2006), which addressed flawed credibility assessment practices and problems with the conduct of first instance interviews; in particular the failure of interviewers to adequately establish the facts. Comparable studies have not been undertaken in Australia or Canada, though for Canada see: Canadian Council for Refugees, 'The Experience of Refugee Claimants at Refugee Hearings at the Immigration and Refugee Board' (2012) <[http://ccrweb.ca/files/irb\\_hearings\\_report\\_final.pdf](http://ccrweb.ca/files/irb_hearings_report_final.pdf)>; Canadian Council for Refugees, 'The Experience of Refugee Claimants at Refugee Hearings in the New System' (April 2014) <<http://ccrweb.ca/sites/ccrweb.ca/files/refugee-hearing-report-2014.pdf>> (these Canadian Council for Refugees studies used interviews with refugee applicants to explore their experiences of the hearings).

<sup>13</sup> There is I think an urgent need for research that addresses the conduct of first-instance determinations in Australia and for further research on IRB decision-making in Canada. The credibility literature highlights the significant number of first-instance decisions overturned on administrative appeal, thus pointing to the need for greater scrutiny and assessment of this stage of decision-making. Millbank and Kagan, among others, have noted that the quality of first-instance decision-making is one of the central problems of existing RSD mechanisms, given the credibility requirement of consistency and since evidence presented on review is judged against evidence presented at first instance: Michael Kagan, 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination' (2002) 17 *Georgetown Immigration Law Journal* 367, 403-7 (who also notes that 'a review of credibility-based decisions indicates that appeals tribunals frequently accept first instance credibility findings with very little analysis' at 403). As well, in both Australia and the United States, first-instance decision-makers have a broad discretion, minimal training and significant caseloads: Jenni Millbank, "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21 *International Journal of Refugee Law* 1, 33.

recordings of six further oral hearings.<sup>14</sup> These hearings took place in Sydney and Melbourne between July 2012 and April 2014. Alongside my own hearing observation notes, the audio recordings and transcripts, my dataset also comprised the final, written decision for each hearing.<sup>15</sup> As such, my fieldwork primarily involved either observing Canadian IRB and Australian RRT oral hearings in person, or listening to and transcribing the full audio recording of hearings that took place before the RRT. I accessed all of the included oral hearings in full.<sup>16</sup> Due to the nature of my ethics approval and scope of the project, I have not addressed the course of each decision after the IRB or RRT hearing took place. I therefore do not attend to the possibility of judicial review of these decisions, though to my knowledge, the negative determinations in the dataset were not appealed.

The in-person observations and recordings allowed access to the non-verbal, aural and affective elements of the hearing, which are frequently left off the hearing transcript and generally not mentioned in the written decision.<sup>17</sup> Of course, my own observations are interpretations. They remain imperfect and highly subjective (which

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<sup>14</sup> Where I accessed the hearings in person, my data comprised my simultaneous notes, which recorded as faithfully as possible all verbal exchanges during the hearing that were either in English or translated into English. My notes also included non-verbal observations about the hearings. Where I accessed an audio recording of the hearing, the data included the recording as well as a written transcription of the hearing. I checked the initial transcriptions of each hearing against the audio recording at least once, to ensure the accuracy of all transcriptions. I discuss the limitations and strengths of this method below.

<sup>15</sup> For full details of the forms of data I accessed for each hearing, see the Appendix.

<sup>16</sup> Notably, a full transcript of the hearing is not produced as a matter of course in either jurisdiction. Applicants and their advocates may, however, access audio recordings of the hearing. Where an applicant before the RRT seeks a transcription of the hearing, she or he must pay for this service: Administrative Appeals Tribunal Migration and Refugee Division, 'Costs Arising from Applications for Review' (2012, updated 2015).

<sup>17</sup> See Austin Sarat, 'Rhetoric and Remembrance: Trials, Transcription, and the Politics of Critical Reading' (1999) 23 *Legal Studies Forum* 355; Emma Cunliffe, 'Untold Stories or Miraculous Mirrors? The Possibilities of a Text-Based Understanding of Socio-Legal Transcript Research' [2013] *SSRN Working Paper Series* <<http://papers.ssrn.com/abstract=2227069>>; see also Barsky's extremely detailed examination of the transcription process for refugee hearings in Canada as at 1987. Barsky tracks how the political economy of transcription outsourcing practices directly affected what made it 'on to the record' that was presented to decision-makers. Barsky, above n 5, Chapter 3: Interpreting and Transcribing the Other. Emma Cunliffe argues that by 'seeing a transcript as an authorless mirror of court proceedings, socio-legal scholars risk overlooking the ways in which the technology of transcripts influences the record that is produced. Paying attention to the laws and practices governing transcript production allows those who engage in transcript research to appreciate how the transcript is defined in relation to the spoken proceedings it purports to represent, and that the act of representation alters those proceedings': Cunliffe, 1. In making this argument, Cunliffe contests Sarat's description of the transcript as 'the verbatim record of a present soon to become past, a mirror/ a record/ a voice in the machine in which the "author" exercises no authorial presence.' Even in making this argument, Sarat highlights the fact that every transcript involves particular silences and exclusions and must be read for both 'what is present and what is absent': Sarat, 356–7.

I discuss below) and do not access all those aspects of the hearings that are ordinarily left out of the decision or erased from the official transcript.<sup>18</sup> Despite the inevitable gaps in my data, listening to or observing the hearings in full was an important part of my method, which is interested in how refugee testimony is presented and tested *before* it is recounted in the written decisions of refugee decision-makers—texts that are ordinarily the only public record of RSD hearings.<sup>19</sup>

As described in the Introduction, both the IRB and the RRT are designed to function as inquisitorial decision-making bodies. This fact was central to the research design's focus on accessing the IRB and IRB oral hearings. Many scholars have noted that no purely inquisitorial or adversarial system of legal decision-making exists.<sup>20</sup> However, in principle, inquisitorial tribunals conduct decision-making in an efficient, informal manner, where the decision-making body and the party or parties may jointly endeavour to establish the facts of the matter to be heard.<sup>21</sup> In Australian and Canadian RSD, the theoretically non-adversarial hearing is intended to reflect 'both the informality and efficiency values of the tribunal[s] and the fact that the claimant is not on trial.'<sup>22</sup> It also reflects a belief that 'features of an adversarial procedure are detrimental to cross-cultural fact-finding.'<sup>23</sup> While both bodies may make their own inquiries, Kneebone and Dauvergne have noted that generally neither institution takes

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<sup>18</sup> Sarat, above n 17, 356–7.

<sup>19</sup> As well, only a small proportion of written decisions are published in each jurisdiction. For a full account of recent decision publication rates, see below n 67.

<sup>20</sup> See, eg, Lorne Sossin and Samantha Green, 'Administrative Justice and Innovation: Beyond the Adversarial/Inquisitorial Dichotomy' in Laverne Jacobs and Sasha Baglay (eds), *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives* (Ashgate, 2013) 71; Felicity Nagorcka, Michael Stanton and Michael Wilson, 'Stranded between Partisanship and the Truth: A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice' (2005) 29 *Melbourne University Law Review* 448.

<sup>21</sup> Notably, in Australia the recent *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) has entirely removed any expectation that the decision-maker will inquire in an applicant's case and imposed a strict burden of proof on the applicant. Although this legislation post-dates the hearings included here, the *Migration Act 1958* (Cth) s 5AAA now sets out that it is the sole responsibility of an asylum seeker to 'specify all particulars of his or her claim ... and to provide sufficient evidence to establish the claim.'

<sup>22</sup> Dauvergne, above n 5, 99. While in Australia, the Government is not 'represented' at the hearing and does not contest it, in Canada the Minister may intervene into an IRB matter.

<sup>23</sup> Peter W Billings, 'A Comparative Analysis of Administrative and Adjudicative Systems for Determining Asylum Claims' (2000) 52 *Administrative Law Review* 253, 280.

up the opportunity to jointly endeavour to establish the facts of the case.<sup>24</sup> Adversarial approaches to testing evidence—the norm in both common law jurisdictions—have not necessarily been replaced by an informal or inquisitorial style.<sup>25</sup> Perhaps the most direct enactment of the right to inquire is both bodies’ production of libraries of ‘country information’ and research, which decision-makers may use to investigate conditions in the applicant’s country of origin.<sup>26</sup> While, due to questions of scope, my thesis and methods do not directly address role of ‘independent country information’ in RSD and the hearing, I note here that decision-makers’ use of such information has often been to ‘test’ or contest applicant’s claims.<sup>27</sup>

Nonetheless, the inquisitorial nature of the hearings relates to key themes addressed in both my methods and my argument. First, it partly explains why the hearings are not uniformly structured, but rather run according to the ‘style’ of each decision-maker. Second, the inquisitorial nature of the hearings enables decision-makers’ direct and substantial participation in eliciting and testing evidence; as well as in determining the ‘issues’ the hearings address. A theme in forgoing literature is the extent to which the ‘theoretical’ advantages of inquisitorial decision-making—particularly of making ‘the hearing less onerous for the applicant’—are not realised in either the RRT or IRB.<sup>28</sup> This is case even as the protections of more formal trial procedures (such as the substantial role of advocates and of rules of evidence) are eliminated from the process. These questions of procedure have significant implications for how decision-maker interventions into the hearing are regulated and controlled. Chapters Five and

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<sup>24</sup> Susan Kneebone, ‘The Refugee Review Tribunal and the Assessment of Credibility: An Inquisitorial Role’ (1998) 5 *Australian Journal of Administrative Law* 78, 80–1; Dauvergne, above n 5, 99–102.

<sup>25</sup> Billings, above n 23, 296–7; Kneebone, above n 24, 80–1; Dauvergne, above n 5, 99–102.

<sup>26</sup> See especially Robert Gibb and Anthony Good, ‘Do the Facts Speak for Themselves? Country of Origin Information in French and British Refugee Status Determination Procedures’ (2013) 25 *International Journal of Refugee Law* 291; James Sweeney, ‘The Lure of “Facts” in Asylum Appeals’ in Steven R Smith (ed) *Applying Theory to Policy and Practice: Issues for Critical Reflection* (Ashgate, 2007) 19; Catherine Dauvergne and Jenni Millbank, ‘Burdened by Proof: How the Australian Refugee Review Tribunal Has Failed Lesbian and Gay Asylum Seekers’ (2003) 33 *Federal Law Review* 299.

<sup>27</sup> The question of how country information is used during the hearing is worthy of further inquiry, particularly insofar as such information represents a further narrative with which applicants must contend. The small size of hearing sample is perhaps why I only infrequently witnessed decision-makers’ engagement with country information. Also, in both jurisdictions, country information is often primarily addressed in written submissions both before and after the hearings.

<sup>28</sup> Billings, above n 23; Dauvergne, above n 5, 100.

Six address this topic in detail, in their attention to the conduct of the hearings and critique of the nature of decision-makers' participation in and direction of the hearing.

*i. Recruitment and Criteria for Inclusion*

To access hearings in Canada, I recruited research participants through a partnership with members of the Canadian immigration bar in Montréal and Vancouver, and also through UNHCR Canada, which has a statutory right to observe RSD hearings in Canada.<sup>29</sup> In Australia, participants were recruited through a partnership with a medium sized, community-based refugee legal service. I adopted broad and open criteria in determining which oral hearings to include in this research. The inclusion criteria were that the applicant had applied for a protection visa and that the application involved a hearing before either the RRT or the IRB.<sup>30</sup> The key reasons for these broad criteria for inclusion were the practical challenges of accessing and attending the oral hearings and the limited timeframe and scope of a doctoral project. As such, I did not limit the hearings included here on the basis of a particular set of criteria, such as the Refugee Convention ground on which the claim was made or the applicant's region of origin, nationality or gender. Adopting some kind of criteria for the 'type' of hearing included in the project may have enhanced the comparability of the hearings. However, the variance in the type of cases I observed was not a significant obstacle for this research, as my aim was not to understand how the IRB and RRT treat particular kinds of claims but to investigate the nature of the oral hearing as such.<sup>31</sup>

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<sup>29</sup> Immigration and Refugee Protection Act, SC 2001, c 27, s 166(e).

<sup>30</sup> The Appendix sets out various elements of each hearing, including the jurisdiction; gender of the applicant; basis of claim; country of origin; credibility determination and outcome. Although I do not read the hearings quantitatively, for the sake of both interest and description, I note the data sample included: 9 men and 5 women; and 6 negatives outcomes and 8 positive outcomes. In terms of country of origin, 4 participants were from Middle Eastern countries (Iran, Afghanistan, Egypt and Lebanon) 3 participants were from Pakistan; 2 from Sri Lanka; 2 were from Central or South America (Cuba and Mexico); 2 from Africa (Ethiopia and a small African state omitted for reasons of confidentiality); and 1 from Burma. All applicants were represented and in two matters a family member was attached to the claim (*Adere* [2012](RRT); *Zeidan* [2014](RRT)).

<sup>31</sup> There are also a number of studies that examine RSD decision-making by comparing particular classes of claim, particularly claims that involve gender-based harms, as discussed in the Introduction. These studies reveal the advantage of comparing like claims with like claims, and in particular the importance of revealing the narratives and assumptions at play for certain groups. See, eg, Laurie Berg and Jenni Millbank, 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants' (2009) 22 *Journal of Refugee Studies* 195; Jenni Millbank, 'Imagining Otherness: Refugee

The two non-governmental refugee advocacy organisations and numerous independent refugee lawyers, who participated as research partners, played a role in selecting the hearings included in this research. My agreement with this project's research partners was that I would attend or access RRT or IRB hearings where this was logistically possible and where advocates felt it was appropriate and practicable to approach clients to participate. In Australia, when choosing potential participants, the advocacy organisation considered the effect of my presence within the hearing, and specifically the possible negative effect of my involvement in sensitive hearings. Partner organisations and individuals in Canada did not explicitly articulate this consideration. The effects of my presence in the hearing and the hearing selection process, are discussed in the section below that addresses the limitations of my research design.

*ii. Multiple Forms of Data*

The data upon which this project is based is by no means solely textual—and as is now evident, multiple kinds of data constitute the final dataset. The data types include my own first-person observation of some hearings, the complete audio recordings of some hearings and the written transcriptions of some hearings.<sup>32</sup> Notably, where I did not attend the hearing and was granted access to the audio recording, I not only listened to the hearing, but also had the hearing professionally transcribed and then listened to audio while ‘correcting’ the transcription and making my own notes as to non-verbal aspects of the hearing. Notably, each record of the hearing and form of data is necessarily ‘unstable’ and can never amount to a fixed, purely objective account of a hearing. My process of ‘correcting’ the official transcription makes this patently clear.

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Claims on the Basis of Sexuality in Canada and Australia’ (2002) 26 *Melbourne University Law Review* 144; Millbank, above n 13; Thomas Spijkerboer, ‘Stereotyping and Acceleration: Gender, Procedural Acceleration and Marginalised Judicial Review in the Dutch Asylum System’ in Gregor Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martin Nijhoff Publishers, 2005); Baillot, Cowan and Munro, “‘Hearing the Right Gaps’”, above n 5. And see generally Efrat Arbel, Catherine Dauvergne and Jenni Millbank (eds), *Gender in Refugee Law: From the Margins to the Centre* (Routledge, 2014); Thomas Spijkerboer (ed), *Fleeing Homophobia: Sexual Orientation, Gender and Asylum* (Routledge, 2013).

<sup>32</sup> In the Appendix, I outline the types of data that were available in relation to each hearing.

The multiple forms of data were both a strength and a limitation of the project: a strength insofar as each form of data provides different kinds of information and representations of the hearing, and a limitation in that the ‘comparability’ of data is undermined by the diversity of forms. For example, for some of the hearings I attended, I did not have access to the case file or recordings and so could not verify and complete my necessarily partial observations. Equally, in hearings where the primary source of data was audio recordings, I was unable to observe the applicant and the decision-maker.<sup>33</sup> While the multiplicity of data types provides a variegated picture of how testimony is presented for the purposes of refugee status determination, the absence of a uniform and complete dataset for every hearing is unsettling. I have attempted to address the resulting gaps by grounding particular questions and findings in the data forms and hearings most suited to my various research questions. I have also been careful not to fill in the gaps for certain hearings and to clearly articulate the basis for my findings throughout each chapter.

## **Part Two. Qualitative Methods of Observation and Analysis**

### *i. Methods of Observation*

In order to record data for the oral hearings that I attended in person, I adopted the qualitative research technique of participant observation. Participant observation is a rather counter-intuitive term that describes a means of gathering data where the researcher (participant) observes a particular social event or phenomenon *without* directly participating.<sup>34</sup> Raymond Gold’s ‘classic typology’ of four observational research roles—of which ‘participant-as-observer’ is one—best explains the concept

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<sup>33</sup> I recall here that my ability to observe the applicant was limited by my position at the back of the hearing in both jurisdictions, as well as the fact that the applicant faces the decision-maker when speaking, rather than the ‘rest’ of the hearing room. As such, even though the question of the applicant’s demeanour is a significant element of the credibility literature, as well as a fascinating line of inquiry, my findings do not address questions of body language or facial expression due to my inability to really see either of these for much of the time. For observations about interpretations of applicant demeanour though, see Jane Herlihy, Kate Gleeson and Stuart Turner, ‘What Assumptions about Human Behaviour Underlie Asylum Judgments?’ (2010) 22 *International Journal of Refugee Law* 351; Millbank, above n 13; Kagan, above n 13; Audrey Macklin, ‘Truth and Consequences: Credibility Determination in the Refugee Context’ in International Association of Refugee Law Judges (ed), *The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary* (International Association of Refugee Law Judges, 1998) 134.

<sup>34</sup> Patricia Adler and Peter Adler, ‘Observational Techniques’ in Norman Denzin and Yvonna Lincoln (eds), *Handbook of Qualitative Research* (Sage Publications, 3rd ed, 2005) 377.



of participant observation. The four modes are the complete observer, who is fundamentally or physically removed from the setting and neither seen nor noticed; the participant observer, who is known to those being observed but does not play a role in the setting; the observer-as-participant, where the researcher is known to and interacts with the setting but does not form an intense relationship with the subjects; and the complete participant.<sup>35</sup> Participant observation was primarily developed in the context of long-term sociological and anthropological ethnographies of particular groups or societies of people.<sup>36</sup> However, the method has evolved and is increasingly used in studies where the researcher observes ‘events’ or occasions as they occur, rather than understanding them through other qualitative research methods such as interviews and discussions with participants. Courtroom observation, for example, is an increasingly common research practice that adopts this method.<sup>37</sup>

The term ‘participant observer’ describes my role as a passive observer of the hearings. Like participant observers, my observations were characterised by their non-intervention in relation to the subject matter, even though my role and presence was explained to and known of by those being observed. For observational parts of this research, I was in the hearing room, visible to all participants, and in each case I was required to explain my presence once the hearing had started. I did not participate in formal proceedings beyond this initial introduction and did not speak again for the duration of each hearing. Admittedly, I initially thought of myself as a complete observer, but my method is best described as ‘complete observation’ for only some hearings: those where my data comprised the full, recorded audio of the hearing and case file, and where the hearing took place before the applicant consented to my access to the audio recording and the case file. In one sense, the closed case files are a less ‘contaminated’ source of data; however, my absence from those hearings does

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<sup>35</sup> Raymond L Gold, ‘Roles in Sociological Field Observations’ (1958) 36 *Social Forces* 217.

<sup>36</sup> See, eg, Bronislaw Malinowski, *Coral Gardens and Their Magic: A Study of the Methods of Tilling the Soil and of Agricultural Rites in the Trobriand Islands* (Allen and Unwin, 1935).

<sup>37</sup> See, for eg, the influential work of John M Conley and William O’Barr on conducting ethnographies of legal institutions (including the courtroom) in practice and in spoken legal discourse: John M Conley and William M O’Barr, *Rules Versus Relationships: The Ethnography of Legal Discourse* (University of Chicago Press, 1990); John M Conley, William M O’Barr and E Allan Lind, ‘The Power of Language: Presentational Style in the Courtroom’ (1978) 1978 *Duke Law Journal* 1375.

not compensate for the non-random nature of the dataset, as discussed in the next section.<sup>38</sup>

## ii. *Methods of Analysis*

In order to analyse the hearing data, I adopted a ‘grounded theory’ approach.<sup>39</sup> The ‘grounded’ element of grounded theory refers to the idea that results or theories produced by the researcher are grounded or located within the data itself; that is, theories ‘start’ with the data.<sup>40</sup> Grounded theory emerged in the 1960s as a method for conducting and approaching qualitative research and data analysis.<sup>41</sup> Kathy Charmaz provides one of the most useful and well-known explications of the approach, drawing on its foundational texts to provide a set of ‘systematic, flexible guidelines’ for the task of analysing data. She argues that grounded theory guidelines are ultimately an approach to dealing with data, and that they do not dictate a methodological or theoretical approach.<sup>42</sup> The approach is particularly effective because it does not obscure how data is interpreted and used beneath layers of ‘qualitative analysis’ terminology or discipline-specific language.

Following Charmaz’s interpretation of ‘grounded theory,’ I have adopted its guidelines for dealing with data in light of my own theoretical frameworks. The aims and methods of grounded theory are the best fit for the qualitative, thematic and

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<sup>38</sup> An obvious disadvantage of audio files as a form of data was that I could neither experience the hearing nor see the participants. However, as noted even for the hearings that I did attend, because I was required to sit at the back of the room, the only face I was able to fully see was the decision-maker’s. At times, I was able to glimpse the side of the applicant’s face as he or she spoke, and in certain hearings, I was able to see the face of the interpreter if she or he sat to side of the applicant’s table.

<sup>39</sup> Barney G Glaser and Anselm L Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine Publishing, 1967); Barney Glaser, *Theoretical Sensitivity: Advances in the Methodology of Grounded Theory* (Sociology Press, 1978); Kathy Charmaz, *Constructing Grounded Theory: A Practical Guide Through Qualitative Analysis* (Sage Publications, 2006).

<sup>40</sup> Charmaz, above n 39, 3. In explicating a grounded theory approach I note Richards and Richards point that often grounded theory is ‘widely adopted as an approving bumper-sticker in qualitative studies’ and that I do not critically engage with the epistemology of these methods: Lyn Richards and Tom Richards, ‘The Transformation of Qualitative Method: Computational Paradigms and Research Processes’ in Nigel G Lee and Raymond M Fielding (eds), *Using Computers in Qualitative Research* (Sage Publications, 1991) 38, 43.

<sup>41</sup> See, eg, Glaser and Strauss, above n 39.

<sup>42</sup> Charmaz, above n 39, 9. Charmaz’s approach is partly in response to original versions of grounded theory, which had a strong positivist bent; see eg Glaser, above n 39. The grounded theory method, particularly in Barney Glaser’s approach, treated coding categories as strictly emergent from the data and based them on what Charmaz calls a rather ‘direct, and, often, narrow empiricism.’ See also Kathy Charmaz and Anthony Bryant (eds), *Handbook of Grounded Theory* (Sage, 2002).

narrative-focused analysis of the hearings that I undertake in the following chapters. Yet this project does not take a ‘pure’ grounded theory approach, as I drew upon a large amount of background reading, and exposure to similar data and relevant case studies to guide my observations. Significantly, my early identification of ‘narrative,’ narrative performance and narrative structures as relevant themes entailed letting my observations and data be shaped by pre-existing contentions or suspicions.

The elements of a grounded theory approach employed in this work included the practice of grounding findings in the ‘raw’ data, sorting and synthesizing the data at the early stages of collection and then again throughout the project, and the use of qualitative coding.<sup>43</sup> Coding essentially involves attaching labels (or codes) to segments of data, to record the researcher’s interpretation of those segments’ meanings. The researcher uses those codes and comparisons to categorise and sort data and gain an analytic grasp on it.<sup>44</sup> The codes and their eventual organisation provide a series of analytic themes and frameworks that are generated through refining, coalescing and interpreting the codes produced.<sup>45</sup> The approach ultimately aims to provide an explanatory, theoretical contribution to the subject being studied. I adopted these grounded theory processes when analysing the audio files, transcriptions and my own notes on the refugee hearings.

There is necessarily a quantitative element to qualitative coding, in that the repeated occurrence of certain codes is what provides the foundation for the development of particular theories about the data. However, these themes and their occurrence are not interpreted numerically, and importantly, the themes are not presented as representative or randomised. In a grounded theory approach, this numerical aspect of the data analysis is acknowledged in the concession that sampling takes place for the purposes of ‘theory construction’ and not for population representativeness.<sup>46</sup> In this project, the process of coding is used to generate questions and observations about the

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<sup>43</sup> Charmaz, above n 39, 3. I found this process, while certainly not highly prescriptive or structured, very useful in guiding my approach to the data.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid 96–8. Strauss and Corbin describe coding as the process of ‘breaking down, examining, comparing, conceptualizing and categorizing data’: Anselm Strauss and Juliet M Corbin, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (Sage Publications, 1998) 61.

<sup>46</sup> Glaser and Strauss, above n 39, 33.

event of the oral hearing, as well as to provide a rich and careful account of how oral testimony is presented and tested in the particular cases I am investigating.

### **Part Three. Limitations of the Thesis's Method and Analysis**

Although this research makes no claim to representativeness, there remain a number of limitations to the project and to the methods I have adopted. In this section, I outline the key limitations of my methods for recruitment and analysis, and of the content of the final dataset.

#### *i. Limitations of the Non-random Dataset and Hearing Selection Process*

Because all recruitment of refugee applicant participants took place through third-party members of the legal profession in conjunction with non-governmental refugee advocacy organisations, refugee advocates played a de facto role in choosing the hearings. Advocates selected hearings for my attendance firstly on a pragmatic basis, that is, all parties' availability and the ability to secure applicants' consent. However, certain hearings were also selected based on whether the advocate involved believed my attendance and access to case files would be 'appropriate' and would not be a source of major concern or distress to the applicant. This is a limitation of my dataset. Particularly with the hearings I attended in person, the participants were those viewed as confident, likely to consent and unlikely to be anxious about research participation. Three advocates directly informed me they had not facilitated my attendance at 'sensitive' RRT hearings.<sup>47</sup> For access to the audio recording, the selection process was slightly different: advocates selected cases where the application had been finalised; where gaining retrospective consent would be possible (that is, where advocates were still in contact with the applicant); and where the full audio recording of the hearing was readily available.

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<sup>47</sup> Some advocates did facilitate participation at hearings where evidence was of a particularly 'sensitive' nature and/or related to sexual violence or gender-based harm (these hearings included the *Bhatti* [2013](IRB); *Rostami* [2013](IRB); *Valdez* [2013](IRB); *Mena* [2014](RRT); and *Zahau* [2012](RRT) hearings). It is also worth noting that given the nature of most refugee hearings, almost all of which include evidence of harm to the applicant, there is no obvious way to define 'sensitive' hearings or 'vulnerable' applicants, as an exceptional category. However, important scholarship has shown that claims relating to gender-based harms present particular difficulties for the applicant during the hearing, including feelings of shame and reluctance to discuss sensitive material: for key works, see the Introduction to this thesis, n 58.

A further factor that shaped and limited the dataset was that in both Australia and Canada the included hearings were those of applicants who were represented by an experienced refugee advocate. As well, advocates had been involved in the matter for a significant length of time prior to all included hearings. Particularly in Australia, the applicants' representation came via a community-based refugee advocacy organisation, where applicants in contact with the organisation were likely to have access to a range of services, support mechanisms, and information. This is, of course, not the experience of all refugee applicants. Access to high-quality legal assistance fundamentally affects the applicant's ability to deal with the hearing and determination processes.<sup>48</sup> And, in the case of the lawyers involved in this research, the legal assistance provided was of a high standard and helped the applicant to present the claim in question. As a result, the applicants represented here are a subset of asylum seekers with access to high-quality legal assistance both in the preparation and presentation of their claims.

*ii. Limitations of the Role of Researcher and of Refugee Applicant Testimony*

As noted in the Introduction, the testimony presented during the oral hearings is highly mediated and 'depends on the relational interaction between advocate or decision-maker and asylum seeker at every stage of the process.'<sup>49</sup> The claimant's lawyer, interpreters and the decision-maker mediated the testimony that is presented and analysed in this thesis: as well, in my role as researcher, I also *represent* the data.

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<sup>48</sup> In Canada, means-tested legal aid is available for refugee claimants in all provinces except Saskatchewan, Nova Scotia, Prince Edward Island, New Brunswick, Northwest Territories, Yukon and Nunavut. Legal aid is delivered by provincial legal aid offices and includes assistance for judicial review subject to a further merits test. Peter Showler, 'Legal Aid for Refugee Claimants in Canada' (2012) <<http://oppenheimer.mcgill.ca/Legal-Aid-for-Refugee-Claimants-in>>. Note, however, that significant funding cuts have occurred at a provincial level, particularly for applicants from 'designated countries of origin,' which places them in a fast-track RSD process that undermines access to government-funded representation. See, eg Nicolas Keung, 'Legal Aid Ontario Cutbacks Could Leave Desperate Refugees without Lawyers at Hearings' *Toronto Star* (Toronto), 4 April 2013 <[http://www.thestar.com/news/immigration/2013/04/04/legal\\_aid\\_ontario\\_cutbacks\\_could\\_leave\\_desperate\\_refugees\\_without\\_lawyers\\_at\\_hearings.html](http://www.thestar.com/news/immigration/2013/04/04/legal_aid_ontario_cutbacks_could_leave_desperate_refugees_without_lawyers_at_hearings.html)>. At the time of writing, asylum seekers who arrive in Australia on a valid visa are entitled to legal assistance under the Immigration Advice and Assistance Scheme (IAAAS) at the departmental (first instance) stage of the process, but not for merits review or judicial review. From 2014, asylum seekers who arrived without a valid visa are not entitled to any form of legal aid: Minister for Immigration and Border Protection, 'End of Taxpayer Funded Immigration Advice to Illegal Boat Arrivals Saves \$100 Million' (31 March 2014) <<http://www.minister.immi.gov.au/media/sm/2014/sm213047.htm>>.

<sup>49</sup> Berg and Millbank, above n 31, 197–8.

Inherent in qualitative research is the rejection of the possibility of a purely 'objective' or disinterested processes of observation or analysis.<sup>50</sup> In the process of extracting and analysing certain parts of each applicant's oral testimony, I necessarily create versions and interpretations of the evidence, which are constrained both by my own subjective interpretations and observations, and by my role in editing each hearing.<sup>51</sup>

Certainly one of the discomfiting aspects of adopting participant observation and grounded theory as a method is the subjective and partial nature of observations and data analysis.<sup>52</sup> The researcher must accept that a multitude of details do not make it 'onto the record' or are not addressed due to the limited scope of the work. As such, my thesis forms just one of a set of narratives about the hearings in question, one that focuses on particular questions and themes as they arose in relation to each applicant's testimony. In discussing the use of stories and narratives in forced migration research, Marita Eastmond emphasises the unavoidability of processes of cultural and analytical translation undertaken by the researcher, and the extent to

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<sup>50</sup> See Kathy Charmaz and Richard G Mitchell, Jr, 'The Myth of Silence Authorship: Self, Substance and Style in Ethnographic Writing' in Rosanna Hertz (ed), *Reflexivity and Voice* (Sage Publications, 1997) 193; Smith, above n 3. Kirmayer writes, '[m]emory is anything but a photographic record of experience; it is a road way full of potholes, badly in need of repair, worked on day and night by revisionist crews. What is registered is highly selective and thoroughly transformed by interpretation and semantic encoding at the moment of experience.' Kirmayer's observations about the subjective and interpretative nature of memory apply to the observations of qualitative researchers, as much as they apply to refugee applicants and their narratives: Laurence J Kirmayer, 'Landscapes of Memory: Trauma, Narrative, and Dissociation' in Paul Antze and Michael Lambek (eds), *Tense Past: Cultural Essays in Trauma and Memory* (Routledge, 1996) 173, 176.

<sup>51</sup> Toni Johnson, who undertook a similar process of refugee hearing observations, explains this point well:

[w]hile carrying out the data collection portion of the fieldwork, I made a particular effort immediately following the interview or court observation to note down anything that may have struck me as odd, personal responses to information gleaned and personal responses to interviewees. In these reflective moments, I remembered certain events in more detail than I felt I had observed. ... In light of this methodology it is my responsibility as a researcher to acknowledge my own bias when viewing the court. Undoubtedly I view events through a particular lens of inquiry and this ultimately shapes the way in which my perception of events unfold[s].

Johnson, above n 5, 63.

<sup>52</sup> Following participant observation and grounded theory methods, my observations took place in a 'systematic and purposive' manner, with particular questions and concerns mapped out from the beginning and revised in a process of regular comparison between the hearings: Adler and Adler, above n 34, 377. In my coding of the hearings, I refined the project's 'codes' whilst observing and listening to the hearings, and then again once the dataset had been finalised. This process allowed me to continually identify, articulate and then refine emerging themes in the data in order to determine the themes I would eventually focus on.

which such processes interpret rather than merely present the data.<sup>53</sup> In a similar vein, Freeman, writing in relation to life history research, argues that the researcher's role in the creation of a story is not 'an interference with the data, but rather an integral part of it, indeed it is the data.'<sup>54</sup> Nonetheless, it is worth noting that my approach to observing and listening to hearings, and what I did and did not take note of, were conditioned by own beliefs, cultural and social position, and most significantly, by the questions I am asking as part of this project. Whilst my note-taking and recording practices improved as my hearing observations progressed, the data I collected was inescapably shaped by my assumptions and specific purpose.<sup>55</sup>

A further, final limitation, also related to participant observation as a method of data collection, is the researcher's *participation*. Participant observation by definition entails that the observer does participate, to varying degrees, in the events in question and therefore affects the nature of the data. There is no clear answer to the question of what effect my predominantly passive presence in the room had on the conduct of the hearings observed. It would be too simplistic to say that my presence was an advantage or disadvantage to the applicant. However, one recurrent observation was that the atmosphere in the room shifted when there were one or more attendees in the room who were there on behalf of the applicant. In almost all of the hearings that I attended, I was understood both by the applicant and the RRT or IRB employees as being there 'with' the applicant. Since the hearing rooms are relatively small and there were only ever between five and nine people in the room, when three or more attendees were there 'with' the applicant, this provided some sense of a 'public,' or support for the applicant, that was absent when the only people in the room were the decision-maker, interpreter, applicant, the applicant's lawyer and myself.

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<sup>53</sup> Marita Eastmond, 'Stories as Lived Experience: Narratives in Forced Migration Research' (2007) 20 *Journal of Refugee Studies* 248, 261.

<sup>54</sup> James M Freeman, *Hearts of Sorrow: Vietnamese-American Lives* (Stanford University Press, 1989) 432–3; cited in Eastmond, above n 53, 261.

<sup>55</sup> Johnson also experienced the inevitable focus on one's pre-existing research questions and hypothesis when observing refugee oral hearings, writing, 'I am more than willing to acknowledge that the events I describe in court are more and less than what actually occurred. I am in no doubt that I missed vital components within the hearing because of my focus on particular aspects that connected with my research questions': Johnson, above n 5, 63–4.

#### **Part Four. The Dataset in Context: Access to Refugee Hearing Data and Silence**

The broader political context of onshore asylum seekers creates challenges in conducting research that addresses refugee status determination in practice. In this final section, having explained my method, its motivations and its limitations, it is worth briefly reflecting on the difficulties I encountered in accessing asylum seeker testimony for the purposes of this project. Within all RSD, protecting the applicant's privacy is a critical and central concern—and even more so in the current age of readily available digital information, when home country governments can access publically available information in receiving states. In this section, though, I suggest that concerns about confidentiality are necessarily articulated in the context of the politics of limiting and controlling onshore asylum seeking. Moreover, that the value of allowing people not directly involved in RSD to access refugee oral hearings, and of public and academic scrutiny, need to be more carefully balanced against concerns about confidentiality.<sup>56</sup> In undertaking this project, it was my observation that there is a silence and lack of access and transparency surrounding refugee determination processes, which I posit exacerbates the existing difficulties of 'hearing' refugee testimony, even within the constraints of the law and procedure of RSD processes.<sup>57</sup>

Organising third-party researcher access to refugee hearings was difficult. In order to observe a hearing, both the applicant and the IRB or RRT decision-maker had to directly consent to my presence; the advocate needed to agree to and facilitate my attendance; and the hearings (which spanned four different cities) needed to coincide with my availability.<sup>58</sup> RSD hearings are not publicly listed, and in both Australia and

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<sup>56</sup> For an earlier reflection on the 'clash' of rights in relation to closed immigration hearings, see Debra M McAllister, 'Refugees and Public Access to Immigration Hearings: A Clash of Constitutional Values' (1990) 2 *International Journal of Refugee Law* 562.

<sup>57</sup> This topic is addressed in the next chapter. To a limited extent, recent work has addressed the interpretation of silence in the spaces of refugee status determination; a key point has been to critique or correct the law's ascription of meaning to refugee applicants' silence. See Johnson, above n 5; Baillot, Cowan and Munro, "'Hearing the Right Gaps'", above n 5; Baillot, Cowan and Munro, 'Seen but Not Heard?', above n 5. See also Teresa Puvimanasinghe et al, 'Narrative and Silence: How Former Refugees Talk about Loss and Past Trauma' (2015) 28 *Journal of Refugee Studies* 69 for an exploration of the relationship between silence and trauma in refugee narratives.

<sup>58</sup> Hearing dates were often changed or rescheduled at the last minute. As well, in Australia, two applicants provided initial consent but then withdrew it directly prior to the hearing due to nervousness and concerns about the potential effect of my presence. These concerns and apprehensions were more prevalent among the Australian participants than the Canadian participants. At the time of the hearings, one of the central goals of Australian refugee policy was to deter refugee applicants travelling to



Canada, refugee hearings are private.<sup>59</sup> The applicant's privacy and the confidentiality of the hearing are necessarily carefully protected.

The initial plan for fieldwork involved first-person observation and attendance at up to eight refugee hearings in both Australia and Canada. As noted, my access to the Australian hearings took place through a research partnership with a medium sized, community-based refugee legal service.<sup>60</sup> In 2012, I attended two Australian hearings. The RRT consented to my attending those hearings in 2012, and the plan was to attend the remainder of hearings in 2013. However, in 2013, the RRT contacted the legal service to inform them that I would not be permitted to attend the hearings in my capacity as a researcher, despite the client's informed, written consent to my attendance. The Registrar and the relevant Tribunal decision-makers communicated that my attendance was prohibited because hearings are required to be held in private and that my presence was not necessary for the conduct of the hearing.<sup>61</sup> Further, it was expressed that only those required for purposes of the performance of the Tribunal's functions were permitted to be present in the room.<sup>62</sup> This statement was at odds with the previous practice of the RRT, which has been to allow third parties into

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Australian by boat, and both of the major political parties supported a policy of 'stopping the boats' and limiting Australia's onshore refugee program.

<sup>59</sup> Migration Act 1958 (Cth), s 429; Immigration and Refugee Protection Act, SC 2001, c 27, s 166(c).

<sup>60</sup> Prior to this, I also approached the RRT itself as a potential research partner, explaining the content and purpose of this research and requesting access to up to ten hearings. In November 2011, the Tribunal Registrar informed me that that the Tribunal was unable to accommodate my request due to the requirement that hearings be held in private, as well as 'the significant resource implications of supporting requests to access tribunal hearings and materials.' The Registrar stated that the Tribunal must focus its resources on its core function of conducting reviews and that 'it has been the Tribunal's experience that the overwhelming majority of RRT review applicants are unwilling to grant permission for an outside observer to attend hearings or access their case files.' In my correspondence from the Tribunal, the Registrar suggested that I may 'wish to approach potential participants through representative organisations': Letter from RRT Registrar to the author, 11 November 2011 (on file with the author).

<sup>61</sup> Telephone conversation between the author and head of the legal service on 25 November 2013. The Tribunal's decision to prohibit my attendance was made after a change of Federal Government in late 2013, from the Australian Labor Party to the Liberal and National Party Coalition. While each party implemented onshore asylum deterrence policies, the conservative Liberal Party's key election promise was to 'stop the boats' and to prevent asylum seekers who arrived without valid visas from seeking protection in Australia.

<sup>62</sup> Section 429 of the *Migration Act 1958* (Cth) sets out that the 'hearing of an application for review by the Tribunal must be in private.' In *SZAYW v MIMIA* (2006) 230 CLR 486, the High Court of Australia interpreted s 429 of the Act and held that 'it is consistent with the statutory purpose, and with common use of language, to treat the concept of privacy as embracing, not only agents of an applicant, but also persons whom an applicant desires to be present and thus to be made privy to what occurs at a hearing': *SZAYW v MIMIA* (2006) 230 CLR 486, [25]–[26].

the hearing where the applicant provided consent to their presence.<sup>63</sup> In my case, the Tribunal was aware of the applicants' informed consent and also of my status as an academic researcher, as opposed to being a relative or friend of the applicant.

Both the non-governmental refugee advocacy organisation and I considered it inappropriate to contest the RRT's decision to deny my access to the hearings, as it was made in relation to individual applicants' hearings. We felt that challenging the Tribunal's decision may negatively affect the applicants in question.<sup>64</sup> This concern raises questions about the culture of RSD spaces in Australia, as well as the degree of power held by individual Tribunal members. In any case, the Tribunal's forbidding my attendance at hearings—coupled with the pre-existing logistical and practical difficulties of arranging my attendance—led to the decision to access the remaining Australian hearings through the audio recordings of hearings in closed case files.

In relation to the Canadian dataset, access to refugee hearings was less difficult to gain. I arrived in Canada to complete my fieldwork in January 2013, at a time when the Immigration and Refugee Board was in a period of intense flux. As will be discussed in Chapter Three, the omnibus Bill-C31, entitled the '*Protecting Canada's Immigration System Act*,' had just passed on 15 December 2012, and a central element of the reforms was a major overhaul of Canada's RSD processes. A number of advocates suggested that the IRB was likely to be unable (or unwilling) to accommodate a request for participation in the research project due to internal restructuring. As such, my primary recruitment strategy was to establish contact with lawyers and advocates working in the field and to attend their clients' hearings, where this was appropriate and possible.<sup>65</sup> In Canada, although a number of hearings I had

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<sup>63</sup> See, for eg, the RRT's approach to a third-party researcher in Luker, 'Decision Making Conditioned by Radical Uncertainty', above n 7. In this instance, a third-party researcher was permitted to attend the hearing once the applicant's consent had been secured and on the condition that the confidentiality of the hearings was maintained.

<sup>64</sup> Such a challenge would have also exceeded the scope of my ethics approval.

<sup>65</sup> This process was made easier by the existence of the Canadian Association of Refugee Lawyers, an association of members of the Canadian immigration bar that, according to its website, 'serves as an informed national voice on refugee law and human rights, and promotes just and consistent practices in the treatment of refugees in Canada.' The Association intervenes into political and legal debates concerning refugee applicants in Canada: *Canadian Association of Refugee Lawyers* <<http://www.carl-acadr.ca/about>>.

planned to attend were delayed or cancelled,<sup>66</sup> arranging my attendance was a comparatively straightforward process.

While I was able to access or observe 14 hearings, it remains the case that access to refugee hearings is not easily attained, and therefore *hearing* refugee testimony, even in the constrained setting of an RSD oral hearing, was often not possible. The institutional rules that restrict access to refugee testimony mean that hearing, let alone interpreting, a refugee applicant's speech or silence is a difficult task. While systems of law and justice are often described via visual and spatial metaphors of transparency and openness, the notion of aurality and in particular silence is a useful concept when reflecting on access to refugee testimony and the methods I have adopted in this thesis. Since any kind of 'hearing' of refugee applicants' speech is exceptionally difficult, the institutional silence or silencing of testimony is the most obvious and overarching silence in relation to my project and to refugee speech. The difficulty of hearing refugee testimony comes as a consequence of the closed nature of refugee status determination processes; the limited portion of status determinations decisions that are published in both Australia and Canada; the very limited access to recordings of refugee hearings; and—as I experienced in the Australian context—administrative cultures of non-transparency within the institutions responsible for RSD.<sup>67</sup>

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<sup>66</sup> Notably, on the day of one scheduled hearing in Canada—for which the applicant had waited over ten months—we all sat stiffly in a windowless, basement hearing room in the Montréal office of the IRB for 40 minutes, waiting for the Board Member to arrive. Only after some time did a staff member inform the advocate that the Member was sick and had forgotten to inform anyone of his absence. The hearing was rescheduled for the following week. The 30-odd minutes of waiting, mainly in silence, for the Member to arrive added to the months of waiting that had preceded the hearing, as well as the applicant's lack of power over the timing or terms of the hearing.

<sup>67</sup> In Australia, first-instance decisions are not made available at all. In 2013–14, 19 per cent of the then Migration and Refugee Review Tribunal's decisions were published: Migration Review Tribunal-Refugee Review Tribunal, above n 11, 12. The MRT and RRT were separate statutory bodies but operated as a single agency, and a disaggregated statistic for each Tribunal's publication record was not available. The publication rate is significantly lower than in previous years. The RRT's Annual Report of 2011–12 stated that at least 40 per cent of all decisions were to be published, and in 2011–12, 42 per cent of decisions of MRT and RRT decisions were published; in 2010–11, 43 per cent of decisions were published. In 2009–10, disaggregated statistics showed that 54 per cent of RRT decisions were published that year: Department of Immigration and Border Protection, 'Department of Immigration and Border Protection Annual Report 2011–12' (2012) 10; Department of Immigration and Border Protection, 'Department of Immigration and Border Protection Annual Report 2010–11' (2011) 27; Department of Immigration and Border Protection, 'Department of Immigration and Border Protection Annual Report 2009–10' (2010) 25. In Canada, decisions that are deemed 'persuasive' are published, as are certain decisions designated as 'jurisprudential guides': Immigration and Refugee Board of Canada, 'Policy Note on Persuasive Decisions' (19 May 2009). The total percentage of RPD decisions

Such reflections recall the observations of ‘law and narrative’ scholars and the critical interventions of outsider storytelling (discussed in Chapter One), which challenge and critique the law’s power to exclude and delegitimise certain kinds of testimony.

Literature addressing storytelling within the law (and especially within case law) has shown how the law’s refusal to hear or sanction the stories of marginalised groups renders these groups and their accounts invisible and silent.<sup>68</sup> The exclusion of certain groups’ narratives (including narratives that are presented within legal contexts and therefore already shaped and constrained by the law) allows the law’s own narratives and stereotypes to prevail over the accounts of those who are raced, gendered or classed as ‘other.’<sup>69</sup> The inaccessibility of refugee testimony, even though such testimony is at the very centre of RSD, reflects the power of law and legal institutions to control who hears and interprets refugee narratives and on what terms.

Katherine Biber argues that silence may be interpreted in many ways, but that ‘it is rarely, actually, silent’; silence only acquires meaning via what we might say about it, and such discussions of silence are really rather noisy.<sup>70</sup> In her analysis of a criminal defendant’s right to silence, she observes that the law is most interested in describing, classifying, evaluating and protecting a silence ‘which isn’t really there.’<sup>71</sup> In regards

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published by the IRB is not available; however, an Access to Information request in 2008, revealed that five per cent of all sexual orientation cases over a four-year period had been published, may give some indication of publication rates: Millbank, above n 13, 3.

<sup>68</sup> David Ray Papke, *Narrative and the Legal Discourse: A Reader in Story Telling and the Law* (Deborah Charles, 1991).

<sup>69</sup> See, for eg, Patricia Ewick and Susan S Silbey, ‘Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative’ (1995) 29 *Law & Society Review* 197; Mari J Matsuda, ‘Looking to the Bottom: Critical Legal Studies and Reparations’ (1987) 22 *Harvard Civil Rights-Civil Liberties Law Review* 323; Richard Delgado, ‘Storytelling for Oppositionists and Others: A Plea for Narrative’ in David Ray Papke (ed), *Narrative and the Legal Discourse – A Reader in Storytelling and the Law* (Deborah Charles Publications, 1991) 289.

<sup>70</sup> Katherine Biber, ‘How Silent Is the Right to Silence?’ (2012) 18 *Cultural Studies Review* 148, 148–9. Biber cites Susan Sontag, who laments our lack of silence, and observes that we are always chattering: ‘One recognizes the imperative of silence, but goes on speaking anyway. Discovering one has nothing to say, one seeks a way to say *that*’: Susan Sontag, *A Susan Sontag Reader* (Penguin, 1983) 187–8; on silences in the law more generally (and modern law’s silence on the topic of justice) see Marianne Constable, *Just Silences: The Limits and Possibilities of Modern Law* (Princeton University Press, 2009).

<sup>71</sup> Biber, above n 70, 149. The observation that, in law, silence is rarely actually silent can also be applied to the small amount of writing focusing on the silence of refugee applicants, where the negative, silent space is given a series of meanings and interpreted. Toni Johnson’s work carefully considers the nature of silence in UK asylum cases that involve lesbian and gay claimants. Although Johnson acknowledges the ‘indeterminacy’ of silence, she asks ‘whether the ambiguous and textured quality of silence can be a productive site of resistance,’ such that an asylum applicant’s silence might be ‘restive’ and ‘embod[y] its host with an unrepentant energy barely contained’: Johnson, above n 5,

to oral testimony within contemporary refugee determination processes, the notion of silence highlights the inaccessibility of refugee applicants' oral testimony and of details of their participation in oral hearings. This testimony is excluded from the public record.<sup>72</sup> If a public record of refugee testimony is available at all, it is a decision-maker's written account of the hearing, which may or may not contain decontextualised excerpts of refugee speech. Such accounts contain a lot of noise and discussion about what refugee applicants *have* said, and how it should be interpreted and judged. In a perhaps harsh reflection, it is to this category, of further 'noise' interpreting refugee speech, which this thesis belongs. Indeed, at the very least, my thesis confirms the immense difficulty of accessing or hearing refugee testimony presented in contexts of legal adjudication.

## Conclusion

The value of my dataset is its focus on the oral hearing in full. It provides insight into a stage of refugee status determination that has been minimally observed and even less frequently critically assessed. This chapter has outlined the methods and research design of this thesis, which I have adopted in order to investigate the terms upon which oral testimony is presented and assessed within refugee oral hearings. The chapter has also explained the reasons behind the selection of the Canadian IRB and the Australian RRT as the primary sites of analysis and has outlined the content of the final pool of hearings that were included in the dataset. Further, the chapter has addressed the limitations of various elements of my research design.

In the final part of this chapter, I reflected on the difficulties of accessing details of proceedings before refugee decision-makers, and in particular, of accessing the full oral hearing within RSD processes in Australia and Canada. By highlighting the discourses at play in limiting access to the refugee determinations, I do not mean to

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58. Helen Baillot and her co-authors argue that female refugee applicants' silence about gender-based violence should be understood through the lens of research about the reluctance of survivors of sexual assault to speak up about harm in institutional contexts: Baillot, Cowan and Munro, 'Seen but Not Heard?', above n 5.

<sup>72</sup> This concern, about the lack of a public record of these hearings, recalls Austin Sarat's argument that the legal transcript is one way in which the law 'helps to construct and use history to authorize itself and to justify its decisions.' Indeed, the transcript is a partial and incomplete public record, but even this limited form of record does not exist in relation to refugee hearings. See Sarat, above n 17.

dismiss the need to maintain confidentiality or to carefully manage how information about particular cases is made public and accessible; indeed, these concerns guided and informed my own research design. However, such considerations should be understood within a political and administrative context where governments exercising power over refugee applicants have an interest in controlling how and on what terms the State deals with applications for refugee status, and with refugee applicants more generally. The history of RSD processes, particularly of the oral hearing, reveal that both the Australian and Canadian governments have long sought to maintain maximum executive control over refugee decision-making and the terms upon which refugees are able to enter each country. In the next chapter, I outline the history of the oral hearing in both jurisdictions, in order to better understand the nature of the hearing as a ‘narrative occasion’ and to demonstrate the mixed aims of the oral hearing. The chapter traces the history of RSD from the first asylum seeker ‘interviews’ in Australia and Canada to the hearing in its current form, in order to understand how and when the hearing became a critical event within RSD in Australia and Canada. As with the research design and methods outlined in this chapter, the following chapter seeks to better understand the purpose, context and conduct of RSD oral hearings and to investigate how the hearing itself governs how refugee oral testimony is presented and tested.

## CHAPTER THREE. A HISTORY OF THE ORAL HEARING IN RSD IN AUSTRALIA AND CANADA: HOW DID WE GET HERE?

### Introduction

Having now addressed two of the ‘genre’ requirements of a doctoral thesis, namely a critical description of my theoretical approach and my research methods, this chapter now addresses the history and context of the refugee oral hearings that are at the centre of this project. This thesis maintains that the reception and assessment of testimony during the hearing is one of the central events of RSD in Australia and Canada.<sup>1</sup> Contemporary constructions of the oral hearing in Australia and Canada present it as a procedural mechanism that guarantees an opportunity for the applicant to be fairly heard. Yet, as addressed in the Introduction to this thesis, the contemporary oral hearing is also a critical site for the testing of an applicant’s credibility. IRB and RRT decision-makers determine whether an applicant’s evidence is valid by asking whether it meets the normative standards of consistency, coherence and plausibility.<sup>2</sup> This chapter explores how, why and when the oral hearing became a central event within RSD processes in Australia and Canada in order to contextualise the contemporary oral hearing. I trace the genesis of the IRB and the RRT and explain why the oral hearing was introduced in both countries.

What this history of the oral hearing reveals is that in Australia, the hearing was introduced in the context of major reforms that sought to limit and control onshore

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<sup>1</sup> I argue that this remains the case even as the spaces for onshore RSD are shrinking and as many refugee-receiving states seek to fast-track RSD processes and limit access to review. One further exception is Australia’s recent introduction of the practice of ‘enhanced screening,’ which peremptorily screens applicants out of the RSD oral hearing altogether. I address these contemporary reforms later in this chapter.

<sup>2</sup> As set out in the previous chapter, the RRT’s findings of fact (including credibility determinations) are final. For certain applicants appearing before the IRB (those not from ‘designated countries of origin’), there is the availability of merits review *on the papers only* before the Refugee Appeal Division (RAD): *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 109.1(1), 110(2)(d.1), 110(3). Section 110(3) sets out that ‘the Refugee Appeal Division must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division, and may accept documentary evidence and written submissions from the Minister and the person who is the subject of the appeal...’ At the RAD’s discretion, applicants may be provided with an oral hearing if the documentary evidence before it ‘raises a serious issue with respect to the credibility of the person who is the subject of the appeal’ and if such evidence was ‘central to the decision’ and ‘if accepted, would justify allowing or rejecting the refugee protection claim’: *Immigration and Refugee Protection Act*, SC 2001, c 27, ss6 (a), (b), (c).

refugee arrivals—including Australia’s policy of mandatory detention of unauthorised arrivals.<sup>3</sup> In Canada, the introduction of the oral hearing also coincided with new ‘deterrence’ policies, though the hearing itself was less explicitly presented as a means of limiting onshore arrivals through excluding ‘bogus’ claimants and as limiting judicial oversight of protection visa decisions.<sup>4</sup> In both jurisdictions, however, the introduction of the oral hearing coincided with an increasing State focus on the numbers and ‘genuineness’ of onshore refugee applicants. This was precipitated in part by Australia and Canada’s relatively new status as countries of first asylum. Critically, this question of genuineness was to be tested *via* the oral hearing and oral testimony. As this chapter demonstrates, the introduction of fair and consistent RSD processes came at a time when both States’ rhetoric about ‘genuine’ refugees and abuse of asylum processes was on the ascent. In this context, a robust determination process was presented as a way to ensure that ‘genuine’ refugees were given asylum. In Australia, the hearing’s introduction was also linked to the culture of gate-keeping and disbelief that inflects contemporary onshore RSD processes and to rhetoric that undermines the genuine protection needs of onshore asylum seekers.

This chapter traces the development of onshore refugee determination procedures in Australia and Canada over the last quarter of the 20<sup>th</sup> century. It does not address the rich history of offshore refugee and humanitarian programs in each country, nor the motivations of both countries’ immense post-World War II refugee intake programmes.<sup>5</sup> Until well into the second half of the 20<sup>th</sup> century, at least, refugees and humanitarian migrants entering Australia and Canada did so under the auspices of existing immigration schemes and were still required to fit, to some degree, within criteria deemed to be in line with national interests. Until the 1980s there were no

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<sup>3</sup> Migration Amendment Act 1992 (Cth).

<sup>4</sup> Central to this difference is the fact that the IRB was introduced as a ‘quasi-judicial body with the status of a superior court of record,’ while in Australia, ‘the constitutional separation-of-powers doctrine ensures that the Tribunal remains part of the executive branch of government’: Catherine Dauvergne, *Humanitarianism, Identity, and Nation: Migration Laws of Australia and Canada* (UBC Press, 2005) 97.

<sup>5</sup> For detailed accounts of both immigration history and refugee policy in Canada and Australia, particularly in the period post-WWII, see Ninette Kelley and Michael J Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy* (University of Toronto Press, 2nd ed, 2010); John Lack and Jacqueline Templeton, *Bold Experiment: A Documentary History of Australian Immigration Since 1945* (Oxford University Press, 1995); and in relation to the US and North America generally, see Gil Loescher, *Calculated Kindness* (Free Press, 1998).



codified or even quasi-independent status determination procedures, or an oral hearing for individual onshore refugees.<sup>6</sup>

While the exact history of the oral hearing tracks a different course in each jurisdiction, the general evolution of refugee policy in Australia and Canada is similar in key ways. In neither jurisdiction was the oral hearing introduced by the Government *only* to improve procedural fairness for onshore applicants and provide them with the right to be heard. Rather, concerns about the regulation of onshore migration, efficiency, economy and government control also played a part. The extent to which the oral hearings were a clear improvement on the fairness and transparency of RSD processes was, in part, the result of each state becoming, more than ever before, a country of first asylum. Additionally, as a result of onshore refugee arrivals and domestic enactments of the Refugee Convention, both Australia and Canada needed to develop a means to process large numbers of onshore refugees. The executive could no longer hand-pick offshore refugees according to immigration criteria that reflected national interests. As applicants made onshore claims, each Government came under pressure from the legal profession and from advocates to improve the existing processes. Parts One and Two chart this history, and the emergence of the oral hearing, in Australia and Canada respectively. This history also reveals that the ‘right’ to fair and independent decision-making processes has become increasingly constrained in both jurisdictions as policies of deterrence and exclusion of onshore applicants (described in the Introduction) are enacted to limit access to RSD protection and the oral hearing.

### **Part One. Refugee Determination and the Oral Hearing in Australia**

Australia first began to develop a process of onshore refugee status determination in the late 1970s. As Roz Germov and Francesco Motta note, from at least the post-World War II period to the 1970s, Australia had primarily received refugees ‘whose status or needs for resettlement had been determined elsewhere according to various agreements between Australia and international organisations such as the

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<sup>6</sup> James C Hathaway, ‘The Conundrum of Refugee Protection in Canada: From Control to Compliance to Collective Deterrence’ (1991) 4 *Journal of Policy History* 71, 71; Peter Waxman, ‘The Shaping of Australia’s Immigration and Refugee Policy’ (2000) 19 *Immigrants & Minorities* 53, 62–65.

International Refugee Organisation (IRO) and the UNHCR.’<sup>7</sup> In 1947, an assisted passage and resettlement agreement was put into place with the IRO. As part of this agreement, Australia accepted around 200,000 refugees (or persons displaced at the end of World War II), and by 1976, Australia had admitted over 350,000 refugees.<sup>8</sup> Until well into the 1970s, the majority of these refugees were of European extraction, as Patricia Hyndman and many others have noted.<sup>9</sup> Throughout this period, Australia's principally ‘offshore’ program was criticised ‘for exploiting the refugee situation for population-building and work-force purposes [and] for taking very few of the “hard-core” cases.’<sup>10</sup> Peter Waxman writes that the large majority of displaced persons selected for acceptance were young, of good health and character and assimilable.<sup>11</sup>

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<sup>7</sup> Roz Germov and Francesco Motta, *Refugee Law in Australia* (Oxford University Press, 2003) 33. The International Refugee Organisation was an international body created at the end of World War II to coordinate and manage the refugee crisis that followed the war. Australia agreed to settle a minimum of 12,000 persons a year from camps in Europe: at 32.

<sup>8</sup> David Cox, ‘Australian Refugee Policy and Developing Countries: Evolvement of Australian Refugee Policy, 1945-85’ in Reginald T Appleyard (ed), *The Impact of International Migration on Developing Countries: Conference on Migration and Development* (Organisation for Economic Co-operation and Development, 1989) 249, 249; see also David Cox, ‘Refugee Settlement in Australia: Review of an Era’ (1983) 21 *International Migration* 332. From 1947–1952 alone, Australia had accepted 170,400 displaced persons: Waxman, above n 6, 68.

<sup>9</sup> Patricia Hyndman, ‘Australian Immigration Law and Procedures Pertaining to the Admission of Refugees’ (1987) 33 *McGill Law Journal* 716, 719. This was a consequence of the White Australia policies, which restricted non-British and non-European migration through a number of exclusionary measures. Grewcock notes that ‘no non-European refugees were granted entry between 1945 and 1965 and, even after the [White Australia] policy was relaxed in 1966 to allow visas for non-Europeans with special skills that local residents could not provide, European heritage and self-identification were decisive’: Michael Grewcock, *Border Crimes: Australia’s War on Illicit Migrants* (Institute of Criminology Press, 2009) 93. Hyndman also charts the history of Arthur Calwell’s attempts to expel the people, who were allowed to come to Australia during the war, once the war had ended, attempts that were successfully challenged in *O’Keefe v Calwell* (1949) 77 CLR 261. An Act was then passed to permit these deportations, which did not take place because of a change of Government, but restrictions preventing some family reunion and naturalisation remained in place: Hyndman, 719.

<sup>10</sup> Cox, ‘Australian Refugee Policy and Developing Countries: Evolvement of Australian Refugee Policy, 1945-85’, above n 8, 249. Equally, in the period of 1947–74, although the IRO was primarily responsible for the selection of displaced persons, it should come as no surprise that the Australian government retained the right to make the final selection. ‘Hard-core’ is a term often used in reference to post-war immigration and refugee intakes, and it generally describes refugees or humanitarian entrants who were disabled, injured, sick or elderly: Kelley and Trebilcock, above n 5, 344.

<sup>11</sup> Waxman, above n 6, 68. According to the 1977 ‘Refugee Policy and Mechanism Statement,’ refugee selection was influenced by capacity to integrate, the state of the economy, the refugees’ background and locational choice within Australia, and the availability of services upon arrival: Commonwealth, *Parliamentary Debates*, House of Representatives, 24 May 1977, 1714 (Hon Michael Mackellar, Minister for Immigration and Ethnic Affairs). Although this a rather early set of criteria, James Jupp’s review of refugee intake criteria found that important factors in Australia’s refugee intake in this period included Australia’s past political and military involvement; established ethnic communities in Australia attempting to assist their communities overseas; suitability for resettlement; financial

The arrival of those who, in contemporary terms, might be called onshore refugees first occurred in Australia from the mid-1970s onwards. While Australia's early ascension to the Refugee Convention in 1954 brought the instrument into force, it was only at the end of the Vietnam War that Australia became a country of 'first asylum,' as those fleeing post-war Vietnam arrived seeking protection.<sup>12</sup> Andrew Endrey writes that race was not all that distinguished this refugee movement from every other in Australian history; rather, it was also that the Indo-Chinese arriving by boat were the first 'self-selecting' humanitarian migrants of recent times.<sup>13</sup> Prior to these arrivals, there had been very few onshore refugee applicants. At the time, the Immigration Minister determined the outcome of onshore humanitarian applications as part of the discretionary power to grant entry permits under the *Migration Act*.<sup>14</sup> When 'the first refugee boat' carrying Vietnamese asylum seekers arrived in April 1976,<sup>15</sup> there was little media coverage of the event. The men on board were granted entry permits and sent to the St Vincent de Paul Charity for support. Michael Grewcock details the reception of further boats in the same year:

Two more boats, carrying 106 Vietnamese refugees, arrived in November and December 1976. All were permitted to enter and most were flown to the Wacol Migrant Hostel in Brisbane, where they resided while their status was considered.<sup>16</sup>

Between April 1976 and August 1981, 56 boats carrying a total of 2100 people arrived in Australia.<sup>17</sup> The arrival of these first boats of 'onshore' asylum seekers, as

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considerations in relation to providing assistance; and the State's willingness to become involved in certain crises over others: James Jupp, *Exile or Refuge? The Settlement of Refugee, Humanitarian, and Displaced Immigrants* (Australian Government Publishing Service, 1994); cited in Cox, 'Australian Refugee Policy and Developing Countries: Evolvment of Australian Refugee Policy, 1945-85', above n 8, 66.

<sup>12</sup> See Mary Crock, 'Judging Refugees: The Clash of Power and Institutions in the Development of Australian Refugee Law' (2004) 26 *Sydney Law Review* 51, 53.

<sup>13</sup> Waxman, above n 6, 70; Andrew Endrey, 'Outline of Australia's Response to Refugee Situations Since 1975' (National Population Council, 1990).

<sup>14</sup> Andreas Schloenhardt, 'Australia and the Boat-People: 25 Years of Unauthorised Arrivals' (2000) 23 *University of New South Wales Law Journal* 33, 36. See also *Migration Act 1958* (Cth) No 62 of 1958, s 6. Note, though, that Australia's political and social preoccupation with maritime arrivals often overlooks significant phases of arrival of other national groups fleeing political crisis and unrest after World War II. Amongst these groups were approximately 15 000 Hungarians in the mid-1950s (escaping the Russian crackdown in Hungary) and roughly 5500 Czechs escaping the reinvasion of Prague after 1968. As well, about 18 000 Lebanese arrived during the civil war in Lebanon from 1975–78: see Waxman, above n 6, 69.

<sup>15</sup> Grewcock, above n 9, 97.

<sup>16</sup> Ibid; and see also Nancy Viviani, *The Long Journey: Vietnamese Migration and Settlement in Australia* (Melbourne University Press, 1984).

well as offshore Vietnamese refugees resettled in Australia post-1975, were the subject of the 1976 Senate Committee report ‘Australia and the Refugee Problem: The Plight and Circumstances of Vietnamese and other Refugees’ (‘Australia and the Refugee Problem report’).<sup>18</sup> Grewcock argues that the Senate Standing Committee on Foreign Affairs and Defence were prompted to commission the Report not just by the influx of refugees in the late 1970s, but also by the ad hoc and inconsistent responses to the initial phases of migration following the collapse of the Saigon regime in 1975.<sup>19</sup>

The ‘Australia and the Refugee Problem’ report clearly evinced the tension between the Government’s reluctance to accept refugees whom the state had not directly chosen and the growing recognition of international refugee law. While Australia had ratified the Refugee Convention long before some states, in 1954, it was not until 1973 that Australia signed the 1967 Protocol, which broadened the application of the Convention to events occurring outside of Europe after 1951.<sup>20</sup> Also in play was the liberal state’s ideal of humanitarianism, which would support some form of international responsibility for the growing Indo-Chinese refugee populations.<sup>21</sup>

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<sup>17</sup> Department of Immigration and Ethnic Affairs, *Review of Activities to 30 June 1982* (Australian Government Publishing Service, 1982); Grewcock, above n 9, 97; and see further Nancy Viviani, *The Indochinese in Australia, 1975-1995: From Burnt Boats to Barbecues* (Oxford University Press, 1996); Schloenhardt, above n 14. 1973 was also the year that the Whitlam Government signed the 1967 Protocol to the Refugee Convention. This came long after significant expansions of Australia’s offshore refugee program, and tracks a similar course to Canada’s eventual signing onto the Refugees Convention, as well as the Protocol in 1969. Although the official date for the dismantling of the White Australia Policy was 1973, moves had been made to change the policy earlier. Notably in 1966 the Holt Government approved the limited entry of highly skilled non-Europeans and reduced the 15-year wait for naturalisation by non-Europeans to the standard waiting period of five years: see Waxman, above n 6, 58.

<sup>18</sup> Senate Standing Committee on Foreign Affairs and Defence, *Australia and the Refugee Problem: The Plight and Circumstances of Vietnamese and Other Refugees* (Australian Government Publishing Service, 1976). Cox argues that the South-East Asian migration that occurred in the mid-seventies was when Australians became more acutely aware of ‘the proximity of Asia.’ Cox, writing in the early 1980s, gives some sense of the endurance of the anti-Asian racism at the time when he notes that after 1976, Australians found themselves ‘confronted’ by Asians on public transport, in shops and on the streets, and that ‘reactions were *understandably mixed*’ [my emphasis]: Cox, ‘Refugee Settlement in Australia: Review of an Era’, above n 8, 332.

<sup>19</sup> Grewcock, above n 9, 96.

<sup>20</sup> Ibid 92–3.

<sup>21</sup> Surprisingly, the ‘Australia and the Refugee Problem’ report also includes the original text of the leaflet given the Vietnamese refugees, whom the Government had flown in from Vietnam and Guam. The leaflet, which provides a profile of Australia ‘as a nation’ (‘Australia, your new country is a mixture, with many varied points’), also includes information about accommodation and access to basic welfare services for refugees. It closes by stating that:

Much of the ‘Australia and the Refugee Problem’ report was devoted to outlining the policy and resettlement failures that had become apparent since the arrival of the first groups of Indo-Chinese refugees.<sup>22</sup> In particular, it argued that the absence of a clear set of policies in relation to asylum seekers ‘reduces our practical ability to respond to crises, and in turn can become justification for not involving ourselves with particular situations.’<sup>23</sup> In response to the ‘problem’ of the refugee influx, the report recommended the creation of a ‘comprehensive set of policy guidelines together with the necessary administrative machinery to be applied to refugee situations.’<sup>24</sup>

Out of this report, the then-Minister for Immigration presented ‘the Refugee Policy and Mechanism’ to Parliament, which made four statements that were intended to guide Australia’s nascent refugee policy. While the reforms did not introduce an oral hearing, even at this early stage, the Government presented the codification of procedure as a means to determine which onshore applicants did not merit protection.<sup>25</sup> The first two of these four statements set out that ‘Australia fully recognises its humanitarian commitment and responsibility to admit refugees for resettlement,’ and that ‘the decision to accept refugees must always remain with the Government of Australia.’<sup>26</sup> These two key points in many ways represent the tension that has characterised onshore refugee policy up to the present moment.<sup>27</sup> Even

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A number of migrants get along very well, but not all are the same. It is only when you are prepared to face and overcome the above-mentioned difficulties that you can ask to come to Australia. ... Australia has had a lot of experience with migrants, especially in the last 25 years. The majority, about three in four, get along very well; the remainder because they failed, leave Australia. ... But, finally, whether you succeed or not is up to you. Now is the time to decide and see if you believe you will succeed like other migrants to Australia.

Senate Standing Committee on Foreign Affairs and Defence, above n 18, 118.

<sup>22</sup> Close behind the publication of this report was a report that addressed migrant settlement more generally: Francis Galbally, *Migrant Services and Programs: Report of the Review of Post-Arrival Programs and Services for Migrants* (Australian Government Publishing Service, 1978).

<sup>23</sup> Senate Standing Committee on Foreign Affairs and Defence, above n 18, 89; Germov and Motta, above n 7, 33–34.

<sup>24</sup> Senate Standing Committee on Foreign Affairs and Defence, above n 18, 89; Grewcock, above n 9, 96.

<sup>25</sup> Michael Mackellar, ‘Refugee Policy and Mechanism Statement’, Commonwealth, *Parliamentary Debates*, House of Representatives, 24 May 1977, 1714 (Minister for Immigration and Ethnic Affairs).

<sup>26</sup> Ibid.

<sup>27</sup> The two further points made in the ‘Refugee Policy and Mechanism’ statement set out that ‘[s]pecial assistance will often need to be provided for the movement of refugees in designated situations or for their resettlement in Australia’ and that ‘[i]t may not be in the interest of some refugees to settle in Australia [and] their interests may be better served elsewhere,’ a situation that Australia’s annual financial contribution to the UNHCR was intended to address: *ibid.*

though the statement itself was far from a detailed approach to onshore refugee determination or to Australia's international treaty obligations, in May of 1977 the 'Refugee Policy and Mechanism' constituted the beginnings of what has perhaps been overstated as 'a new Australian refugee policy.'<sup>28</sup>

Grewcock argues that the policy did more than articulate the Government's preference for an organised approach to refugee entry and resettlement; it also intimated that a more restrictive response might yet develop towards unauthorised boat arrivals as a result of the policy's focus on the imperative of executive control.<sup>29</sup> Indeed, the policy initiated the increased codification of RSD procedure, and with it the assertion of Government control over onshore refugee applications. David Cox notes that, during this period, the Government increasingly articulated its 'concerns' about the genuineness of later phases of Indo-Chinese arrivals, with the Secretary of the Department of Immigration stating in 1982 that 'the arrangements for the individual determination of refugee status, and a general tightening of our refugee policies, are now ensuring that only genuine refugees are settled here under Australia's protection.'<sup>30</sup>

A range of humanitarian programs for receiving offshore refugees had existed in Australia prior to its acting as a country of first asylum for applicants arriving by boat. However, these programs still afforded the Australian Government significant control over which refugees would finally be selected for admission. As Cox notes, once Australia had chosen a 'refugee situation to respond to,' individual refugees were then selected.<sup>31</sup> The primary criteria on which selection was made were three-fold: the reunification of immediate family; identification of those considered to have the

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<sup>28</sup> See, for example, Schloenhardt, above n 14, 38.

<sup>29</sup> Grewcock, above n 9, 96. Grewcock also notes that it was as the number of onshore Indo-Chinese refugees increased—as opposed to post-World War II refugees arriving from Europe—that the beginnings of a formal refugee status determination policy were articulated, which also marked the 'beginnings of a state infrastructure for monitoring and ultimately detaining and deterring unauthorised refugees': at 94.

<sup>30</sup> Australian Council on Population and Ethnic Affairs, 'Regional Refugee Consultations' (Canberra, DIEA, 1982) cited in Cox, 'Australian Refugee Policy and Developing Countries: Evolvement of Australian Refugee Policy, 1945-85', above n 8, 250. However, Cox also notes that these statements were often tempered by strong moral statements about Australia's obligation to those less fortunate and to share our wealth and prosperity with those who do not enjoy 'our political and social freedom.' See also Senate Standing Committee on Foreign Affairs and Defence, *Indo-Chinese Resettlement: Australia's Involvement* (Australian Government Publishing Service, 1982).

<sup>31</sup> Cox, 'Refugee Settlement in Australia: Review of an Era', above n 8, 333.

highest capacity to assimilate; and the acceptance of a proportion of so-called ‘hard-core’ refugees.<sup>32</sup> Australia continued to be criticised for ‘creaming’ refugee situations, and it is clear that criteria based on who would be a ‘good’ migrant continued to play a role in hand-selecting offshore refugees for resettlement.<sup>33</sup> The arrival of onshore refugee applicants interrupted Australia's ability to control its refugee program and policies. Concerns about the (still relatively minimal) numbers of arrivals and their genuineness, as well as international moves towards the standardisation of RSD protocols, both influenced Australia’s early development of its own RSD process.

*i. Determining Status in the Early Days: The Determination of Refugee Status (DORS) Committee*

Following the publication of the ‘Australia and the Refugee Problem’ report in 1976, the Australian Government established the Determination of Refugee Status (DORS) Committee and the Standing Inter-Departmental Committee on Refugees in 1977. The purpose of these committees was to consider refugee claims and make recommendations to the Minister of Immigration.<sup>34</sup> Both bodies existed within the Department of Immigration and Ethnic Affairs (DIEA) and, as Germov and Motta note, their recommendations were without statutory foundation<sup>35</sup> and were not binding on the Immigration Minister.<sup>36</sup> Indeed, from this point until 1989, the task of refugee determination remained wholly at the discretion of the executive, without any form of independent standards or oversight.<sup>37</sup>

The establishment of the DORS Committee was a key outcome of the 1977 reforms.<sup>38</sup> Meeting regularly in Canberra, the DORS Committee functioned on a case-by-case

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<sup>32</sup> Ibid. See Kelley and Trebilcock, above n 5 for a definition of ‘hard-core’ refugees. Cox defends this choice, characterising the refugee program as part of Australia’s general migration scheme and writes that ‘such criteria are understandable and consistent with Australia’s overall immigration policy’: Cox, ‘Refugee Settlement in Australia: Review of an Era’, above n 8, 333.

<sup>33</sup> Cox, ‘Refugee Settlement in Australia: Review of an Era’, above n 8, 333.

<sup>34</sup> Schloenhardt, above n 14, 36.

<sup>35</sup> Germov and Motta, above n 7, 65–7.

<sup>36</sup> Schloenhardt, above n 14, 36.

<sup>37</sup> Germov and Motta, above n 7, 65–7.

<sup>38</sup> Four government officials drawn from four different departments constituted the entire committee, with a UNHCR representative present in an advisory, non-voting capacity; representatives came from the DIEA, the Attorney General’s Department, the Department of Prime Minister and Cabinet and the Department of Foreign Affairs and Trade. Dianne Ayling and Sam Blay note that the role of the UNHCR representative was to offer a credibility assessment based on what was known about the

basis and was required to apply the Refugee Convention definition of a refugee. Where the applicant was ‘screened in’ and the initial claim was deemed to be of substance, the Department arranged an interview with a case officer of the DORS Secretariat (which existed within the Department of Immigration), and a transcript of this interview accompanied any application to the Committee.<sup>39</sup> All decisions were made by way of a majority vote and passed on to the Minister as recommendations only.<sup>40</sup>

The year 1980 marked the first time that Australian domestic legislation made reference to the Refugee Convention. Prior to 1980, no legislative instrument or regulatory provision had referred to the question of whether a person had the status of a refugee or to the obligations that were owed to a person who was determined to be a refugee.<sup>41</sup> The new provision did not incorporate the Refugee Convention’s terms, or set out how status was to be determined, or remove the complete discretion of the executive to determine who would be granted status. Rather, it set out that a non-citizen shall be granted an ‘entry permit’ if the ‘Minister has determined by instrument in writing that he [sic] has the status of a refugee within the meaning of the Convention Relating to the Status of Refugees.’<sup>42</sup>

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applicant’s country of origin; ‘to provide information on the treatment of similar cases or similar legal points in other jurisdictions’; and ‘to represent the international community’s interests by providing its interpretation of fundamental concepts such as a “well-founded fear of persecution”’: Dianne Ayling and Sam Blay, ‘Australia and International Refugee Law: An Appraisal’ (1987) 9 *University of Tasmania Law Review* 245, 259; Savitri Taylor, ‘The Right to Review in the Australian On-Shore Refugee Status Determination Process: Is It an Adequate Procedural Safeguard against Refoulement?’ (1993) 22 *Federal Law Review* 300, 259.

<sup>39</sup> Hyndman, above n 9, 738. Unless the claim was considered ‘manifestly unfounded’ based on an initial interview with a DIEA officer, in which case the DORS Committee could recommend it be rejected without a full interview: at 738.

<sup>40</sup> Ibid 727. Where votes split down the middle, the chair had the casting vote. From 1980, the application process became slightly more transparent, and the applicant was required to fill in an application form and submit any relevant documentary evidence to the Committee: Germov and Motta, above n 7, 66. From 1987, a comprehensive 48-page application form was introduced, and this document became the basis upon which the Committee considered the application. Hyndman notes that the ‘whole procedure’ from the initial application to receipt of a decision might take up to 12 months or longer: Hyndman, above n 9, 738, 742.

<sup>41</sup> Germov and Motta, above n 7, 38.

<sup>42</sup> *Migration Act 1958* (Cth) s 6A(1)(c) (in time at 1980); Hyndman, above n 9, 734. The same section set out that in circumstances where the Minister granted a person territorial asylum or determined there were ‘strong compassionate grounds or humanitarian grounds’ for entry, an entry permit could also be issued.



Critically, in this same period, the Government was also introducing new legislation targeting ‘people smugglers’ and expanding the powers of the Coast Guard and executive powers to deport.<sup>43</sup> And despite the procedural reforms to RSD, obvious deficiencies in process persisted.<sup>44</sup> These included a complete lack of independence from the Department; the lack of transparency or requirement for reasons;<sup>45</sup> the fact that the reviewing body was also the original decision-making body; and the informal nature of the Committee, which effectively entailed that only applicants with knowledge and the correct contacts had access to the system.<sup>46</sup> The DORS Committee remained in place as the key body determining refugee status until 1990. Although there were changes to the precise manner in which the Committee functioned, these changes—like the body itself—were policy-based, not legislated for or codified.

The difficulty of charting the basis upon which decisions to grant status or entry permits were made in this period reveals the persistence of executive discretion – and arguably the extent to which such discretion meant that credibility testing as a means to control and determine the genuineness of claims was not necessary. The administrative arrangements and decisions were scantily documented.<sup>47</sup> Hyndman writes that decisions were made on the basis of ‘procedures and guidelines set out in departmental manuals and circulars,’ which were amended frequently.<sup>48</sup> Andreas Schloenhardt records that, in practice, political considerations strongly influenced the

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<sup>43</sup> Schloenhardt, above n 14, 39.

<sup>44</sup> Relevantly, an applicant before the Committee could request an informal review, in which case the DIEA or the Minister could, but was not required to, refer the matter back to the Committee: Hyndman, above n 9, 746. There was also the possibility of judicial review under the *Administrative Decisions Judicial Review Act 1977* (Cth). This was subject to considerations of whether determinations of refugee status were ‘made under an enactment’ in order for the Act to apply. And, as Hyndman notes, this avenue of appeal was rarely accessed, particularly up until the late 1980s: *ibid* 749.

<sup>45</sup> Note, though, that since *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 57 CLR 290, the Minister must give reasons if requested to do so.

<sup>46</sup> Hyndman, above n 9, 746; citing the Australian Human Rights Commission, *Human Rights and the Migration Act*, Report No. 13, Australian Government Publishing Service (April 1985) [316]. Complaints could also be made to the Commonwealth Ombudsman.

<sup>47</sup> They were primarily mentioned in executive documents and not necessarily on a case-by-case basis: Germov and Motta, above n 7, 66.

<sup>48</sup> Hyndman, above n 9, 725. Some of these manuals produced by the DIEA included the *Determination of Refugee Status: Notes for the Guidance of Interviewing Officers* and *Examination of Passengers and Crew at Airports*. These documents are not dated but Hyndman’s research indicates they were produced in or around 1978. In a reminder of pre-Internet days, Hyndman also notes these manuals were apparently available for inspection at DIEA offices and government bookshops: at 725–6.

DORS determinations,<sup>49</sup> claiming ‘the establishment of the DORS crystallised an increasingly severe approach of the Government to refugees; it was clear that refugees were just another, more difficult, class of immigrants and not a humanitarian exception.’<sup>50</sup> There was neither any actual independence nor an attempt to create any semblance of it.<sup>51</sup> Certainly, the statutory right to oral hearing before any kind of decision-maker was not included in the DORS Committee reforms.<sup>52</sup>

Part of the reason for the absence of a clearer legislative or codified framework into the early 1980s, which could have constrained and controlled refugee entry, was without a doubt the low number of onshore or boat arrivals. Indeed, Australia had only recently been identified as a ‘first destination’ for onshore Indo-Chinese refugee applicants.<sup>53</sup> Approximately 350 arrivals per year was a significant spike in onshore arrivals at the time and Grewcock notes that in the early 1980s, the Government began with ‘more systemic’ attempts to question the legitimacy of Indo-Chinese refugee claims.<sup>54</sup> At this time, the concept of ‘queue jumping’ acquired a form of ‘official sanction’ and was used by Immigration Minister MacPhee in March 1982 in order to justify a review of refugee policy for the purpose of ‘ensur[ing] that only genuine refugees are admitted under Australia’s refugee programs.’<sup>55</sup>

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<sup>49</sup> Schloenhardt, above n 14, 37.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> While beyond the scope of this chapter, it is worth noting that these changes took place in the broader context of the expansion of administrative justice and of mechanisms for the review of administrative decisions in Australia. See generally Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007); John Griffiths, ‘Australian Administrative Law: Institutions, Reforms and Impact’ (1985) 63 *Public Administration* 445.

<sup>53</sup> Between April 1976 and August 1981, 56 boats arrived, carrying 2100 people. The primary source of Indo-Chinese arrivals in this era was not as a consequence of boat arrivals but rather of large numbers offshore refugees accepted by the Australian Government. In roughly the same period (1974–1981), 51 780 Indo-Chinese refugees were resettled in Australia: Department of Immigration and Ethnic Affairs, *Review of Activities to 30 June 1981* (Australian Government Publishing Service, 1981); see also Grewcock, above n 9, Chapter 3.

<sup>54</sup> Grewcock, above n 9, 100.

<sup>55</sup> Department of Immigration and Ethnic Affairs, ‘Annual Report 1983’ (Australian Government Publishing Service, 1983) 27; and see Grewcock, above n 9, 100.

ii. *Orality and the Emergence of the RSD Oral Hearing*

Australia's relatively new executive system of onshore RSD was addressed in a number of reports in the 1980s.<sup>56</sup> In 1988, the then-Labor Government commissioned the Fitzgerald Inquiry report to 'undertake a broad ranging look at its immigration policies.'<sup>57</sup> The report, entitled 'Immigration: A Commitment to Australia' ('Fitzgerald Inquiry' report) was expansive, and produced a model migration bill that led to a significant overhaul of the existing *Migration Act*.<sup>58</sup> The 'Fitzgerald Inquiry' report declared that while the mass exodus from Indo-China had begun to dwindle, the 'seepage of people is nonetheless taxing the humane reception policies of neighbouring countries and exacerbating regional tensions.'<sup>59</sup> The report went on to note that the outflow was also 'of an increasingly migratory character.'<sup>60</sup> Obviously not predicting the influx of onshore applicants that would occur in the early 1990s, the report made its recommendation as follows:

While recognising the importance of responding to refugee situations in our region, the Committee recommends that from 1988/89 Australia gradually disengage itself from Indochinese resettlement, in line with the decreasing outflow and diminishing numbers of refugees from Indochina and in the context of positive strategies for solutions to this problem.<sup>61</sup>

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<sup>56</sup> In 1985, the Human Rights Committee recommended that the DORS Committee be given an independent chair, and in 1986, the Administrative Review Council reported there was a need for a mechanism to review refugee determinations—specifically a system of independent review—and noted that 'the [DORS] Committee cannot be said to provide an independent review of its own primary decisions': Administrative Review Council, 'Review of Migration Decisions' (Australian Government Publishing Service, 1986) 90; Human Rights Committee, 'Human Rights and the Migration Act 1958' (Australian Government Publishing Service, 1985); Germov and Motta, above n 7, 71.

<sup>57</sup> Fitzgerald Committee to Advise on Australia's Immigration Policies, 'Immigration: A Commitment to Australia' (Australian Government Publishing Service, 1988) ix. Germov and Motta note that the 'Fitzgerald Inquiry' report recommended that a Commissioner for Refugees be established and that this replace the DORS Committee. The report suggested that the Commission be completely independent of the Department and have final power to determine refugee status: Germov and Motta, above n 7, 71. While outside of the scope of this chapter, one of the central issues addressed by the report was also the policy multiculturalism in Australia. Concerns about the nationality of onshore refugees were linked to criticisms of multiculturalism and the need for better integration of 'ethnic' migrants.

<sup>58</sup> Minister for Immigration, Local Government and Ethnic Affairs and Senator the Hon Robert Ray, 'Minister Ray Hails Start of New Era in Immigration' (Media Release, 18 December 1989).

<sup>59</sup> Fitzgerald Committee to Advise on Australia's Immigration Policies, above n 57, 83. The 'Fitzgerald Inquiry' report, written in 1987-88, notes that the Australian government continued to be criticised on the basis that a large proportion of its refugee intake had family links to Australia, noting that approximately half of intake in that period had family ties: at 84. The report also defended these choices, writing that 'it has been suggested that these people should come under the Family Immigration category, leaving their places available for other refugees in need.' The report's response was that, '[i]f such people apply as refugees and if they are genuine, this right should not be denied.'

<sup>60</sup> Fitzgerald Committee to Advise on Australia's Immigration Policies, above n 57.

<sup>61</sup> Ibid 84.

Soon after the report published this recommendation, in 1989 and the early 1990s, numbers of onshore asylum seekers increased, and the Government moved to codify and formalise the RSD process. Until 1989, there had been fewer than 500 refugee applications per year. Then, in 1989–1990, there were 12 130 applications received, and in the period of 1990–1991, the number of onshore applications reached 16 428.<sup>62</sup> These figures are commonly explained as representing the large numbers of asylum seekers who fled China in the wake of the Tiananmen Square massacre and those who left former Soviet Bloc countries upon the lifting of exit restrictions at the end of the Cold War.<sup>63</sup> As part of the round of amendments following the ‘Fitzgerald Inquiry’ report, the Migration Regulations 1989 (Cth) were gazetted. These regulations, for the first time, provided transparent and detailed guidelines as to how refugee status was to be determined and to whom it was to be granted.<sup>64</sup> The changes remained in place only briefly, as the immediate predecessor of the Refugee Review Tribunal that began operating in July 1993.<sup>65</sup>

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<sup>62</sup> Of which, 77 per cent were from the People’s Republic of China: Germov and Motta, above n 7, 34; Table 2.1; Schloenhardt, above n 14, 42. Many of the applicants were Chinese citizens who initially entered the country as students and who, as a consequence of Tiananmen Square, made *sur place* refugee claims.

<sup>63</sup> Schloenhardt, above n 14, 40–3.

<sup>64</sup> Germov and Motta, above n 7, 39. Along with the new regulatory framework came a new apparatus to determine and grant refugee status. In June 1990, an Inter-departmental Working Group (IWG) was established to develop a streamlined refugee determination process. In October of that year, the Minister announced the new determination process, which was based on the IWG’s recommendations: *ibid* 67.

<sup>65</sup> The process for making a primary decision under the new system was standardised to a greater extent than before. After the application was received and processed, the UNHCR was given a copy of the application. The Minister’s delegate prioritised any cases that required fast-tracking, and then cases were assigned to case officers. Following this, a case officer interviewed the applicant. The interview was recorded and transcribed. The primary decision-maker then prepared a statement of reasons, which was sometimes vetted by the legal branch of the Department and then signed. The applicant and the UNHCR were both given 21 days to comment on any negative assessments. Where comments were submitted, the case officer could carry out further investigations. If a new assessment was recommended, this was passed on to the decision-maker, who documented the findings. If the final determination was still negative, a statement of reasons was given to the applicant. By 1994, the DORS section contained about 380 staff, and about 170–180 of those were case officers: Germov and Motta, above n 7, 39. In 1992, the Department sought to further ‘streamline’ the primary decision-making stage: the distinction between the decision-maker and the case officer was removed, and all applicants were to be given an interview, along with ‘an opportunity to comment during the interview and afterwards on any adverse material’: at 68. Fonteyne notes that the delegates’ decision-making was subject to varying degrees of hierarchical control within the Department, depending upon the degree of experience of each officer and the section of the DORS committee where the decision was made; case officers were not required to be legally qualified, and almost never were in practice: Jean-Pierre Fonteyne, ‘Refugee Determination in Australia: An Overview’ (1994) 6 *International Journal of*

A key part of the reform of refugee status determination in this period was also the Minister's creation of the Refugee Status Review Committee (RSRC), the first separate body conducting merits review of refugee determinations.<sup>66</sup> This new system for in-house review of primary refugee status decisions, like the DORS Committee for primary determinations, did not have the power to make final determinations; rather, it made non-binding recommendations to the Minister's delegate.<sup>67</sup> As with the DORS Committee, an UNHCR representative once again assisted in a non-voting capacity.<sup>68</sup> The RSRC, then, remained a semi-independent body with no statutory basis, and its main function was not to make decisions but to make recommendations to a delegate of the Minister of Immigration.<sup>69</sup> Savitri Taylor notes that the RSRC 'certainly never gave the claimant an oral hearing.'<sup>70</sup> However, where required, the original decision-maker (the Departmental delegate) could be invited by the RSRC to 'make a presentation' in regards to the assessment of the case.<sup>71</sup> If a RSRC panel did have questions for an applicant, it could request a Departmental officer to conduct an interview with the applicant.<sup>72</sup> When the executive's unrestricted discretion to determine asylum was finally replaced with an independent decision-making process,

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*Refugee Law* 253, 254; see also James Crawford, 'Australian Immigration and Refugees: The 1989 Amendments' (1990) 2 *International Journal of Refugee Law* 626.

<sup>66</sup> Fonteyne, above n 65, 255.

<sup>67</sup> Ibid. These RSRC operated from 1990 until 1 July 1993. It was comprised of a representative from each of the Department of Immigration, Local Government and Ethnic Affairs; the Department of Foreign Affairs and the Attorney General's Department; and one community representative appointed by the Government, nominated by the Refugee Council of Australia: Susan Kneebone, 'The Refugee Review Tribunal and the Assessment of Credibility: An Inquisitorial Role' (1998) 5 *Australian Journal of Administrative Law* 78, 79.

<sup>68</sup> Indeed, the makeup of the new RSRC was also very similar to the former DORS Committee, although a community representative had been added to the committee's membership. Kneebone, above n 67, 79.

<sup>69</sup> Savitri Taylor argues that the RSRC was 'a body which failed to be independent in any real sense,' and that on this basis it failed to meet the minimum requirements of procedural fairness: Taylor, above n 38, 315.

<sup>70</sup> Ibid 317.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid 317, 323. Taylor writes that this asymmetry, in terms of who could access and engage with the review process, did nothing to enhance the Committees' appearance of independence. Taylor notes, based on interviews with then-RSRC members, that during RSRC meetings, lengthy discussion took place on points of disagreement, and that the discussion was genuine 'in the sense that members were known to go into a meeting sometimes without a clear view as to what the recommendation should be.' This procedure was, however, insufficient to ensure the independence of the body, since 'no RSRC member from a government department was completely free of government control,' and one or more departments could have decided at any point 'to require their RSRC representatives to confine themselves to ... voting according to a departmental view': at 317.

the oral hearing was introduced. And the hearing was now the site where departmental decision-makers were able to ‘test’ claims and determine credibility.

As these new procedures were being established in the early 1990s, and onshore refugee applicants were starting to number in the thousands rather than the hundreds, the regulations governing the conditions and criteria for permanent and temporary protection-related entry permits were changing constantly.<sup>73</sup> Then, with the passage of the *Migration Reform Act 1992* (Cth), the Government completely overhauled the system that had been built upon the 1989 Regulations.<sup>74</sup> These amendments created an oral hearing in the first instance and the RRT.<sup>75</sup> Critically, the same Act also introduced the policy that those arriving by boat and without documentation were to be subject to mandatory detention.<sup>76</sup> It is significant that one of Australia’s harshest ‘deterrence’ policies, which persists under current law, was introduced *with* the introduction of the oral hearing and a semi-independent merits review mechanism.

In July 1992, the Minister announced that the RRT would function as a specialist administrative tribunal and would take over the functions of the RSRC.<sup>77</sup> As such, beginning in July 1993, it would be the body responsible for reviewing all primary decisions made by the delegates of the Minister. The newly formed Tribunal was ‘charged with conducting reviews *on the merits* of adverse departmental decisions in refugee determination cases’; this function has continued as the Tribunal’s primary function up to the present moment.<sup>78</sup> In the second reading speech for the *Migration Reform Act 1992* (Cth) Gerard Hand, then Minister for Immigration, Local Government and Ethnic Affairs, stated that ‘credible independent merits review will ensure that the Government’s clear intentions in relation to controlling entry to

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<sup>73</sup> Germov and Motta, above n 7, 41–43.

<sup>74</sup> Ibid 43. Note, though, that much of the Act did not come into force until 1994, at which time it had been amended by the *Migration Legislation Amendment Act 1994* (Cth).

<sup>75</sup> *Migration Reform Act 1992* (Cth). Additionally in 1991, the *Migration Act* finally incorporated, by direct reference, the full definition of a refugee as set out in the Refugees Convention and the 1967 Protocol: *Migration Amendment Act 1991* (Cth) No 86 of 1991; *Migration Act 1958* (Cth), s36(1),(2) (in time at 1991).

<sup>76</sup> *Migration Reform Act 1992* (Cth) s 13.

<sup>77</sup> Kneebone, above n 67, 79; Gerard Hand, Minister for Immigration, ‘Migration Reform Bill 1992 Second Reading Speech’ (4 November 1992).

<sup>78</sup> Fonteyne, above n 65, 255.

Australia, as set out in the *Migration Act*, are not eroded by narrow judicial interpretations.’<sup>79</sup>

The Tribunal differed from the RSRC in significant ways. It was able to make final decisions about whether or not a decision could be remitted for redetermination, rather than simply make recommendations to the Minister; and it was a statutory body, which was to operate quasi-independently of the Department of Immigration. Unlike the RSRC, it was to make determinations with single-member benches, and it no longer had the power to make recommendations to the Minister for the exercise of his or her discretion in humanitarian cases falling outside the Convention definition.<sup>80</sup> From the outset, the RRT was set up as an inquisitorial tribunal and was entitled to conduct its own inquiries. The applicant made all initial submissions in writing and was then given an opportunity to appear before the decision-maker at an oral hearing, unless a positive decision could be made on the papers.<sup>81</sup> The idea that the Tribunal was to be ‘fair, just, economical, informal and quick’ was stated in the original enabling legislation and remains the language of the current *Migration Act*.<sup>82</sup> Other features of the Tribunal were that it was not bound by ‘technicalities, legal forms, or rules of justice,’ and that it was to act according to principles of ‘substantial justice and the individual merits of the case.’<sup>83</sup>

Jean-Pierre Fonteyne argues that the Tribunal was initially established partially in reaction to claims that the RSRC was ‘stacked’ with members of the Department of Immigration.<sup>84</sup> Those critical of the former RSRC voiced concerns that if staff were simply transferred from the former RSRC to the Tribunal, then it too would be ‘infected’ in the way that the RSRC had been.<sup>85</sup> This view is supported by Germov

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<sup>79</sup> Gerard Hand, Minister for Immigration, above n 77.

<sup>80</sup> Fonteyne, above n 65, 255.

<sup>81</sup> Ibid 256. Fonteyne notes that the legislation set out that there was no right to legal representation but that ‘most applicants are in practice accompanied by a legal advisor at Tribunal hearings’: at 256.

<sup>82</sup> *Migration Act 1958* (Cth) s 420.

<sup>83</sup> *Migration Act 1958* (Cth) s 420.

<sup>84</sup> Fonteyne, above n 65, 257.

<sup>85</sup> Ibid 257–58. Taylor outlines the basic process for appointment of RRT members, who from the outset were appointed on the recommendation of Cabinet, on the advice of the Minister for Immigration, who was in turn advised by the Australian Public Service. Apart from the RRT’s principal member and a head administrator, the original members of the RRT were interviewed and selected by a panel comprised of the Tribunal’s principal member, and a representation from each of the DIEA, the Department of Foreign Affairs and Trade and the Attorney General’s Department.

and Motta, who write that the Tribunal was established in part because of the perceived lack of independence of the RSRC, as well as the fact that the Committee's decisions did not compel the Minister to grant status to those recognised as meeting the refugee definition.<sup>86</sup> During a hearing before the Joint Standing Committee on Migration Regulations, the Department explained this as follows:

...the Tribunal will do exactly the same job but will be seen to be more transparent and fairer than the RSRC, which in the minds of our critics is not transparent and not fair. The public perception of the unfairness of the RSRC is, presumably based on the ideas that this is a committee of bureaucrats.<sup>87</sup>

Whatever pressures the Government was facing, improving the fairness of the review process was, for the Government, also about attempts to keep asylum appeals out of the court system and away from judicial interference. Fonteyne writes that a further key factor that led to the establishment of the RRT was ongoing government concern with 'what it viewed as the excessive use of the regular court system by unsuccessful refugee applicants—and the degree of success in persuading the courts to overturn departmental review determinations.'<sup>88</sup> Fonteyne also observes the connection between the two goals of improving perceived fairness and limiting the judicial review of decisions. He notes that the Department hoped that the new Tribunal would assuage concerns about the 'bias' of Departmental employees and that it would be 'perceived as sufficiently independent from the Department, so as to have a significant impact on the frequency with which rejected applicants would turn to the courts.'<sup>89</sup>

The brief history above reveals that the creation of a fulsome oral hearing for protection visa applications, one that takes place before a decision-maker and includes rights to quasi-independent and judicial review, was slow to come to Australia. It seems fair to observe that the Tribunal was created in a climate of animosity among

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Neither the UNHCR nor the Refugee Council of Australia was involved in these selections: Taylor, above n 38, 319.

<sup>86</sup> Germov and Motta, above n 7, 73.

<sup>87</sup> Joint Standing Committee on Migration Regulations, *Australia's Refugee and Humanitarian System: Achieving a Balance between Refuge and Control* (Australian Government Publishing Service, 1992) 127 (in camera evidence).

<sup>88</sup> Fonteyne, above n 65, 258.

<sup>89</sup> Ibid. In fact, the opposite transpired, and given the right to appeal directly to the Court from the Tribunal, the number of appeals rose from 229 cases in 1991–92 to 2339 in 1992–93: Schloenhardt, above n 14, 47.



legal professionals, advocates and the Government, and in ‘an atmosphere of concern about the cost of processing increased numbers of refugees in the period of the post-Tiananmen Square incident.’<sup>90</sup> The extent to which the RRT provided full merits review and an oral hearing was the result of pressure placed on the Government for a fairer and more independent review process. The hearing also reflected Government interest in maintaining control over onshore determination processes, and in quarantining decisions, as much as possible, from judicial review.<sup>91</sup> In then Minister Hand’s second reading speech, he emphasised that the new Tribunal would ‘lead to greater precision in our efforts to control the border.’<sup>92</sup>

The codification of RSD as Australia emerged as a country of first asylum reflected Government concerns about the growing numbers of onshore refugees and its desire to settle only ‘genuine’ refugees from the region. Indeed, there had been little need for a codified process, or an oral hearing, when the number of onshore arrivals was small and the Government maintained legitimate, executive discretion over which refugees Australia accepted and on what terms. Increasing the procedural rights of onshore refugee applicants may initially seem at odds with the desire to maintain control over onshore arrivals. However, when the codification of RSD processes is conceived of as a legitimate means to test and finally determine the facts of a claim, and an applicant’s credibility, this apparent tension is in many ways resolved.

Once introduced, the oral hearing became the central event within RSD in Australia. Applicants were provided with hearings before a decision-maker at two stages of RSD. The hearings, both at first instance and before the RRT, were presented as sites where claims could be efficiently determined, and where the Government could exercise control over the terms decision-making and review. And at this particular juncture, the *oral testimony* provided by the applicant, which was the central event of the hearing (rather than, say, legal argument or the calling of witnesses), became the

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<sup>90</sup> Kneebone, above n 67, 80. As noted above, the annual number of onshore arrivals had jumped from 500 in the mid-1980s to upwards of 10 000 arrivals per year in the early nineties: Glenn Nicholls, ‘Unsettling Admissions: Asylum Seekers in Australia’ (1998) 11 *Journal of Refugee Studies* 61, 62; Joint Standing Committee on Migration Regulations, above n 87, [6.49].

<sup>91</sup> On the battle between the executive and judiciary for power over final RSD decisions in Australia, see Crock, above n 12.

<sup>92</sup> Gerard Hand, Minister for Immigration, above n 77.

key way in which the departmental delegates and RRT Members tested the credibility and genuineness of each applicant.

## **Part Two. Refugee Determination and the Oral Hearing in Canada**

### *i. The Beginnings of a Refugee Policy*

James Hathaway describes Canadian refugee policy up to the early 1990s as having evolved through 'three distinct traditions.'<sup>93</sup> Like in pre-World War II Australia, humanitarian entrants to Canada applied for admission under Canada's general immigration scheme. Hathaway describes this first era of refugee protection, which lasted until the mid-1960s, as 'a matter of *immigration control*.' The other two traditions that Hathaway identifies are *compliance* with international legal obligations, which lasted from the 1960s through 1990s, and then, from the 1990s onwards, *collective deterrence*, which was characterised by a move away from the expansion of domestic determination procedures. Hathaway, writing in 1992, described this final tradition as a prediction of what was to come and there is little to contradict his forecast that after the 1990s, Canada's 'asylum dilemma' would 'centre on the viability of a continued commitment to multilateral refugee protection as contemplated by the Refugees Convention in the context of an effective renunciation of the responsibility by many of [Canada's] traditional [European] allies.'<sup>94</sup>

In this section, I briefly chart the history of RSD processes in Canada in order to describe and assess the introduction of the oral hearing within RSD and its place within the development of domestic refugee laws. As in Australia, the codification and regulation of RSD in Canada came late due to the persistence of the 'immigration control' period. Though, when codification finally was introduced, the oral hearing in Canada set a new high water mark of procedural fairness even as it attempted to preserve Government control over refugee status determinations. Indeed, the introduction of the oral hearing took place as Canada moved into the period identified by Hathaway as having been marked by collective deterrence. As with the history of the Australian oral hearing, the Canadian hearing was accompanied by improvements

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<sup>93</sup> Hathaway, 'The Conundrum of Refugee Protection in Canada: From Control to Compliance to Collective Deterrence', above n 6, 71.

<sup>94</sup> Ibid 72.

in the overall fairness of the RSD, but simultaneously, the new procedure was presented as a means to ensure that only ‘genuine’ inland refugee applicants accessed Canadian protection.<sup>95</sup>

In the first tradition that Hathaway identifies, that of ‘immigration control’ in the period following World War II, Canadian refugee policy and practice were remarkably similar to policy and practice in Australia. Even though there were ‘millions of Europeans to be protected, Canada responded cautiously by seeking out only the most “adaptable” European refugees from among those in need of resettlement.’<sup>96</sup> As in Australia, the refugees that Canada accepted were viewed as capable of assimilation and were not expected to place major demands on national resources.<sup>97</sup> And again, like Australia, ‘Canada refused to admit any of the “hardcore” European refugee population, including thousands of persons whose age, illness or handicap made them undesirable immigrants.’<sup>98</sup> Thus, although Canada established a number of situation-specific refugee programs throughout the early 1970s,<sup>99</sup> the refugees who were admitted were selected on the basis of the criteria governing Canada’s general immigration program.

In the late 1980s, Canada came to be, like Australia, a more prominent country of first asylum, even though throughout the early 1980s the number of onshore claims was still very small in proportion to the broader refugee program.<sup>100</sup> Prior to this time,

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<sup>95</sup> Gerald E Dirks, *Controversy and Complexity: Canadian Immigration Policy During the 1980s* (McGill-Queen’s Press, 1995) 60–91.

<sup>96</sup> Hathaway, ‘The Conundrum of Refugee Protection in Canada: From Control to Compliance to Collective Deterrence’, above n 6, 72. See generally David Brian Dewitt and John J Kirton, *Canada as a Principal Power: A Study in Foreign Policy and International Relations* (Wiley, 1983).

<sup>97</sup> Hathaway, ‘The Conundrum of Refugee Protection in Canada: From Control to Compliance to Collective Deterrence’, above n 6, 72.

<sup>98</sup> Ibid. See also Gerald Dirks, *Canada’s Refugee Policy: Indifference or Opportunism* (McGill-Queens University Press, 1977). Dirks traces Canada’s reluctance to accept refugees who could not assist with working the land or growing the nation’s commerce in early century, through to the anti-Semitism of the 1930s, as well as Canada’s reluctance to sign on to permanent international institutions established to care for refugees and migrants post-WWII.

<sup>99</sup> For refugees fleeing former Czechoslovakia and Hungary, and for Ugandan Asians, for example: Hathaway, ‘The Conundrum of Refugee Protection in Canada: From Control to Compliance to Collective Deterrence’, above n 6, 72. And details of each program, see Harold Troper, ‘Canada’s Immigration Policy since 1945’ (1993) 48 *International Journal: Canada’s Journal of Global Policy Analysis* 255.

<sup>100</sup> Due to extensive offshore programs, during the 1980s (specifically 1988), Canada ranked fifth in the world for per-capita refugee intake, but in roughly the same period onshore refugee intake still

although Canada was one of the key participating states in drafting the Refugee Convention, it did not sign the final version of the accord. At the heart of the decision not to sign the Refugee Convention until 1969 were Departmental and Government concerns about the Refugee Convention's open-ended definition of 'refugee' and the implication that Canada would be bound to admit 'Asiatic' refugees under proper domestic implementation of the definition.<sup>101</sup> Despite the scope of Canada's existing refugee programs, which allowed for a greater number of admissions than many signatory states, several successive immigration ministers argued against signing on the grounds that the refugee definition was in conflict with Canada's restrictive immigration legislation and that the Refugee Convention's rule of *non-refoulement* had undesirable implications for applicants within Canadian territory.<sup>102</sup> Indeed, in the period up to the early 1970s, a Cold War definition and understanding of refugee status in Canada persisted, and decisions regarding status and protection remained at the discretion of the executive. The Refugees Convention was cast as undermining these important raced-based—or rather openly racist—policy objectives.<sup>103</sup>

A 1966 White Paper on Immigration led to a shift in policy and an expansion of the post-war definition of a refugee.<sup>104</sup> The White Paper found that Canada's refugee definition was 'orientated towards Europe at a time when we boast a global view' and that the existing statutory definition appeared to be 'exclusive and politically orientated' and 'very restricted in time.'<sup>105</sup> The White Paper led to Canada's ascension

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averaged well below 1000 per annum from 1981 to 1984: James C Hathaway, 'Selective Concern: An Overview of Refugee Law in Canada' (1987) 33 *McGill Law Journal* 676, 686.

<sup>101</sup> Hathaway, 'The Conundrum of Refugee Protection in Canada: From Control to Compliance to Collective Deterrence', above n 6, 74 citing Memorandum to the Minister of Citizenship and Immigration, File 566-10 (19 January 1953); Memorandum to the Minister of Citizenship and Immigration from Laval Fortier, Deputy Minister of Citizenship and Immigration, File 566-10 (29 May 1958).

<sup>102</sup> Ibid 74–75. This was the case despite opposing views from Canada's Department of External Affairs, which argued ascension to the Refugee Convention was required to improve Canada's international standing and influence: 75.

<sup>103</sup> Ibid 74–5; see also Audrey Macklin, 'Asylum and the Rule of Law in Canada: Hearing the Other (Side)' in Susan Kneebone (ed), *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (Cambridge University Press, 2009) 78.

<sup>104</sup> Jean Marchand, 'White Paper on Immigration' (Department of Manpower and Immigration, 1966); cited in Christopher J Wydrzynski, 'Refugees and the Immigration Act' (1979) 25 *McGill Law Journal* 154, 159; see also Kelley and Trebilcock, above n 5, 352–8.

<sup>105</sup> AJ Banerd, 'Memorandum to the Director, Planning Branch' (Department of Manpower and Immigration, 23 November 1967) 8; cited in Hathaway, 'The Conundrum of Refugee Protection in

to both the Refugee Convention and its 1967 Protocol in 1969<sup>106</sup> and to the first incorporation of a Convention-based definition of a refugee into Canadian law in 1973.<sup>107</sup> Despite the above statutory reforms in 1973,<sup>108</sup> Canada's onshore refugee policy remained a matter of discretion. The then Immigration Appeal Board had the power to apply an enacted version of the Refugee Convention definition, however it was not bound to do so, and the matter of refugee protection could only be raised on appeal rather than at the initial stage of an application.<sup>109</sup>

ii. *A New Process, the Singh Decision and the Establishment of the Oral Hearing*

The first formal process to adjudicate asylum claims in Canada came with the 1976 *Immigration Act*.<sup>110</sup> Under the *Immigration Act 1976*, the Refugee Status Advisory Committee (RSAC) was responsible for identifying refugees in the first instance. In coming to its decision, the Committee reviewed a transcript of an applicant's formal examination under oath and then provided an opinion to the Minister. While the applicant was required to give evidence, there was still no formal oral hearing before a decision-maker.<sup>111</sup> Like Australia in this period, the Canadian Government sought to exert control over onshore refugee arrivals as the number of arrivals increased; and then, as now, the Canadian Government 'imposed selective visa controls which prevented many refugees from coming to Canada in order to present a claim for asylum.'<sup>112</sup> The 1976 *Immigration Act* also incorporated into Canadian law a detailed expression of the Convention refugee definition, rather than a mere reference to it. At this time, many bureaucrats and politicians nonetheless persisted in trying to preserve complete executive discretion over refugee decision-making, as well as to maintain a broadly protectionist stance vis-à-vis onshore claimants. As Hathaway explains,

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Canada: From Control to Compliance to Collective Deterrence', above n 6, 75; see also Marchand, above n 104.

<sup>106</sup> Gerald Dirks, 'The Green Paper and Canadian Refugee Policy' (1975) 7 *Canadian Ethnic Studies* 61. Hathaway, 'The Conundrum of Refugee Protection in Canada: From Control to Compliance to Collective Deterrence', above n 6, 75.

<sup>107</sup> *An Act to amend the Immigration Appeal Board Act*, SC 1973-74, c 27.

<sup>108</sup> Hathaway, 'Selective Concern', above n 100, 683-4; see also Wydrzynski, above n 104.

<sup>109</sup> *Immigration Appeal Board Act*, SC 1966-67, c 90, s 11.

<sup>110</sup> *Immigration Act*, SC 1976-77, c 52.

<sup>111</sup> Hathaway, 'Selective Concern', above n 100, 684.

<sup>112</sup> *Ibid* 704.

Persons in Canada who met the Convention definition as codified in the [1976 Immigration] Act were to be protected from removal to a country in which persecution was feared, but the decision to grant or withhold permanent resident status remained, at least in theory, an immigration prerogative.<sup>113</sup>

The RSAC remained in place until the Government's major reform of refugee determination in response to the 1985 Supreme Court of Canada decision, *Singh v Minister for Employment and Immigration*.<sup>114</sup> In the landmark *Singh* decision, the Supreme Court of Canada held that Canada's existing RSD procedures breached the principles of fundamental justice, set out in section 7 of the *Canadian Charter of Rights and Freedoms*, by failing to grant applicants an oral hearing before a decision-maker at any point in the decision-making process.<sup>115</sup> Notably, the Government had argued in *Singh* that the existing process did not breach principles of fundamental justice, or in the alternative that if they were breached, under section 1 of the *Charter*, oral hearings would be too resource-intensive to be practicable.<sup>116</sup>

In the *Singh* decision, Justice Wilson (writing on behalf of Chief Justice Dickson and Justice Lamer) set out the following:

where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing. Appellate courts are well aware of the inherent weakness of written transcripts where questions of credibility are

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<sup>113</sup> Hathaway, 'The Conundrum of Refugee Protection in Canada: From Control to Compliance to Collective Deterrence', above n 6, 77. And in this period, Canada's offshore refugee program expanded significantly. Although Canada expanded the scope of protection to include non-European source countries, refugees not within Canadian territory continued to be elected on the basis of general immigration policies and criteria, including on the basis of whether they could successfully establish themselves in Canada with minimal reliance on social services: 78–9.

<sup>114</sup> *Singh v Minister for Employment and Immigration* (1985) 1 SCR 177 ('Singh').

<sup>115</sup> *Canadian Charter of Rights and Freedoms*, s 2, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 ('the Canadian Charter of Rights and Freedoms'). The case involved seven applicants who, as Justice Wilson explains:

... had each made an application for redetermination of his or her refugee claim by the Immigration Appeal Board pursuant to s. 70 of the Act. ... [T]he Immigration Appeal Board in each case refused to allow the application to proceed on the basis that it did not believe that there were "reasonable grounds to believe that a claim could, upon the hearing of the application, be established..."

Each applicant then sought judicial review of the Board's decision pursuant to the provisions of s 28 of the *Federal Court Act*, RSC 1970 (2nd Supp), c 10. The Federal Court of Appeal denied these applications. The appeal to the Supreme Court was made in terms of the application of the *Canadian Charter of Rights and Freedoms* to the procedural mechanisms for RSD set out in the *Immigration Act* 1976, SC: *Singh v Minister for Employment and Immigration* (1985) 1 SCR 177, [6].

<sup>116</sup> As section one of the *Canadian Charter of Rights and Freedoms* sets out, 'The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.' The Supreme Court in *Singh* rejected this argument: *ibid* 218–19.

at stake and thus are extremely loath to review the findings of tribunals, which have had the benefit of hearing the testimony of witnesses in person. I find it difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions.<sup>117</sup>

The Canadian Government's response was 'a complete overhaul of the refugee determination process'<sup>118</sup> and the introduction of a tribunal process for first-instance refugee determinations. Following *Singh*, the Canadian Government created the Convention Refugee Determination Division (CRDD) to determine refugee applications, as a new arm of the Immigration and Refugee Board (which had replaced the previous Immigration Appeal Board).<sup>119</sup> Under the new procedure, applicants appeared before an immigration adjudicator, housed within Immigration Canada, in order to be screened into or out of the process. Applicants who were determined to be eligible for an oral hearing then appeared before a two-member panel of the CRDD. The hearing process was intended to be non-adversarial and to be facilitated by the Refugee Hearing Office, a member of which acted as counsel to the CRDD panel. In order for a positive determination to be made, only one of the two panel members was required to find in the applicant's favour, and applicants were granted access to interpreters as a matter of right, and to legal aid in certain provinces.<sup>120</sup>

Hathaway identifies the 1987 reforms of the *Immigration Act* as part of a 'new wave of control mechanisms.'<sup>121</sup> He writes that the benefits of the new CRDD and introduction of the oral hearing 'were overshadowed' by the government's 'unfortunate' decision to advance a distinctly protectionist agenda as part of the same

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<sup>117</sup> Ibid 213–14; citing *Stein v The Ship 'Kathy K'* (1976) 2 SCR 802, 806–08.

<sup>118</sup> Catherine Dauvergne, 'How the Charter Has Failed Non-Citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence' (2013) 58 *McGill Law Journal* 663, 668; *Singh v Minister for Employment and Immigration* (1985) 1 SCR 177, 213–14.

<sup>119</sup> Bill C-55, An Act to Amend the *Immigration Act*, 1976 and to Amend other Acts in Consequence Thereof, 2d Sess, 33d Parl, 1986-87 ('Bill C-55').

<sup>120</sup> See *Immigration Act*, SC 1976, c 1-2, s 69.1(8) which set out that one member of the Refugee Division may hear and determine a claim where the claimant consents. See also Peter W Billings, 'A Comparative Analysis of Administrative and Adjudicative Systems for Determining Asylum Claims' (2000) 52 *Administrative Law Review* 253, 280–81.

<sup>121</sup> Hathaway, 'Selective Concern', above n 100, 704.

legislative reform that established the CRDD.<sup>122</sup> Although Hathaway labels this move as unfortunate, the protectionist context of the CRDD's introduction was concordant with Canadian Government policy at the time, which remained primarily protectionist and geared towards expanding offshore rather than onshore programs.<sup>123</sup> Indeed, in the year of the *Singh* hearing and the year following the decision, the number of onshore claimants drastically increased, from 8,400 in 1985 to 18,000 in 1986, with projections at the time of up to 25,000 claims in 1987.<sup>124</sup> And finally, in line with other restrictions and controls brought in at the same time as the introduction of the oral hearing, appeal rights from both the first-stage eligibility interview and the CRDD determination were limited. Then, as now, applicants required special leave to appeal to the Federal Court of Canada, and while the eligibility determination could be appealed, such an appeal would not ordinarily stay a removal order.<sup>125</sup>

Simultaneously, though, the form of the new hearing and process—particularly the two-member panel and a quasi-judicial process at first instance—was at the time a high watermark of quality in RSD processing. Dauvergne notes that the new process was, ‘for two decades, widely regarded as one of the fairest refugee determination processes in the world.’<sup>126</sup> Unlike in Australia, at the time of its introduction, the hearing was not explicitly framed as a means to preserve, as efficiently as possible,

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<sup>122</sup> Hathaway, ‘The Conundrum of Refugee Protection in Canada: From Control to Compliance to Collective Deterrence’, above n 6, 81. The new legislation included granting the Immigration Minister the right to interdict ships carrying undocumented aliens and turn them back without determining any claims to protection; the legislation also introduced ‘safe third country’ provisions and criminal sanctions for people smuggling: Bill C-84, An Act to Amend the Immigration Act, 1976 and the Criminal Code in Consequence Thereof, 2d Sess, 33d Parl, 1986–87 (‘Bill C-84’).

<sup>123</sup> It is interesting to note, though, that in this period, the Government implemented an Expedited Process within the CRDD, under which a Refugee Hearing Officer could recommend a claimant for CRDD recognition, following which an agreed statement of facts could be endorsed by a single CRDD decision-maker. Claimants from major source countries with high acceptance rates were eligible. The reform was positive for the affected groups. However, the primary motivation for the process was the imperative of finding a way to manage the number of applications made before the CRDD. Indeed, in its first two years of operation, the CRDD had finalised over 21 000 claims from over 100 different states: *ibid* 83.

<sup>124</sup> Hathaway, ‘Selective Concern’, above n 100, 705. Indeed, based on the increasing number of claims prior to decision in *Singh*, the Government had already commissioned a report, which recommended the reform of existing procedures: Gunther Plaut, ‘Refugee Determination in Canada (report to the Hon E MacDonald, Minister of Employment and Immigration)’ (Employment and Immigration Canada, 1985); see also Employment and Immigration Canada, ‘Refugee Perspectives: 1985-1986 (Ottawa: Employment and Immigration Canada, 1985).’ (Employment and Immigration Canada, 1985).

<sup>125</sup> Hathaway, ‘The Conundrum of Refugee Protection in Canada: From Control to Compliance to Collective Deterrence’, above n 6, 83.

<sup>126</sup> Dauvergne, ‘How the Charter Has Failed Non-Citizens in Canada’, above n 118, 668.



executive control of refugee determinations and refugee acceptance rates throughout the late 1980s remained high.

In Australia, the introduction of the RRT was not imposed by means of a Government-opposed judicial ruling.<sup>127</sup> Nonetheless, in both jurisdictions, an oral hearing came about in response to criticism of existing, executive forms of refugee status determination. In Australia, the Government sought to introduce reforms that preserved as much executive discretion as possible whilst remaining true to the policy goal of creating fair determination procedures and finding a means to manage its obligations under the Refugee Convention. In Canada, in spite of the moves towards broader policies of deterrence, at the time of its implementation in 1987 Canada's system of RSD was indeed regarded as 'world-class'<sup>128</sup> and the 'Rolls Royce' of RSD systems. The two-member constitution of the first instance decision-making Board, and the requirement that only one decision-maker find in the applicant's favour, was arguably a direct implementation of the 'benefit of the doubt' standard that applies to refugee status decision-making.<sup>129</sup> Equally, providing the applicant with a full oral hearing at first instance, rather than upon review, has been recognised as a form of RSD best practice,<sup>130</sup> which not only saves resources lost through poor quality first-

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<sup>127</sup> Billings, above n 120, 282. In Australia, shortly before the RRT was established, a case arguing that natural justice required that each refugee claimant be given an oral hearing failed before the Federal Court of Australia: *Zhang De Yong* (1993) 118 ALR 165 at 179. Also, earlier, in the case of *Simsek v MacPhee* (1982) 148 CLR 636, the High Court of Australia held that a refugee applicant had no legitimate expectation or right upon which to base an entitlement to be accorded the right to natural justice and therefore to a hearing before a DORS committee. *Chen v Minister for Immigration and Ethnic Affairs* (1994) 48 FCR 591 held that there was to be an oral hearing for applicants seeking review before the RSRC. As Mary Crock notes, 'The prevailing wisdom in Australia was that immigration applicants—whether refugees or otherwise—had no legal right to a hearing before being expelled or excluded from Australia. The rules of 'natural justice' did not apply to these people': Crock, above n 12, 56.

<sup>128</sup> See Macklin, above n 103; Catherine Dauvergne, 'Evaluating Canada's New Immigration and Refugee Protection Act in Its Global Context' (2003) 41 *Alberta Law Review* 725.

<sup>129</sup> See François Crépeau and Delphine Nakache, 'Critical Spaces in the Canadian Refugee Determination System: 1989–2002' (2008) 20 *International Journal of Refugee Law* 50, 88–9; Jenni Millbank, "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21 *International Journal of Refugee Law* 1, 30; Hathaway, 'Selective Concern', above n 100, 707. Crépeau and Nakache note that 'when the IRB was created in 1989, the panels hearing the cases were to consist of two members. In order to give effect to the 'benefit of the doubt' promoted by UNHCR, the refugee claim had to be accepted by at least one of the members sitting on the panel.' They contend that 'a two-member panel is a richer critical space, in that it can usually become the stage for in-depth discussion on rules and policies and how they apply to the parameters of the case' and that '[i]t is the reason why many tribunals in the world are set with three or more members': Crépeau and Nakache, 88–9.

<sup>130</sup> Millbank, above n 129, 27.

instance determinations, but also entails that the applicant is able to present a claim before a quasi-independent body with greater procedural fairness protections from the outset. In reflecting on the *Singh* decision almost three decades later, Dauvergne writes that *Singh* has become part of the mythic foundation of Canadian refugee law. The anniversary of its handing down is celebrated annually by the advocacy community in Canada as Refugee Rights Day.<sup>131</sup>

The early years of refugee determinations before the IRB were exemplary, in terms of RSD processes, especially in relation to the oral hearing.<sup>132</sup> However, the influence of the Canadian Government and the executive on the IRB, and especially on its Refugee Protection Division, proved to be an ongoing and significant issue. The lack of independence from Government, particularly in the form of Member appointments, undermined the standard of procedural fairness afforded to refugee applicants as well as perceptions of the oral hearing as granting applicants a meaningful right to be heard. In analysing the IRB's operation from 1989 to 2002, François Crépeau and Delphine Nakache explain the 'difficulties' associated with the IRB as an institution in that period. Their article documents the exceptionally politicised nature of appointments to the IRB and the ways in which this affected the day-to-day functioning of the institution. Through a series of in-depth interviews with key witnesses of the IRB's work at the time, they observed:

[P]olitical patronage with regard to appointments and renewals infringes on this basic principle of independence, as well as on the general competence (expertise and experience) of the Board members. Similarly, although the right to be heard was clearly a vital strength of the Board system, it was frequently compromised by the disrespectful or biased attitudes of certain Board members, the use of hostile and aggressive cross-examination techniques by certain Refugee Protection Officers...<sup>133</sup>

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<sup>131</sup> Dauvergne, 'How the Charter Has Failed Non-Citizens in Canada', above n 118, 668–9. Dauvergne notes that the decision also became part of the *Canadian Charter of Rights and Freedoms* mythology more generally, because in it, the Supreme Court quite radically held that *Charter* applied to every person physically present in Canada, rather than just to Canadian citizens; *Singh v Minister for Employment and Immigration* (1985) 1 SCR 177, 209.

<sup>132</sup> See Dauvergne, *Humanitarianism, Identity, and Nation*, above n 4, 78–80.

<sup>133</sup> Crépeau and Nakache, above n 129, 57. Indeed, the partiality of the IRB was a major, ongoing issue in Canadian federal politics. See also James C Hathaway, 'Rebuilding Trust: A Report of the Review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board of Canada' (1993). The Hathaway review was commissioned in response to allegations that 'refugee hearing officers had been meeting privately to discuss cases of individual refugee claimants with members of the Immigration and Refugee Board's Convention Refugee Determination Division' and that 'the IRB had taken steps to establish Refugee Analysis Liaison Unit (RALU)' whose reports would be based on both public *and* classified information, and provided to refugee hearing officers to

This assessment fits within a broader literature that has tracked the extent to which relentless political interventions into the executive and administrative spaces of migration determination have compromised these spaces and the members' ability to meet basic standards of independence and consistency.<sup>134</sup> Criticisms leveled at the IRB in the early 1990s also reveal that the Board was implicated in the State's increasing attempts to limit and discredit onshore refugee claims.<sup>135</sup>

*iii. Deterrence in the New Century: Reforms to the Oral hearing, 2000 to Present*

The next major reform of refugee and immigration law relevant to this history of the oral hearing came with the *Immigration and Refugee Protection Act* ('IRPA'), which mostly came into effect in 2002.<sup>136</sup> Dauvergne notes that the new legislation marked 'the culmination of close to a decade of public consultations about immigration law and policy and [presented] a comprehensive overhaul of the previous legislation dating from the mid-1970s.'<sup>137</sup> Although the conduct of the oral hearing was not significantly affected by *IRPA*, the Act reformed the two-member panel system (under which only one member had to find in favour of the applicant in order for protection be granted) such that determinations would now be made by a one-member panel.<sup>138</sup> In reality, Dauvergne notes, this change essentially brought the legislation into line with existing practice since, by the time of the reforms' introduction in 2002, two-member panels had become rare due to resource allocations and constraints.

While the hearing process established in response to *Singh* had initially been very highly regarded, a number of reforms, access-to-justice issues, and resource limitations effectively diminished its overall fairness:

When the former regime was functioning at its fullest, the argument that the Canadian system was world class, and [that] a merits review would have been almost redundant, was a reasonably easy argument to make. However, as the two-member system for

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assist them in *contesting* applications for refugee status: at 1-2.

<sup>134</sup> Although the means for appointments to the IRB were improved, the lack of independence in the first years of the Canadian oral hearing's implementation undermined any perception of its fairness or the advantage of new procedural guarantees: Cr peau and Nakache, above n 129..

<sup>135</sup> Hathaway, above n 132.

<sup>136</sup> SC 2001, c 27. See also the Immigration and Refugee Protection Regulations, SOR/2002-227.

<sup>137</sup> Dauvergne, 'Evaluating Canada's New Immigration and Refugee Protection Act in Its Global Context', above n 128, 726. Much of the Act concerned reform of Canada's general immigration law. I do not address those reforms here, but for a comprehensive outline, see Dauvergne, *ibid*.

<sup>138</sup> Immigration and Refugee Protection Regulations SOR/2002-227, r 163. Multiple member panels could still be constituted at the IRB chairperson's discretion.

determinations was removed in this round of law reform and legal aid has been pared back across the country, the overall fairness of the refugee process is seriously impinged by not providing a merits review.<sup>139</sup>

The *IRPA* also made provision for the introduction of a Refugee Appeal Division (RAD) within the IRB, although its implementation was delayed just as the *IRPA* came into force. The RAD (whose eventual implementation roughly ten years later is discussed below) was intended to improve the overall fairness of RSD in Canada through the introduction of on-the-papers merits review of first-instance decisions, where previously no merits review had existed. Although the reforms provided for ‘the weakest possible merits review’ available,<sup>140</sup> the new procedure fit generally with the profession's call for increased fairness in RSD processes.

As Dauvergne argues, the ongoing ‘unimplemented’ status of the Refugee Appeal Division reflected the then-Government's lack of commitment to change the law. It was also, I would argue, an attempt to control and contain the review of refugee decision-making and credibility assessments as much as possible whilst complying with the *Singh* ruling. The failure to implement the RAD put even greater pressure on the oral hearing before the IRB, and until 2012, no merits review of the Board's initial findings was available. When the RAD was finally introduced in late 2012, it came with a further major overhaul of RSD that severely shortened the procedural timelines for refugee protection applications.<sup>141</sup>

The 2012 reforms are significant for the purposes of this short history. While they left formal access to the hearing and the hearing itself intact, they reduced the fairness of the hearing process as a whole by instituting shortened pre-hearing timelines that place more pressure than ever on refugee applicants as they prepare their claims. Advocates critiqued the new timelines as a means of limiting who has access to

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<sup>139</sup> Dauvergne, ‘Evaluating Canada’s New Immigration and Refugee Protection Act in Its Global Context’, above n 128, 733 (footnotes omitted).

<sup>140</sup> Ibid.

<sup>141</sup> Bill C-31, *Protecting Canada’s Immigration System Act*, 1st Sess, 41st Parl, 2012 (assented to 28 June 2012), SC 2012, c 17 (‘Bill C-31’). The Act amended the *Balanced Refugee Reform Act*, SC 2010, c 8, which came into force with the passing of Bill C-31; and the *Immigration and Refugee Protection Act*, SC 2001, c 27. Bill C-31 amended a number of areas of Canadian refugee and migration law, including those relating to human smuggling offences, the mandatory detention of groups designated as ‘mass arrivals,’ and limitations on the right to family reunion and access to permanent residency for accepted refugees: see Donald Galloway, ‘Rights and the Re-Identified Refugee: An Analysis of Recent Shifts in Canadian Law’ in Susan Kneebone, Dallal Stevens and Loretta Baldassar (eds), *Refugee Protection and the Role of Law* (Routledge, 2014) 35.

onshore refugee protection, as the timelines make it enormously difficult, procedurally, to prepare and present a successful claim.<sup>142</sup>

A quick sketch of the detail of the legislation gives a sense of how little time applicants have to prepare their claims; how quickly the oral hearing takes place after an application is made; and how speedily first-instance claims are determined. Timelines apply differently depending on the applicant's country of origin and whether the applicant makes his or her claim at a port of entry (POE), such as at a land border or an airport, versus making an 'inland' claim, having already entered the country on another basis. POE claimants are required to file their comprehensive application document, the Basis of Claim form (BOC), *in full* within 15 days of entering the country. For applicants making an inland claim, the BOC form must be returned at the time of the initial eligibility interview, which, circularly, will take place when the BOC is completed.<sup>143</sup> Oral hearings are then scheduled within 60 days of the deadline for returning the BOC, and all evidence must be filed at least 10 days before the hearing date.<sup>144</sup>

The justifications offered for the reforms are in keeping with the history of the oral hearing in Australia and to a lesser extent in Canada, whereby the hearing was seen

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<sup>142</sup> See Peter Showler, 'Advocacy Challenges Under the New Refugee Claim Process' (paper presented at the Law Society of Upper Canada Immigration Law Summit, Toronto, 26 November 2012); see also Canadian Bar Association, 'CBA Says Bill C-31 Raises Serious Concern about Excessive Ministerial Discretion. Press Release.' <[http://www.cba.org/cba/news/2012\\_Releases/2012-02-22.aspx](http://www.cba.org/cba/news/2012_Releases/2012-02-22.aspx)>; Canadian Civil Liberties Association, 'Despite Strong, Reasonable Opposition, Government Proceeds with Anti-Refugee Bill. Press Release.' <<http://ccla.org/2012/02/16/preliminary-response-to-bill-c-31-despite-strong-reasonable-opposition-government-proceeds-with-anti-refugee-bill/>>.

<sup>143</sup> Immigration and Refugee Protection Regulations SOR/2002-227, r 159.8. While on the face of it, this gives inland applicants unlimited time to complete the BOC form, legal aid and full welfare entitlements are not available until after the eligibility interview: Showler, *ibid*. The hearing for inland applicants must also take place within 60 days of referral to the IRB (r 159).

<sup>144</sup> Refugee Protection Division Rules SOR/2012-256 (RPD Rules) r 34. By far the shortest time for filing and finalising a claim applies to applicants from a list of 'Designated Countries of Origin' (DCOs), a further major reform introduced by Bill C-31. Under the DCO reforms, the Minister may exercise a discretionary power to designate certain countries as 'safe.' Hearings for applicants from these countries will take place within 30 days (inland claimants) or within 45 days (POE claimants) of referral to the IRB. Applicants from these states will be subject to even shorter determination timelines, and applicants from the DCO list, also known as the 'Safe Country of Origin' list, will have no access to an administrative appeal before the RAD. The applicant may appeal to the Federal Court of Canada for judicial review, but there will be no automatic stay on removal of the applicant if an appeal is filed: Bill C-31, clause 36(1), 58; *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 109.1, 110(2)(d.1); RPD Rules, rule 54(5); Immigration and Refugee Protection Regulations SOR/2002-227, r 159.9

just as much as a site that could ‘catch’ onshore refugee applicants who were not genuine refugees, as it was a safeguard of the procedural fairness of the onshore determination process. Indeed, the Citizenship and Immigration Canada (CIC) website declares that ‘too much time and too many resources are spent reviewing these unfounded claims.’<sup>145</sup> The site further explains that refugee claimants from these countries will have their claims ‘processed fast’ which will ensure that those who need it ‘get protection fast’ and those with unfounded claims ‘are sent home quickly through expedited processing.’<sup>146</sup> Speed and efficiency are not, on their own, negative features of RSD. However, in the case of Bill C-31, fast processing times are deployed with an explicit cynicism. The need for speedy determinations is articulated alongside the assertion that many refugee claims are unfounded. And, in the examples discussed here, efficiency-focused reforms are attended by expansions of executive discretion to counter the alleged abuse of RSD systems.<sup>147</sup>

The new shortened timelines necessarily impede the ability of applicants to gather evidence and to seek expert opinions or witnesses where required. They limit each applicant’s opportunity to have the best possible chance at presenting their evidence at the oral hearing in a manner that accords with the demands of Canadian refugee law. Indeed, the pressure and strain on applicants giving oral testimony is necessarily exacerbated by the reforms. The reforms constrain the ability of applicants to speak, and when applicants do articulate their claims, the reforms constrain how they are received and heard. Claims must be made quickly, and in a context where certain applicants are judged as wasting (Canadians’) time when presenting their claims in full. As Donald Galloway argues, the Bill C-31 reforms constitute a ‘radical and revisionary shift in [Canadian] refugee law and the processes of refugee status determination,’ such that the legal concept of the refugee is altered ‘as radically as it would be by substantive redefinition.’<sup>148</sup> The truncation and acceleration of RSD

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<sup>145</sup> Citizenship and Immigration Canada, ‘Designated Countries of Origin’ <<http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-11-30.asp>>.

<sup>146</sup> Ibid.

<sup>147</sup> The process of placing certain countries on the DCO list (see above n 143) is an entirely discretionary act, based on the Immigration Minister’s view of whether countries of origin meet broad threshold criteria in order to be designated as ‘safe’: *Immigration and Refugee Protection Act*, SC 2001, c 27, s 109.1.

<sup>148</sup> Galloway, above n 141, 38–9.

processes place great faith in the Canadian IRB, which is presented as reliable, efficient and effective, while construing protection visa applications as insincere, exploitative and burdensome.

These most recent reforms both reflect and create a culture of gate-keeping and disbelief within refugee status decision-making in Canada. The oral hearing in Canada was introduced to provide applicants with the ‘fundamental right’ to be heard before a decision-maker and as providing a form of independence in refugee decision-making. Its introduction, though, came alongside a number of reforms aimed at limiting onshore refugee migration. The CRDD’s creation has been followed by a steady contraction of the opportunity for applicants to be heard during the oral hearing. The tightening of RSD processes has been justified as countering ‘abuse of the system.’<sup>149</sup> As this account has shown, justification for the entire bundle of recent reforms was at once based on notions of economy and efficiency, and on discourses of asylum seekers as bogus and abusing the system.

There is not a similar history of extensive reform of RRT timelines and processes for onshore applicants arriving ‘regularly’ in Australia. This is because, since at least the mid 1990s, Australian Government action in relation to onshore refugees has been directed almost exclusively towards onshore refugees who arrive ‘irregularly’ and particularly those who arrive by boat.<sup>150</sup> It is beyond the scope of my work here to detail the regime for ‘unauthorised maritime arrivals’ (UMAs) in Australia.<sup>151</sup> Though, these applicants’ statutory rights to onshore RSD have been removed in full,<sup>152</sup> and claims have been processed either at offshore processing centres or under a range of ‘alternative’ non-statutory RSD processes that have at certain times

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<sup>149</sup> Citizenship and Immigration Canada, ‘Making Canada’s Asylum System Faster and Fairer: Additional Designated Countries of Origin Announced’ (Media Release, 30 May 2013) <<http://www.cic.gc.ca/english/department/media/releases/2013/2013-05-30.asp>>.

<sup>150</sup> See especially Michelle Foster and Jason Pobjoy, ‘A Failed Case of Legal Exceptionalism? Refugee Status Determination in Australia’s “Excised” Territory’ (2011) 23 *International Journal of Refugee Law* 583; Jane McAdam and Kate Purcell, ‘Refugee Protection in the Howard Years: Obstructing the Right to Seek Asylum’ (2008) 27 *Australian Year Book of International Law* 87; Anthea Vogl, ‘Over the Borderline: A Critical Inquiry into the Geography of Territorial Excision and the Securitisation of the Australian Border’ (2015) 38 *University of New South Wales Law Journal* 114.

<sup>151</sup> See *Migration Act 1958* (Cth) s 5(1).

<sup>152</sup> *Migration Act 1958* (Cth) s 46A. A UMA may only validly apply for a visa if the Minister personally permits it.

permitted appeals to the RRT and other times removed the RRT as an avenue of appeal.<sup>153</sup> Most recently, Australia has implemented ‘enhanced screening’ of asylum seekers at sea<sup>154</sup> and a ‘fast tracked’ process has been introduced for onshore irregular maritime arrivals who are not subject to Australia’s offshore processing regime.<sup>155</sup> These reforms, which further limit whom may access an RSD hearing and review process, have not affected those who arrive ‘regularly.’ Relevantly, all of the hearings included in the dataset involved applicants who arrived regularly in Australia; in Canada, the dataset included applicants whose claims were processed before the commencement of 2012 Bill C-31 reforms. Equally relevantly, none of these reforms entirely remove the oral hearing, or its status as *the site* for testing the credibility of refugee applicants’ claims.

## Conclusion

As set out the Introduction to this thesis, one of the primary critiques of the oral hearing is the extent to which it has become a site characterised by the adversarial and aggressive testing of applicants’ credibility. While the testing of credibility is an unavoidable task of RSD in its current, individualised form, the cultures of gate-keeping and disbelief that have developed within RSD institutions and processes are neither given nor inevitable. These characteristics of RSD in general, and of administrative hearings in particular, are in direct conflict with constructions of the hearing as being solely *for* the applicant, to realise goals of procedural justice and fairness. The introduction of the oral hearing in both Australia and Canada importantly and significantly improved the fairness of RSD processing, and represented a shift away from executive discretion and toward statutory and

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<sup>153</sup> See Foster and Pobjoy, above n 150.

<sup>154</sup> See Alex Reilly and Rebecca La Forgia, ‘Secret “Enhanced Screening” of Asylum Seekers: A Democratic Analysis Centring on the Humanity of the Commonwealth Officer’ (2013) 38 *Alternative Law Journal* 143.

<sup>155</sup> *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), schedule 4. ‘Fast-track applicants’ include all UMAs arriving between particular dates and not subject to offshore processing. These applicants do not have access to the RRT. Negative decisions are determined by the Immigration Assessment Authority (IAA). The IAA review generally occurs without a hearing and with no new information allowed. A more limited category of ‘excluded fast-track applicants’ (including UMAs with manifestly unfounded claims or who have come from safe third countries, among other grounds) also exists. Excluded fast-track applicants do not have access to any form of administrative merits review: *Migration Act 1958* (Cth) s 5(1), Division 8.



administrative rights and standards. Simultaneously, though, critiques of contemporary oral hearings—as spaces where credibility and plausibility are tested in a disbelieving manner—fit with the history of the oral hearing as a mechanism to identify ‘genuine’ applicants in both Australia and Canada. This history explains the enormous burden placed upon the refugee’s oral testimony, and on orality as a primary means for testing the credibility of the individualised refugee applicant and her or his claim.

This chapter has placed the Australian and Canadian oral hearing, and RSD’s ‘culture of disbelief’ described in the Introduction, into their historical context. It has shown that the history and introduction of the hearing in Australia does not contradict or interrupt contemporary analyses of onshore RSD processes as functioning to control, rather than enable, the entry of onshore refugee applicants. The chapter has also demonstrated that while the precise history of the oral hearing differs between Australia and Canada, the emergence of a semi-independent oral hearing in both countries took place within the context of broader Government attempts to control onshore refugee entry more generally, and in Australia, to limit judicial review of refugee decision-making. In each instance, as the numbers of onshore arrivals increased, the Government sought to preserve executive control over onshore arrivals *at the same time as* establishing a critical form of independence and fairness in RSD determination. In this way, the oral hearing’s introduction and history must be understood as simultaneously a reform that provided refugee applicants with formal rights to procedural justice and to be heard, and a means for the Government to efficiently and effectively identify ‘genuine’ refugee claimants.

Because I move in the following chapters into my reading and analysis of contemporary oral hearings, this chapter must end with the observation that in both jurisdictions the reform of RSD and of the hearing itself has been characterised by a progressive diminishing of the procedural rights that the hearing has historically guaranteed. Such reforms have limited applicants’ access to RSD via continued deterrence of onshore refugee arrivals; via ‘enhanced’ screening processes to summarily exclude applicants from making protection applications; via fast-tracking RSD processes; and through designating certain applicants as having no formal or limited statutory *rights* to either a hearing or an appeal process. Even in the context of

these changes, though, for those who do access the RSD process, the oral hearing persists as the key forum for determinations of fact and credibility. This explains its centrality within RSD processes and the burden on each applicant's oral testimony.

Having now outlined the history of the oral hearing, as well as the theoretical and methodological framing of the thesis, the following chapter moves to my analysis of the RRT and IRB oral hearings examined in this study. It marks the beginning of four chapters that address the conduct of the oral hearings, in order to explore the demands placed upon *how* applicants presented their evidence in these settings. Specifically, the chapter explores narratives of seeking refugee status—of refugee flight, transit and arrival—as they arose during the observed hearings. In particular, it addresses the presence of a 'stock story' of 'becoming a refugee' in the observed oral hearings, against which the form and content of refugee testimony was tested and judged.

## **CHAPTER FOUR. THE ‘NARRATIVE OF BECOMING A REFUGEE’ IN THE ORAL HEARINGS, ITS FORM AND ITS CONTENT**

### **Introduction**

This chapter marks the beginning of Part Two of this thesis, in which I turn for the first time to the refugee applicants’ hearings. Here, I argue that refugee applicants are frequently required to demonstrate narrative competency, and, indeed, the ability to construct a *certain kind* of narrative in order to access refugee protection. First I describe what I refer to as the ‘narrative of becoming a refugee,’ which I argue is a stock story that defines how, when and why onshore refugee applicants decide to flee their countries and seek refugee status in a host country. I critique both the form and content of this stock story. Then, in discussing three specific refugee hearings, I draw upon the definition of narrative outlined in Chapter One and trace how the applicants’ oral evidence was tested against the stock story during the hearings. This account fits into my broader exploration of the demand for narrative placed upon applicants during the oral hearings. My argument in this chapter is that the stock narrative is a poor fit for the available evidence about onshore refugee applicants’ experience of flight, and yet the narrative expectations encapsulated in the stock story form a crucial basis of decision-makers’ assessments of the plausibility of evidence.

In this chapter, I build on and apply the arguments I have made in the forgoing three chapters. In those earlier chapters, I justified the use of a narrative-based method to analyse the refugee testimony presented during RSD oral hearings, and I explained the methods I used to read and interrogate the hearings presented in this second part of the thesis. The previous chapter placed the IRB and RRT oral hearings in their historical context in order to determine how, why and when the hearing became a central event within RSD processes. I argued that from the inception of the oral hearings, the Australian and Canadian Governments conceived of the hearings as spaces where the ‘genuineness’ of protection claims could be determined through the implementation of clear processes and the testing of oral testimony. The present chapter is the first of four in which I interrogate how testimony was dealt with during the hearings in my dataset. In this chapter, my argument that applicants are often

expected to tell a ‘good story’ in a recognisable narrative form reveals itself via a stock narrative of refugee flight that was present in the hearings.

The stock narrative of becoming a refugee, stated in its simplest form, is as follows: genuine onshore refugees, when faced with serious persecution or danger of persecution, take decisive action to flee this persecution and/or the country of origin. They then travel as directly as possible to a place where protection can be sought, and having arrived there, seek the host state’s protection at the earliest opportunity. Through listening to and analysing the hearings in this study, it became apparent that the stock narrative of becoming a refugee frequently arose during the hearings as a normative standard against which the applicant was required to submit his or her evidence for judgment. In this chapter, I chart several such instances in which the narrative of becoming a refugee featured during the hearings as either an explicit or implicit standard. My findings indicate that the narrative entered the hearing in at least three ways: the applicant’s evidence sometimes ‘fit’ with this story and therefore did not lead to further questioning; the applicant’s evidence sometimes did not correspond with the stock story, which could lead to extensive questioning that may or may not form the basis of a credibility or plausibility finding in the written reasons; and finally, the applicant’s evidence sometimes did not correspond with the stock story, yet the ‘alternative’ narrative of flight was accepted by the decision-maker without extensive questioning.

In all but three of the observed hearings, the decision-maker addressed, to varying degrees, the question of how an applicant became a refugee and the applicant’s story of flight, transit and arrival.<sup>1</sup> This question ties the hearings in this study together in a

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<sup>1</sup> The narrative was implicitly or explicitly present in 11 of the 14 included hearings. In five of the six Canadian hearings (*Rostami* [2013](IRB); *Bhatti* [2013](IRB); *Flores* [2013](IRB); *Perera* [2013](IRB); *Valdez* [2013](IRB)), the decision-maker raised the narrative of a becoming a refugee, including questions of decision and timing of departure, the travel route to Canada, and any interim trips before departing. This chapter discusses the *Rostami* and *Bhatti* hearing in detail. In the *Flores* hearing, the applicant was required to explain the timing of and reasons for departing Cuba. In the *Perera* hearing, the applicant was required to explain why he left when he did, his route, why he went via South America, and why he did not claim in the United States en route to Canada. The applicant’s travel route and reasons for flight were not raised in the *Jabbar* [2013](IRB) hearing and were only mentioned but not interrogated in the *Valdez* [2013](IRB) hearing. In six of the eight Australian hearings (*Adere* [2012](RRT); *Jadoon* [2014](RRT); *Mena* [2014](RRT); *Zeidan* [2014](RRT); *Pillai* [2013](RRT); *Zahau* [2012](RRT)) the decision-maker invoked the narrative of a becoming a refugee, including questions of decision and timing of departure, the travel route to Australia, and any interim

way that the content of each applicant's claim did not; notably, the claims in my dataset do not cohere around a particular kind of claim or a specific Refugee Convention ground.<sup>2</sup> Insofar as the Refugee Convention definition provides an evidentiary framework for this study, the question of how and when the applicant had left the country (at the very least) had to be addressed in the written application, and these questions frequently featured in the oral testimony.<sup>3</sup> I have selected this story as my focus here because it effectively demonstrates the narrativity required of refugee applicants, and it reveals the way in which stock stories, and the expression of events in a narrative form, do not necessarily accord with the experiences of onshore refugee applicants.

This chapter explores these questions of narrativity in two parts. In Part One, I set out the particular 'stock story of becoming a refugee' in more detail, tracing its presence within legal standards and mapping the limited amount of research that has focused on this stock story of refugee flight. My purpose in doing so is to critique the normative expectations of onshore refugees embedded within this particular tale.<sup>4</sup> Part

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trips before departing. This chapter addresses the *Adere, Jadoon and Pillai* hearings. The decision-maker did not raise these topics in the *Malik* [2013](RRT) or the *Mbassi* [2012](RRT) hearings.

<sup>2</sup> As noted, the definition of a refugee under the Refugee Convention is a person who: 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country': *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) art 1A; as modified by the *Protocol Relating to the Status of Refugees 1967*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

<sup>3</sup> Although I did not access the written applications in the majority of hearings observed, the written application form demonstrates how refugee applicants are initially required to frame their claims. The three relevant application forms are the former Canadian 'Personal Information Form' (PIF) (required for onshore refugee applicants in Canada until December 2012); the current Canadian 'Basis of Claim Form' (BOC); and the Australian 'Form 866 Application for a Protection (Class XA) visa' (Form 866). The details of these forms are discussed in detail in Chapter Six, Part Two.

<sup>4</sup> In particular, see Robert F Barsky, *Arguing and Justifying: Assessing the Convention Refugees' Choice of Moment, Motive and Host Country* (Ashgate, 2000); Hilary Evans Cameron, 'Risk Theory and "Subjective Fear": The Role of Risk Perception, Assessment, and Management in Refugee Status Determinations' (2008) 20 *International Journal of Refugee Law* 567; Jane Herlihy, Kate Gleeson and Stuart Turner, 'What Assumptions about Human Behaviour Underlie Asylum Judgments?' (2010) 22 *International Journal of Refugee Law* 351. For some of the research addressing the basis upon which asylum seekers choose a destination, unconnected to how this relates to credibility assessment, see Harriet Spinks, 'Destination Anywhere? Factors Affecting Asylum Seekers' Choice of Destination Country' (Australian Parliamentary Library: Social Policy Section, February 2013); Alan Gilbert and Khalid Koser, 'Coming to the UK: What Do Asylum-Seekers Know About the UK before Arrival?' (2006) 32 *Journal of Ethnic and Migration Studies* 1209; Heaven Crawley, 'Chance or Choice? Understanding Why Asylum Seekers Come to the UK' (Refugee Council of the United Kingdom, 2010); Vaughan Robinson and Jeremy Segrott, 'Understanding the Decision-Making of Asylum

Two is devoted to exposing how this story, with its distinct narrative form, was expected of refugee applicants during the oral hearings I observed. Part Two explores the treatment of evidence during the hearings, addressing how, why and when applicants left their countries of origin, and when and where the applicants subsequently applied for refugee protection. This part draws directly on the hearings I observed in order to identify when the topics of flight, journey and arrival were raised and the extent to which this evidence was expected to evince a particular narrative trajectory and form. Simultaneously, the section also explores how applicants responded to this demand for narrativity. As with each of the following chapters, this section demonstrates that the demand for narrative is a burden placed upon refugee applicants' speech during the hearing itself; one that frequently interrupts, limits or disciplines the way in which an applicant is able to present testimony.

### **Part One. The Narrative of Becoming a Refugee: A Stock Story**

Richard Delgado first used the term 'stock story' in the context of law and literature and 'outsider storytelling' scholarship to describe stories that 'are part of, and reinforce, the dominant discourse.'<sup>5</sup> As noted in Chapter One, the concept of stock stories has been at the centre of much law and storytelling scholarship, which has tracked the way in which dominant narratives function to exclude and discredit 'marginal' or 'outsider' stories that are told by people who are denied the power to determine norms of credibility and truth.<sup>6</sup> Stories that are sanctioned by decision-makers as 'true' or 'plausible' frequently reflect the points of view of those with the power to tell their stories, excluding the voices of those without such power and those whose accounts of the world disrupt the status quo.<sup>7</sup> Lisa Sarmas notes that stock

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Seekers' (UK Home Office Research, Development and Statistics Directorate, 2002); and see also Stephen Castles and Sean Loughna, 'Trends in Asylum Migration to Industrialized Countries, 1990–2001' in George Burjas and Jeff Crisp (eds), *Poverty, International Migration and Asylum* (Palgrave Macmillan, 2005) 60.

<sup>5</sup> Lisa Sarmas, 'Story Telling and the Law: A Case Study of *Louth v Diprose*' (1993) 19 *Melbourne University Law Review* 701, 703; Richard Delgado, 'Storytelling for Oppositionists and Others: A Plea for Narrative' (1989) 89 *Michigan Law Review* 2411, 2412.

<sup>6</sup> See Delgado, above n 5.

<sup>7</sup> Ibid. See also Kim Lane Scheppele, 'Foreword: Telling Stories' (1989) 87 *Michigan Law Review* 2073; Patricia J Williams, *The Alchemy of Race and Rights* (Harvard University Press, 1991); and the special symposium edition 'Legal Storytelling' (1989) 87 *Michigan Law Review* 2073. For a comprehensive account of this literature and my critique of it in this context, see Chapter One; Part Two.

stories are connected to the work of critical race and feminist theorists, who have argued that legal narratives or ‘facts’ are often stock stories that ‘are structured in ways which exclude, silence and oppress “outsiders”—those not part of the dominant culture, particularly people of colour, women and the poor.’<sup>8</sup> Literary theorist, Peter Brooks, defines stock stories as common, culturally accepted and sanctioned stories about how and why things function in the world.<sup>9</sup> Such stories are not merely plausible; they are familiar and understood as correctly reflecting how things take place. In my analysis of refugee testimony in this chapter, the most relevant point about stock stories is the contention that they operate by way of unrecognised assumptions, procedures and language. These assumptions, what Roland Barthes has called *doxa*, are sets of unexamined cultural beliefs that structure our understanding of everyday occurrences.<sup>10</sup> Like narratives themselves, *doxa* and stock stories not only constitute our understanding of the day to day; they also seek to establish ‘the way things are supposed to happen.’<sup>11</sup>

My argument in this section is that a stock story or normative narrative of becoming a refugee is at play in RSD, particularly during the oral hearing, and this stock story is used to judge the credibility of claims and the plausibility of evidence. The stock narrative of how one becomes an onshore refugee applicant relates to how the applicant behaves in his or her country of origin when faced with risk or danger; how and when he or she journeys from his or her home country to the receiving state; and how the applicant behaves in the receiving country and seeks protection once having arrived. The narrative relates specifically to the flight path of onshore refugee applicants, rather than to all refugees seeking protection. Like all stock stories, the narrative itself slips almost imperceptibly between the claim that this is how genuine refugees *do* behave in the world and that this is how they *should* behave.

One version of this story, about *who* refugees are and *how* they flee their countries of origin, is often presented as an analogy: deciding to become a refugee is like the

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<sup>8</sup> Sarmas, above n 5, 703.

<sup>9</sup> Peter Brooks, ‘Narrative in and of the Law’ in James Phelan and Peter J Rabinowitz (eds), *A Companion to Narrative Theory* (Blackwell Publishing, 2005) 415.

<sup>10</sup> Roland Barthes, *The Rustle of Language* (University of California Press, 1989) 56, 58.

<sup>11</sup> Peter Brooks, ‘Narrative Transactions: Does the Law Need a Narratology?’ (2006) 18 *Yale Journal of Law & the Humanities* 1, 11.

decision to flee a burning house. This analogy arises because of the perception that refugee applicants leave under conditions of crisis, with their immediate concern being their physical safety. As such, refugees leave their countries in order to save their lives, and they cannot return. At times, this analogy is posed as a question by refugee advocates in order to spark empathy in members of the public: if your house were burning down, wouldn't you leave at any cost?<sup>12</sup> The question has featured as an effective advocacy tool in campaigns seeking to defend onshore refugee applicants as 'genuine' refugees, and to legitimise the mobility and arrival of onshore asylum seekers. It is used in order to counter claims that those who make their way to 'Global North' countries without the correct documentation are 'bogus' refugees, 'mere' economic migrants or (in a uniquely Australian register) 'queue jumpers,' taking the place of those waiting in refugee camps. The story relies on the idea that 'good' refugees are victimised and forced to flee, which I discuss further below.<sup>13</sup>

The stock story of becoming a refugee—particularly its invocation of an immediate crisis, direct causality and certain resolve to flee and seek status—does not necessarily accord with the experience of those who decide to seek onshore refugee status. To critique this narrative is to reveal the normative, contextual nature of these expectations and the extent to which they are at odds with evidence of how asylum is in fact sought by certain refugee applicants on the move. As I argue, the stock narrative of becoming a refugee reflects a particular, contemporary vision of onshore refugee applicants. Onshore applicants must not only be the 'most' needy or very desperate in their quest for protection; they must also be victims, with the agency only to take a linear, forward-moving path in fleeing their home country and seeking

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<sup>12</sup> See, for eg, Daniel Webb, 'A Look at the Cases For and Against the Asylum Seeker Policies: The Against Case' *Herald Sun*, 9 July 2014 <<http://www.heraldsun.com.au/news/opinion/a-look-at-the-cases-for-and-against-the-asylum-seeker-policies/story-fni0ffsx-1226982169298>>. Here, Daniel Webb, director of a national legal advocacy organisation in Australia writes, 'We wouldn't throw someone back into a burning building. Nor should we return the persecuted to their persecutors.' See also the UNHCR's effective Lego Posters, designed to promote refugee rights, for another example of the 'destroyed' home as an advocacy motif and tool: UNHCR, *Lego Posters* (11 December 2014) <<http://www.unhcr.org/46a755202.html>>.

<sup>13</sup> See, for eg, Anna Pratt and Mariana Valverde, 'From Deserving Victims to "Masters of Confusion": Redefining Refugees in the 1990s' (2002) 27 *Canadian Journal of Sociology* 135; Audrey Macklin, 'Disappearing Refugees: Reflections on the Canada-US Safe Third Country Agreement' (2005) 36 *Columbia Human Rights Law Review* 365; Alison Mountz, *Seeking Asylum: Human Smuggling and Bureaucracy at the Border* (University of Minnesota Press, 2010) 93 (Chapter 4: Crisis and the Making of the Bogus Refugee); Danielle Every and Martha Augoustinos, 'Constructions of Racism in the Australian Parliamentary Debates on Asylum Seekers' (2007) 18 *Discourse & Society* 411.



refugee status.<sup>14</sup> In the next section, I examine the narrative content and form of the narrative of becoming a refugee, arguing that story's content and its *form* are critical to its status as a standard of plausibility.

*i. Critiquing the Content*

In determining which stories are 'stock stories,' context and location are critical. Certain stories will be comprehended and sanctioned in certain circumstances, but not in others. Norms of context, performance and content specify when, what, how, and why stories are told.<sup>15</sup> Thus, successful narratives must not only evince Ewick and Silbey's three criteria in relation to their form—the selective appropriation of past events; a temporal, causal ordering of those events; and characters and events that are related to each other in some form of emplotment<sup>16</sup>—they must also, in order to be successful, fulfil a range of contextual expectations determined by the setting in which they are told and for what purpose. This definition of a stock story frames my discussion of the stock narrative of becoming a refugee applied to applicants' testimony during RSD hearings. My argument is that this stock narrative is used to make sense of applicants' evidence in the particular adjudicative spaces of refugee status determination.

It is important to note from the outset that the stock narrative of becoming a refugee is not found in legal definitions of refugee status in either jurisdiction (Australia or Canada) or in the Refugee Convention. The Refugee Convention definition requires that the refugee must 'be outside of his or her country of origin' and that this must be the case 'owing to a well-founded fear of persecution.'<sup>17</sup> The definition does not set out exactly when or how a refugee must have left his or her country of origin, and it certainly does not prescribe when or how the applicant ought to apply for refugee status once in the receiving state. The applicant in both Australia and Canada must have a 'subjective' and 'objective' fear of persecution, but this subjective fear may exist even if the applicant does not act in relation to it, immediately or at all. The

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<sup>14</sup> This point is one I address in greater detail at the end of this chapter, at the close of Part Two.

<sup>15</sup> Patricia Ewick and Susan S Silbey, 'Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative' (1995) 29 *Law & Society Review* 197, 200.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) art 1A.

UNHCR Handbook also acknowledges this fact in stating, ‘An evaluation of the subjective element [of a well-founded fear] is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions.’<sup>18</sup> As Hilary Evans Cameron aptly puts it, ‘the refugee definition says that a refugee must fear danger; it nowhere says that she must be a cautious person’ who flees danger immediately.<sup>19</sup>

Aspects of the ‘narrative of becoming a refugee’ have informed laws governing credibility in certain jurisdictions, and in particular provisions addressing credibility in the EU *Refugee Qualification Directive*.<sup>20</sup> Notably, in Canadian jurisprudence ‘delay’ in making a claim upon arrival *may* be interpreted as negatively affecting the credibility of the claim.<sup>21</sup> However, the significance of delay will depend on the particular case and an applicant’s credibility cannot be disputed solely on the basis that a claim was not immediately made.<sup>22</sup> But the most significant legal basis for (and arguably product of) this narrative is the ‘safe third country’ rule that operates to

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<sup>18</sup> UNHCR, ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’ (HCR/IP/4/Eng/REV1, 3rd ed, 2011) 11 <<http://www.unhcr.org/3d58e13b4.html>>; Evans Cameron, above n 4, 573. For a discussion of problems with requiring the applicant to demonstrate a ‘subjective’ element of fear, separated from the question of whether the applicant has an actual risk of persecution, see James C Hathaway, ‘Michigan Guidelines on Well-Founded Fear’ (2005) 26 *Michigan Journal of International Law* 492; James C Hathaway and William S Hicks, ‘Is There A Subjective Element in the Refugee Convention’s Requirement of Well-Founded Fear?’ (2004) 26 *Michigan Journal of International Law* 505.

<sup>19</sup> Evans Cameron, above n 4, 573. Cf, though, Canadian jurisprudence, below n 21.

<sup>20</sup> The EU *Qualification Directive* to some extent entrenches the narrative of becoming a refugee by stating clearly, in the provision concerning the assessment of claimants’ credibility, that it is the duty of the applicant to submit ‘as soon as possible all elements needed to substantiate the application for international protection.’ It also sets out that if ‘the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so’ the applicant will not be required to substantiate aspects of the applicant that are not supported by documentary evidence: Council of the European Union, *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 (recast)*, 20 December 2011, arts 4(1), 4(5)(d); see also Robert Thomas, ‘Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined’ (2006) 8 *European Journal of Migration and Law* 79.

<sup>21</sup> Immigration and Refugee Board, ‘Assessment of Credibility in Claims for Refugee Protection’ (Legal Services, 2004) [2.3.9].

<sup>22</sup> *Huerta v Canada (Minister for Employment and Immigration)* (1993) 157 NR 225, 227. Though more recently, where delays are inordinate and without explanation and go to the subjectivity of fear, this may constitute grounds for rejecting a claim: *Espinosa, Roberto Pablo Hernandez v MCI* (FC, no IMM-5667-02).

some extent in both Australia and Canada, and in Europe.<sup>23</sup> The rule in principle requires refugee applicants to lodge their claim in the first country of arrival where effective protection could be sought,<sup>24</sup> thus codifying at least one element of the stock story, that the refugee must make a claim at the earliest possible opportunity.<sup>25</sup>

There is no Refugee Convention provision that directly supports safe third country rules, and their legality is contested under international law in light of their burden-shifting nature and their potential to lead to “chain” *refoulement* of asylum seekers.<sup>26</sup>

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<sup>23</sup> In Australia: the *Migration Act 1958* (Cth) 91N. This section limits protection obligations in relation to anyone who has spent seven days in a country where protection could have been sought and the applicant has a right to re-enter and reside in that country. Section 91C applies to ‘safe third countries’ where an Australian agreement with the country permits re-entry, although as Crock and Berg note in their review of the case law, there seems to be ‘some acknowledgement that the measures were more of a political gesture [against forum shopping] than a practical constraint on asylum seekers’ due to the difficulties of enforcement: Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (Federation, 2011) 416; see also *WAGH v MIMIA* (2003) 131 FCR 269. In Canada, a refugee claimant may not be referred to the IRB if the claimant came directly or indirectly to Canada from a country designated by the regulations. The US is a designated country, and applicants coming via the US may be returned there for processing under the Canada-US Safe Third Country Agreement: Immigration and Refugee Protection Regulations, SOR/2002-227, r 159.3; *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 101(1)(e), 102; ‘The Canada-U.S. Safe Third Country Agreement’ (5 December 2002) <<http://www.cic.gc.ca/english/departement/laws-policy/safe-third.asp>>. And, most notably, in Europe, under the *Dublin Convention* the State in which the applicant was first permitted to enter European territory is a key determinant of which European country is responsible for processing the protection claim: *Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities* (15 June 1990). And see also Savitri Taylor, ‘Protection Elsewhere/Nowhere’ (2006) 18 *International Journal of Refugee Law* 283.

<sup>24</sup> Generally, a ‘third country’ is a State through which the applicant passes en route to the host country, and its designation as safe ‘signifies a judgment that the country will provide refugee protection in accordance with the 1951 Refugee Convention and the 1967 Protocol Relating to the Status of Refugees ... and will adjudicate refugee applications in a fair manner’: Macklin, above n 13, 372.

<sup>25</sup> Although a detailed examination of the legality of this principle vis-à-vis international refugee law standards is beyond the scope of this chapter, see especially, Michelle Foster, ‘Responsibility Sharing or Shifting? “Safe” Third Countries and International Law’ (2008) 25 *Refugee* 64. I also agree with Barsky’s critique of the principle when he writes that most consequences of the this policy are deleterious, including to which it ensures that:

problems that occur far from First World borders (in the Third World) remain there; second, it disregards what [is] a fundamental tenet of Convention refugee practices, which is that individual cases must be considered on their merit and not according to some (possibly inapplicable) generality; third, this kind of legislation invariably favours the rich or well-connected (and therefore the less needy) claimants.

Barsky, above n 4, 189.

<sup>26</sup> See Susan Kneebone, ‘The Legal and Ethical Implications of Extra-Territorial Processing of Asylum Seekers: The Safe Third Country Concept’ in Jane McAdam (ed), *Forced Migration, Human Rights and Security* (Bloomsbury Publishing, 2008) 129; Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) 390–412. Kneebone notes, though, that sometimes the term is used to refer to the application of Refugee Convention cessation clauses: *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) arts 1A(2); 1C.

With respect to the narrative of becoming a refugee, safe third country rules certainly encapsulate an expectation that asylum-seekers' journeys are linear; that seeking refugee status is the determinative element of all travel and that choice or agency displaces narratives of victimhood and need. As Macklin puts it, the premise guiding Canada's safe third country agreement with the United States, that refugees ought to apply for protection wherever they arrived first, assumes that to do otherwise would be 'an opportunistic abuse of the international regime of refugee protection'<sup>27</sup> and that '[a]sylum-seekers are the world's supplicants—and beggars can't be choosers.'<sup>28</sup>

Elements of this narrative were also spelt out explicitly in one IRB screening form that was in use at the time of my observations, but which has since been abolished.<sup>29</sup> The screening form, which was given to applicants after the submission of the paper-based application form, was designed to communicate matters that should be addressed in the oral hearing. Under the general heading 'Issues' was a subheading, 'Subjective Fear.' Under this heading, each of the following 'issues' appeared next to a check box: 'delay in departure,' 'delay in claiming,' 're-avilment' (meaning returning to country of origin), 'failure to claim elsewhere,' and 'previous claim elsewhere.' The form indicated that any highlighted issues were to be considered 'central to the claim,' implying that the applicant might be required to address any one of the selected issues before the IRB. The form itself imported a standard into refugee status decision-making that is not otherwise expressed in a domestic statute.<sup>30</sup>

A handful of scholars examining RSD processes have identified the presence of a stock narrative of how one becomes a refugee, and these scholars have observed a relationship between the presence of this stock narrative in an applicant's evidence

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<sup>27</sup> Disparaged, as Macklin notes, in the term 'forum-shopping': Macklin, above n 13, 381.

<sup>28</sup> Ibid.

<sup>29</sup> Immigration and Refugee Board of Canada, 'Screening Form' (on file with author). The form was issued in accordance with Immigration and Refugee Board, 'Guideline 7 Concerning Preparation and Conduct of a Hearing in The Refugee Protection Division: Guidelines Issued by the Chairperson Pursuant to Section 159(1)(h) of the Immigration and Refugee Protection Act' (2003, updated 2012, Immigration and Refugee Board Ottawa). None of these issues are mentioned in the Canadian written application forms (discussed in Chapter Six).

<sup>30</sup> Though for the relevance of delay in applying for protection within credibility guidelines and Canadian jurisprudence, see above n 21, 22.

and determinations of credibility and plausibility.<sup>31</sup> Further, these scholars have identified and critically examined the narrative of flight that refugee applicants are often expected to tell in order to make their stories plausible to RSD officers and decision-makers in refugee-receiving states. Two of the earliest studies to address the expectation that applicants should take immediate steps to flee when faced with serious persecution are Barsky's study of why, when and where people make Refugee Convention claims and Rousseau et al's interdisciplinary study of RSD in Canada, conducted in the late 1990s and early 2000s.<sup>32</sup> While over ten years have passed since the publication of this work, their findings were borne out in my data, as well as in more recent inquiries into decision-makers' expectations of responses to risk and harm.

In Rousseau et al's Canadian study, they found that decision-makers misunderstood 'daily life in a country racked by war or other conflict'<sup>33</sup> and that they demonstrated a very poor understanding of the political complexities of violence.<sup>34</sup> Simplistic assumptions were found to exist regarding how applicants experienced and responded to war and crisis: 'Board Members often seem to posit war as a Manichaeian situation where clearly defined groups function in opposition to or in alliance with one another, and where an individual, if truly persecuted, will immediately flee.'<sup>35</sup> Barsky's study of refugee applicants' reasons for departure found empirical evidence that the timing

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<sup>31</sup> Barsky, above n 4; Cécile Rousseau et al, 'The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board' (2002) 15 *Journal of Refugee Studies* 43; Gregor Noll, 'Evidentiary Assessment under the Refugee Convention: Risk, Pain and the Intersubjectivity of Fear' in Gregor Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martin Nijhoff Publishers, 2005) 141; Evans Cameron, above n 4; Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom' (2009) 13 *The International Journal of Human Rights* 391; Herlihy, Gleeson and Turner, above n 4.

<sup>32</sup> Barsky, above n 4; Rousseau et al, above n 31.

<sup>33</sup> Rousseau et al, above n 31, 54; see also Laurence J Kirmayer, 'Failures of Imagination: The Refugee's Narrative in Psychiatry' (2003) 10 *Anthropology & Medicine* 167.

<sup>34</sup> Rousseau et al, above n 31, 61.

<sup>35</sup> *Ibid.* But then, the authors also observed that 'reasoning the other way, some Board Members question the credibility of claimants who are unable to maintain normal social relations under extreme conditions,' and further, may query why applicants would 'leave' and desert their families. Naturally, a related consequence of assuming that war or persecution brings daily life to a standstill is assuming that all serious persecution (or the threat of persecution) will lead a person to leave a country immediately, and that life cannot continue in an applicant's country of origin. I record a similar assumption in Part Two, regarding decision-makers' normative expectations about how applicants behave in situations of danger in their home countries: at 62.

of and motives for refugee applicants' decisions to flee were infinitely more complex than could be captured in a linear narrative of persecution, direct flight and the immediate submission of a Refugee Convention application:

The flight, and the choices made ... [by refugee applicants], refract varying degrees of claimants' expedience and fear, pragmatism and ignorance, gullibility and knowledge, degrees which depend on the role of intermediaries, prior knowledge, profile, country of origin and, of course, chance.<sup>36</sup>

The refugee stock story, with its immediate flight in response to danger, is necessarily connected to a broader imagining of an applicant's home country, of what it is like to live there and how people there behave. Rousseau et al found that decision-makers' ideas of refugees' 'life at home' were often based on unexamined and unfounded perceptions.<sup>37</sup> Along similar lines, Evans Cameron also examined RSD decision-makers' orthodox expectations of immediate or imminent flight. She elucidates how decision-makers' narrative expectations conflict with psychological evidence about how actors assess and respond to risk:

psychologists, sociologists, anthropologists, economists and historians have studied how human beings perceive and respond to danger ... [and] before adjudicators could even potentially infer from these [responses to alleged danger] that a claimant was not afraid, or is lying, they must consider the psychological and cultural factors influencing the claimant's risk perception, assessment, and management.<sup>38</sup>

Evans Cameron, in a model that maps perfectly onto the narrative of becoming a refugee that I am tracing here, identifies three assumptions about refugee behaviour (or as she calls them, 'articles of faith') that are handed down by refugee judges: that those who fear for their lives in their homelands will not delay in leaving; that they

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<sup>36</sup> Barsky, above n 4, 23.

<sup>37</sup> In Cécile Rousseau and Patricia Foxen's study involving interviews with 17 former Board Members of the Canadian IRB, some members reported that the 'sources' against which they compared refugee applicants' evidence came from their own daily lives, including from 'trips' or holidays to the applicant's country of origin, from popular culture or from literary texts; and from other stories they had heard and believed: Cécile Rousseau and Patricia Foxen, 'Constructing and Deconstructing the Myth of the Lying Refugee: Paradoxes of Power and Justice in an Administrative Immigration Tribunal' in Els van Dongen and Sylvie Fainzang (eds), *Lying and Illness: Power and Performance* (Het Spinhuis, 2005) 70–3. I explore the implications of these subjective sources of narrative and reasoning further in Chapter Five.

<sup>38</sup> Evans Cameron, above n 4, 568.

will ask for protection immediately in the first safe country that they reach; and that they will never return to their homeland for any reason.<sup>39</sup>

Evans Cameron explains exactly why a standardised response to risk is an unreasonable expectation by drawing on a range of psychological and anthropological concepts. Specifically, she shows that response to risk (and therefore, the decision to flee) depends upon how familiar the risk is, how appealing the prospect of responding is, whether the risk was initially perceived as controllable, whether the applicant has a high personal tolerance of risk, whether the applicant possesses optimism bias, and what previous experiences the applicant has with the type of risk in question.<sup>40</sup> Evans Cameron's findings reveal that, in order to understand how and when an applicant leaves her or his country, attention needs to be paid to cultural factors that influence the applicant's risk management strategies. When the stock narrative of becoming a refugee is applied to an individual refugee, much-needed nuance is lost because the stock narrative posits a simple persecution–flight nexus. Indeed, the literature reveals such an extreme variance in personal responses to risk and harm that no assessment of credibility or truth should be based on how an applicant has reacted to fear or danger.<sup>41</sup> In short, the narrative of becoming a refugee not only accords poorly with compelling literature about the range of human behaviour in response to harm; but in addition, the very notion that a standard response to risk exists *at all* is problematic, as is the normative expectation that there is a direct, causative and linear link between harm and flight.

While response to risk is, as noted, not an explicit element of the Refugee Convention definition, Gregor Noll argues that the applicant's personal risk assessment and moment of departure is relevant to RSD because of the Refugee Convention requirement that the applicant hold a well-founded fear of persecution that is both

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<sup>39</sup> Ibid 567.

<sup>40</sup> Ibid 568.

<sup>41</sup> As Barsky notes, the assumption also discounts the very specific regional and national factors, including aspects of a particular conflict, that influence decisions about departure. It is partially for this reason that Barsky's study of refugees' motives for departure and choice of host country is undertaken and analysed according to country of origin: Barsky, above n 4.

subjective and objective.<sup>42</sup> Noll contends that the term ‘fear’ imports a procedural requirement into RSD, namely that the applicant must present an account of her or his personal perception of potential harm. In this way, the applicant is more than an actor who triggers a determination procedure; instead, the applicant ‘retains a form of agency in that procedure ... anchored in the state obligation to assess fear.’<sup>43</sup> Fear thus becomes the applicant’s ‘personal risk assessment,’<sup>44</sup> and the host state applying the Refugee Convention must take into account the applicant’s own emerging sense and understanding of risk.<sup>45</sup> Consideration of subjective fear, though, does not instantiate a demand that refugee applicants assess risk and respond to it immediately. However, if the applicant’s own risk assessment is trusted, and this assessment is recognised as being both variable and subjective, then the existence of risk does not necessarily equal flight, and the narrative thrust of the story of becoming a refugee loses its force. As the hearing excerpts reveal, questioning about the timing and date of departure was frequently used to gauge and judge *how* (and how genuinely) applicants were responding to risk.

Evan Cameron’s identification of refugee decision-makers’ ‘second article of faith,’ that refugee applicants will ask for protection immediately in the first safe country that they reach, is another core ‘event’ in the stock narrative of becoming a refugee. Indeed, a recurrent issue in the determination of refugee claims is the question of when (or at what point) the applicant sought refugee status, and whether the timing of this choice is consistent with the story of persecution upon which the claim is based.<sup>46</sup> Millbank critiques this element of the stock narrative by observing that ‘a

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<sup>42</sup> Noll, above n 31, 145–6. Ultimately, though, Noll critiques the misleading nature of ‘subjective and objective’ requirements as they have been applied to the Refugee Convention requirement of a well-founded fear.

<sup>43</sup> Ibid 144.

<sup>44</sup> Ibid.

<sup>45</sup> See Thomas Spijkerboer, ‘Stereotyping and Acceleration: Gender, Procedural Acceleration and Marginalised Judicial Review in the Dutch Asylum System’ in Gregor Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martin Nijhoff Publishers, 2005); and for an argument in favour of limiting the subjective requirement of a ‘well-founded fear’ see Hathaway, above n 18.

<sup>46</sup> Guy Coffey, in his 2003 study of credibility assessment in RRT decisions also found that ‘there appeared a marked reluctance [amongst RRT decision-makers] to relinquish the notion that the timing of a claim is a measure of its probity’ – in spite of jurisprudence warning against basing credibility determinations on the timing of a claim: Guy Coffey, ‘The Credibility of Credibility Evidence at the Refugee Review Tribunal’ (2003) 15 *International Journal of Refugee Law* 377, 390. And see, eg, *Guo v Minister for Immigration and Ethnic Affairs* (1996) 64 FCR 151, 194.



fundamental but untested assumption of refugee adjudication is that claimants in genuine fear of persecution will make their claim at the earliest possible opportunity and as fulsomely as possible.<sup>47</sup> Millbank then traces how the assumption of immediate disclosure does not hold for applicants making claims on the basis of sexuality. Such applicants may experience shame or difficulties in discussing or acknowledging their sexuality; and in fact, the opposite effect may take place, whereby applicants actively delay or avoid making a claim or discussing the details of their feared persecution.<sup>48</sup>

Indeed, literature addressing applications made on the basis of gender-based harms has consistently critiqued the expectation of immediate application and early disclosure, particularly as it applies to those making claims related to sexual violence or persecution on account of one's sexuality, where delay in disclosure is a well-documented aspect of such claims.<sup>49</sup> Researchers across refugee-receiving jurisdictions have documented the difficulties that women face in disclosing sexual harm, including high levels of trauma, shame and fear.<sup>50</sup> The difficulty of disclosure and the common practice of delaying disclosure are recognised and accepted not only in the critical literature but also in guidelines produced by state institutions responsible for RSD.<sup>51</sup> The guidelines recognise that disclosure and the process of presenting testimony pose a serious challenge to certain classes of applicant, and specifically, that survivors of gender-based harm often do not make prompt and full

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<sup>47</sup> Jenni Millbank, "The Ring of Truth": A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21 *International Journal of Refugee Law* 1, 13.

<sup>48</sup> Ibid 14–15.

<sup>49</sup> Helen Baillot, Sharon Cowan and Vanessa E Munro, 'Seen but Not Heard? Parallels and Dissonances in the Treatment of Rape Narratives across the Asylum and Criminal Justice Contexts' (2009) 36 *Journal of Law and Society* 195, 200; Helen Baillot, Sharon Cowan and Vanessa E Munro, 'Reason to Disbelieve: Evaluating the Rape Claims of Women Seeking Asylum in the UK' (2014) 10 *International Journal of Law in Context* 105.

<sup>50</sup> Debora Singer, 'Falling at Each Hurdle: Assessing the Credibility of Women's Asylum Claims' in Efrat Arbel, Catherine Dauvergne and Jenni Millbank (eds), *Gender in Refugee Law: From the Margins to the Centre* (Routledge, 2014) 98; Baillot, Cowan and Munro, 'Seen but Not Heard?', above n 49; Laurie Berg and Jenni Millbank, 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants' (2009) 22 *Journal of Refugee Studies* 195; Jane Herlihy and Stuart W Turner, 'Asylum Claims and Memory of Trauma: Sharing Our Knowledge' (2007) 191 *The British Journal of Psychiatry* 3.

<sup>51</sup> See in particular Administrative Appeals Tribunal Migration and Refugee Division, 'Guidelines on Vulnerable Persons' (2009, updated 2015); Immigration and Refugee Board of Canada, 'Chairperson Guideline 8: Procedures With Respect to Vulnerable Persons Appearing Before the IRB' (2006, updated 2012).

disclosure of the harms they have suffered.<sup>52</sup> While the reforms and guidelines addressing gender-related persecution are far from perfect, and have been inconsistently and unevenly implemented,<sup>53</sup> they are significant insofar as they ‘give not only legal but also procedural guidelines to decision-makers in relation to dealing sensitively and appropriately with women’s narratives of persecution.’<sup>54</sup> And while the guidelines often relate to late disclosure of certain harms once the applicant has already initiated a claim, the guidelines are pertinent to an applicant’s failure to communicate details of gender-based harms to initiate her or his refugee claim. Still, as Millbank rightly notes, guidelines excusing late disclosure do not remove this requirement, but rather provide a means of explaining and excusing the delay in disclosing.<sup>55</sup> So, such guidelines work to reinforce the normative quality of the story, but for in certain circumstances.

In light of the above, it is critical to question the orthodoxy of immediate disclosure and seeking of refugee status as it applies to refugee applicants more generally. These questions of disclosure are not only relevant to the narrative of becoming a refugee but also to the overall burden of testimony and narrative that this thesis addresses. Applicants, including those who have experienced gender-based harm, must first disclose their harms and then be prepared to present a narrative of these events. Why are refugee applicants expected to know, as soon as they land in a ‘safe country,’ that making an application for protection is the optimal decision; that they will never return to their country of origin; and that it is in their best interests to become a

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<sup>52</sup> Baillot, Cowan and Munro, ‘Seen but Not Heard?’, above n 49, 201. British research has shown that between 50 and 80 per cent of female applicants have experienced some form of sexual violence, which confirms the critical importance of removing late disclosure as a negative indicator of these claimants’ credibility: ‘Refugee and Asylum-Seeking Women Affected by Rape or Sexual Violence: A Literature Review’ (Refugee Council of the United Kingdom, 2009) 4.

<sup>53</sup> See, eg, Nicole LaViolette, “‘UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity’: A Critical Commentary” (2010) 22 *International Journal of Refugee Law* 173; Sophia Ceneda and Clare Palmer, ‘Lip Service or Implementation? The Home Office Gender Guidance and Women’s Asylum Claims in the UK’ (Asylum Aid, 2006) <<http://www.asylumaid.org.uk/lip-service-or-implementation-the-home-office-gender-guidance-and-womens-asylum-claims-in-the-uk/>>.

<sup>54</sup> Baillot, Cowan and Munro, ‘Seen but Not Heard?’, above n 49, 201.

<sup>55</sup> Millbank, above n 47, 14. As Millbank writes, ‘Guidelines on credibility (and others on gender or torture) commonly draw decision-makers’ attention to “exceptions” to this general approach [of requiring immediate application and disclosure all harm], rather than actually displacing the expectation’: at 14.

refugee applicant as soon as possible?<sup>56</sup> This expectation assumes that refugee applicants have predetermined plans and a deep-seated certainty about their decisions—in other words, that they are particular kinds of narrators or subjects. (This point will be returned to in Chapter Seven.) The requirement of certainty about the potential of future harm is more burdensome than the legal test used in Canada and Australia to determine whether applicants hold a well-founded fear of persecution. In Canada, the legal test for determining if the applicant holds a well-founded fear of persecution is whether a ‘reasonable chance’ of persecution exists —ie, a less than fifty per cent chance of persecution but more than a minimal or mere possibility—rather than a finding that persecution is inevitable.<sup>57</sup> Similarly, in Australia, the test is whether there is a ‘real chance’ that the applicant could be persecuted on Convention grounds.<sup>58</sup> Given these standards, why must the applicant exhibit absolute certainty that he or she must flee and seek protection at the earliest opportunity?

Alongside the expectation that refugees seek immediate protection is Evans Cameron’s third and final article of faith, the presumption that applicants will never return to their home country. This expectation is that if an applicant sincerely holds a ‘well-founded’ fear of persecution, he or she will not return to the source of that persecution. I argue, though, that put in terms of narrative form, this is an unrealistic expectation of narrative closure and of the story ‘ending.’ Here the applicant is once again denied agency regarding decision-making and the ability to assess risk. The

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<sup>56</sup> A related question is why applicants who strategically apply for visas not related to protection (such as educational or work-related visas) in order to escape a country of origin are questioned about this decision, on the basis that it indicates something other than a single motivation for leaving? The use of non-protection visas to enter a receiving state was interrogated during the oral hearing, even where the applicant testified that the visa in question was the only means by which he or she could leave the country: *Flores* [2013](IRB); *Pillai* [2013](RRT); *Mena* [2014](RRT). Barsky’s account of the factors influencing such decisions better reflects the raft of factors that contribute to a decision to leave and how that decision is executed:

Of course when we speak of decisions, we must account as well for the personal characteristics of the claimants; indeed the choice of a particular host country is in many cases related to the claimants’ personal history and the baggage, literally and figuratively, that the claimant brings along.

Barsky, above n 4, 28.

<sup>57</sup> *Adjei v Canada (Minister of Employment and Immigration)* (1989) 2 FC 680; *Ponniah v Canada (Minister of Employment and Immigration)* (1991) 13 Imm LR (2d) 241.

<sup>58</sup> *Chan Yee Kin v MIEA* (1989) 169 CLR 379, 389, 398, 406–7. The High Court of Australia held that the chance of harm could be ‘real’ even where the likelihood of its occurrence was less than 50 per cent and that a ‘real chance’ could be as little as ten per cent. Later, though, the High Court (while endorsing *Chan*) held that percentages of likelihood are irrelevant to the task of determining whether persecution is well-founded: *MIEA v Wu Shan Liang* (1996) 185 CLR 259.

assumption is that refugee applicants who are ‘genuine’ are those who do not take a calculated risk and return home prior to applying for refugee status.<sup>59</sup> Evans Cameron uses the framework of risk assessment and risk perception to address the notion that ‘genuine’ refugees will never return home. She argues that we all take certain risks if such risks allow us to access something that we want or that is very important to us. Further, she refers to literature showing that ‘if you want to take a particular risk very badly, this will not only affect how you weigh the pros and cons; it will also make you perceive the risk itself as less dangerous than it is.’<sup>60</sup> To relate this point to refugee applicants’ decisions as to whether or not to risk returning home, she notes that ‘the appeals of home are obvious: family and friends, personal property, community, cultural identity, status, financial security.’<sup>61</sup>

The above examination of the narrative of becoming a refugee highlights the expectations and assumptions about ‘refugee’ behaviour that are embedded in this particular stock story. It bears emphasising that this story of refugee behaviour could very well take on a different form: that ‘genuine’ refugees stay in their home countries for as long as possible despite immense danger; that they endure high levels of fear and harm up to the point of departure; and that when they arrive in a ‘safe’ country, they do everything they can to return home and to avoid permanent migration and delay an application for status until the latest viable moment.

## *ii. Critiquing the Form*

This section returns to Ewick and Silbey’s definitional elements of narrative, to bring these elements to bear on the form of the stock narrative of becoming a refugee. I argue that the narrative of becoming a refugee not only meets the minimum conditions required of the narrative form, but that it actually exemplifies the form. The story exemplifies the narrative form in three respects: namely, its temporal ordering of events; the exceptionally linear causal relationships among events within this story; and the extent to which the events form a clear structure that is identifiable

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<sup>59</sup> Note, the Refugee Convention cessation clauses apply to an applicant who has ‘voluntarily re-established himself [sic] in the country which he left or outside which he remained owing to fear of persecution.’ However, this clause has consistently been found to require more than mere temporary return to one’s country of origin: Goodwin-Gill and McAdam, above n 26, 138–9.

<sup>60</sup> Paul Slovic et al, ‘Affect, Risk, and Decision Making’ (2005) 24 *Health Psychology* S35, 36.

<sup>61</sup> Evans Cameron, above n 4, 571.

as a plot. However, the problem with the stock story's form, as with its content, is that this demand for narrative is not necessarily reflected in the applicant's experience of flight and arrival, or in the manner that the applicant reconstructs and retells relevant events.

Hayden White, whose work has profoundly shaped the place of narrative in the broader humanities, writes that plots are made up of comprehensible causative relationships between events and outcomes, and that in literary narratives, a 'good' plot demands not only that events be temporally and causatively ordered, but also that they reveal some sort of 'narrative closure,'<sup>62</sup> purpose or 'moral meaning.'<sup>63</sup> Similarly, EM Forster writes that whereas in a narrative we might ask 'and then?', in a plot we ask 'why?'<sup>64</sup> The refugee story answers 'why' questions by plotting events in neat, linear time, with each event in the story propelling forward to a climax and a resolution.<sup>65</sup> There are multiple normative meanings or lessons that we might draw from the refugee story in this particular form, which I address briefly in the following section. My critique of the *form* of the narrative of becoming a refugee, though, seeks to highlight the narrative burden placed upon refugee applicants in this context. Alan Dershowitz addresses the core problem of the law's demand for narrative by contrasting the teleological rules of drama and interpretation with the mostly random rules of real life, a contrast that he argues has 'profoundly important implications for our legal system.'<sup>66</sup> For Dershowitz, an awareness of the place of narrative forms within legal trials is critical because 'life is not a purposive narrative ... Events are often simply meaningless, irrelevant to what comes next; events can be out of

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<sup>62</sup> Hayden White, *The Content of the Form: Narrative Discourse and Historical Representation* (Johns Hopkins University Press, 1987) 24–5.

<sup>63</sup> Ibid 11.

<sup>64</sup> EM Forster, *Aspects of the Novel* (Penguin, 1963) 40–42. Forster tells us that 'the king and then the queen died' is a story. By contrast, 'the king died and then the queen because of grief' is a plot—and a gendered one at that.

<sup>65</sup> Against this approach, Evans Cameron suggests we must retain an awareness of the role of hindsight bias in the assessment of refugee action. She notes that because most refugees' stories generally end badly, decision-makers can see that 'threats escalate and problems get worse.' This makes an applicant's possible optimism, and initial decision not need to leave in response to particular dangers, seem implausible: Evans Cameron, above n 4, 574.

<sup>66</sup> Alan M Dershowitz, 'Life Is Not a Dramatic Narrative' in Peter Brooks and Paul D Gerwitz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (Yale University Press, 1996) 99, 101.

sequence, random, purely accidental, without purpose.’<sup>67</sup> Despite this, because decision-makers are familiar with the dramatic form, they expect a beginning, a middle and an end; Dershowitz contends that even ‘surprise endings must be foreshadowed.’<sup>68</sup>

In the narrative of becoming a refugee, the narrative form of the story is crucial. It is hard to imagine a neater or more straightforward tale of causation in relation to seeking refugee status than that of the stock story outlined above. The key events in the story occur one after the other: the refugee does not ‘go back’ on the original decision, does not hesitate upon leaving or equivocate about the decision to seek refugee status upon arriving. The story is one guided by certainty, resolve and immediate need, not by ambivalence, chance or tentative risk-assessment. The events in the narrative are fixed and causally linked, and the timing is linear. The requirement of a particular narrative *form* is apparent in that any sense of haphazardness or disorder to the sequence of events, or the interruption of direct causation, may be cited as evidence of the implausibility of the story. Refugee applicants are expected to take decisive action in response to danger, and it is assumed that the fear of persecution is either the primary or the sole cause of departure. In addition, it is expected that the decision to seek refugee status flows directly from the decision to leave, and that narrative closure is achieved for ‘genuine’ refugees through the determination of their claims.

The narrative elements of temporality, plot and causation are significant to my critique of the demand for narrative with the oral hearings. Together these elements create the demand for a teleological narrative that emphasises a certain kind of progression towards, and a particular version of, closure, which is sought to the

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<sup>67</sup> Ibid 100. Marita Eastmond addresses this point in direct relation to refugee stories when she writes that while ‘predicament, human striving, and an unfolding in time toward a conclusion is central to the syntax of all human stories’ ... in many refugee situations, the outcome is far from given. Refugees are in the midst of the story they are telling, and uncertainty and liminality, rather than progression and conclusion, are the order of the day’: Marita Eastmond, ‘Stories as Lived Experience: Narratives in Forced Migration Research’ (2007) 20 *Journal of Refugee Studies* 248, 251; citing Byron Good, *Medicine, Rationality and Experience: An Anthropological Perspective* (Cambridge University Press, 1994) 145. While I do not necessarily agree with Byron Good, when he writes that striving and conclusions are the syntax of ‘all human stories,’ I certainly do agree that this syntax is not the one that necessarily characterises refugee narratives.

<sup>68</sup> Dershowitz, above n 66, 101.

exclusion of other possible ways of presenting evidence. The first element, temporality, requires that the events of the narrative be located in time and in a temporal relationship to each other. While narratives do not need to be told in a chronological manner, the events within narratives are expected to occur in a manner that ‘makes sense’ in the context in which the story is told. This leads to the second and third narrative elements, plot and causation. In assessments of what constitutes a good or successful narrative, the ordering of events is crucial,<sup>69</sup> and the expectation of order within narratives brings a requirement for beginnings, middles and ends in causal sequence.<sup>70</sup> My concern in conducting this study is that refugee applicants, unlike the imagined applicants represented in the stock narrative of becoming a refugee, do not necessarily experience their own pasts in a neat, causal sequence. Nor do they automatically perceive as a coherent story the evidence that they must present before the RRT or IRB in order to access protection. As I explore in Chapter Six, even when applicants are prepared to meet, and could meet, these expectations of narrative orderliness, the conduct of the hearing frequently thwarts their ability to do so.

## **Part Two. The Narrative of Becoming a Refugee in the Hearings: Beginnings, Middles and Ends (or Inciting Events, Climaxes and Dénouements)**

This section explores how the narrative of becoming a refugee manifested in the hearings.<sup>71</sup> In this section, I discuss scenarios in which the narrative and the narrative form of the story of becoming a refugee either influenced the decision-maker’s findings or featured in the hearing in a significant manner that was not reflected in the final decision.<sup>72</sup> In this discussion of the hearings, I demonstrate the narrative burden placed on the applicant: where the applicant was required to explain a story of flight that was at odds with the story of becoming a refugee, the applicant was required to account for the ‘deviations’ in his or her own narrative and to carefully explain the causal connections among events about which she or he gave evidence.

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<sup>69</sup> White, above n 62, 23–25; see also Ewick and Silbey, above n 15.

<sup>70</sup> Dershowitz, above n 66.

<sup>71</sup> See above n 1 for an overview of how the narrative of becoming a refugee featured in each hearing in the dataset.

<sup>72</sup> These are the *Rostami* [2013](IRB); *Adere* [2012](RRT) and *Bhatti* [2013](IRB) hearings. I also address the *Jadoon* [2014](RRT) hearing, as a point of contrast and an exception to my claims about the narrative of becoming a refugee.

It is worth noting that the stock narrative of becoming a refugee is but one of a number of simultaneous narratives that applicants are attempting to present and to explain in the RSD hearings.<sup>73</sup> This narrative coexists and intersects with a range of other narrative threads within each applicant's testimony. Where necessary, I contextualise each applicant's presentation of evidence in relation to this particular stock narrative.

*i. The Rostami Hearing*

The *Rostami* hearing took place before the IRB and involved a female applicant from Iran. Ms Rostami had made a claim on the basis of her membership of a particular social group and her religion.<sup>74</sup> The international travel she had undertaken before leaving Iran, but after her 'problems' (as the Member referred to them) had begun, was the subject of a lengthy exchange between herself and the Member. Ms Rostami's route to Canada was also addressed at some length. In the first instance, the onus was on the applicant to explain why she had not applied for refugee status prior to her final date of departure from Iran. The Member's style in this hearing was direct, and at some points this directness verged on brusqueness and impatience. He also frequently cut the applicant off mid-sentence or during her attempts at longer explanations, a point I return to in Chapter Six.

My purpose in extracting the following exchanges is to highlight both their content and the extent to which the decision-maker's questioning structures the applicant's narrative of flight. The exchanges included from the *Rostami* hearing capture an applicant being bound to explain why, as someone claiming to have a well-founded fear of persecution, she had not left Iran as soon as she possibly could, and concomitantly, why—if she truly feared for her life—she would return to Iran having managed to depart on at least one occasion. The exchange below took place at the very start of the Member's questioning of the applicant:

Member:            When did you decide to leave Iran?

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<sup>73</sup> I note that the use of 'becoming' here is at odds the formally 'declaratory' nature of refugee status under international law and its domestic enactments, whereby RSD processes confirm a status already in existence rather than constitute it: UNHCR, above n 18, Clause 28.

<sup>74</sup> See Appendix.



Applicant: When the problems with my husband began. I wanted to leave ... to separate and because in Iran all rights to divorce belong to a man and I wanted to divorce and I wanted...

Member: *[Cutting off applicant.]* Okay, one question. You were married in 2000 and six months after that was still 2000 or 2001?

*[No answer. Both interpreter and applicant seem not to understand the question.]*

Member: Maybe I'll ask another question. Since the beginning of your problems, which were approximately six months after your marriage in 2000, what countries have you visited?

Applicant: Up to now?

Member: Yes

Applicant: *[Applicant speaking very quietly, mumbling.]* Turkey, Dubai.

Member: Turkey was when?

Applicant: I don't remember the date, also to Syria.

Member: Any other places you have visited since you had problems after you married?

Applicant: The ones I just told you.

Member: In your PIF [Personal Information Form] you indicate you had visited Switzerland in 2011 and that in 2012 you stopped in Turkey and France.

Applicant: Yes.

Member: For example, in 2011, your intention in going to Switzerland was what?

Applicant: I wanted to leave Iran, and I asked someone to arrange a visa for me, and my intention was to come to Canada.

Member: Did you believe at the time that your life or personal security was at risk?

Applicant: *[Emphatic.]* Yes, always.

Member: Why didn't you request to stay in Switzerland and go back to Iran?

Applicant: Because the person who I paid to arrange a visa told me not to stay in Switzerland and that the best place was Canada and he had bankers' cheques from my father that he would keep if I couldn't get to Canada.

Member: Can you explain the banker's cheques? How did that work?

Applicant: It's sort of a guarantee and if I stayed in Swiss [sic] he would [take the cheques] and put it in his bank, and so I had to go back.

Member: Did you talk to the authorities about how you could stay in Switzerland or make a refugee claim in Switzerland?

Applicant: No.

Member: Why not?

Applicant: [Applicant now speaks louder and more clearly.] Because I didn't know anyone and I didn't know anywhere and I couldn't take a walk and besides that, our arrangement was that I would not stay in Swiss [sic].

The Member implies without directly stating that the applicant should have made an application in the first country she reached, and at the earliest opportunity, in accordance with 'safe third country' rules.<sup>75</sup> What is noteworthy about the above exchange is that the applicant counters the Member by asserting another story, an explanation for why she had not made a claim at the earliest possible opportunity, instead returning to Iran despite an existing fear and despite having already reached a third country.<sup>76</sup> In the RSD hearings, an applicant's re-entry into the country where persecution had allegedly taken place, and the ability to pass through state border authorities, was frequently interpreted as indicating that the applicant was not in danger or sought by authorities.<sup>77</sup> In Ms Rostami's case, the decision-maker possibly did not make this assumption about her re-entry because her claim pertained to persecution by non-state actors, from whom she alleged the Iranian state was unable and unwilling to protect her.<sup>78</sup> As such, there was no reason why she would have been 'known' to the authorities or why it would have been difficult for her to leave the country.<sup>79</sup>

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<sup>75</sup> See above n 23 for details of these rules.

<sup>76</sup> The decision-maker returns to the story about the 'blank cheques' paid to the smuggler later in the hearing, and the applicant is questioned about this point at length.

<sup>77</sup> And of course, this is a further stock narrative about how things operate in countries that are 'other' or unknown to the decision-maker.

<sup>78</sup> The notion that persecutors act consistently and with a single intention has also been critiqued in relation to the 'nexus' requirement in the Refugee Convention definition: that is, the requirement that the applicant must have experienced persecution *for reasons of* race, religion, nationality, membership of a particular social group or political opinion. As Michelle Foster writes, in causation cases, courts: appear determined to isolate the single (or predominant) explanatory factor for the person's predicament (or for the motivation of the persecutor to inflict the serious harm) rather than acknowledge the complexity of the factual situations and the interlinked matrix of factors that often lead to a person's need for international surrogate protection on Convention grounds.

Michelle Foster, 'Causation in Context: Interpreting the Nexus Clause in the Refugee Convention' (2001) 23 *Michigan Journal of International Law* 265, 273. I return to the idea that authorities behave consistently and logically in Chapter Seven, which addresses the genre of refugee testimony. And, on this point, see also Herlihy, Gleeson and Turner, above n 4, 259.

<sup>79</sup> The requirement to explain international 'holidays' or 'trips' that had occurred after persecution had begun but before the applicant had fled was also present in the *Zeidan* [2014](RRT) and *Mena* [2014](RRT) hearings.

When Ms Rostami had left Iran for good, she had stopped with her smugglers in both Turkey and France while en route to Canada. In the following extract, which came almost directly after the extract above, the Member questions the applicant about other countries she had visited after leaving Iran but before arriving in Canada.

- Member: Okay. [*Pause.*] On the way to Canada, you indicate you stayed in Turkey and France. In Turkey, your arrival date was [XXX] and the departure date was [XXX]. Why is it that you did not...try to stay? Did you make a request to make a refugee claim in Turkey?
- Applicant: Umm, I went to Turkey illegally, and also the arrangement I had made with the guy was to take me to Canada, and all the time I stayed inside the hotel room that he appointed to me, and all the time our arrangement was that I would not go out.
- Member: Was there any [bank] guarantee for this trip in regards to your father like for Switzerland?
- Applicant: No.
- Member: [*Pause, writing.*] Umm, you mentioned you were told not to go out. Did you actually go out of the room in Turkey?
- Applicant: No.
- Member: In France you indicate you arrived in Paris on [XXX]. By my approximation, that is six days. Did you request to stay longer in France or to make a refugee claim in France?
- Applicant: [*Louder, clearer.*] No, there also, I didn't leave the house I was in. The arrangement I had made with this person was that he would take me to Canada.
- Member: Did you think about making a refugee claim?
- Applicant (in person): In France?
- Member: In France.
- Applicant: No, because I wanted to get to Canada. I had a friend in Canada. I didn't leave the house to ask anyone; I didn't leave the home at all. That person I paid also said 'don't leave the house' because if the police see me and arrest me he would have no responsibility towards me anymore.
- Member: [*Pause.*] Why were you convinced the person you had paid could successfully get you to Canada?
- Applicant: Umm, because I had heard about him and also other people he had helped and the person who told me said he is alright, he is a good person, and I can trust him to do what he says...
- Member: [*Long pause.*] How important was it that you have a friend in Canada? How important a fact is that for you in deciding where you make a refugee claim?
- Applicant: I think it's very important if you go to a strange country if there is someone you know they will show you things and

help you do things, and it's different if there's a country where no one you know, so it's very important to me.

This entire exchange, and the revelation of the Member's concerns about the applicant's route out of Iran and her international travel prior to departure, does not feature in the written decision. IRB decisions are considerably more concise than those of the RRT. They often deal with the claim in a comparatively cursory manner; the written decision in Ms Rostami's case before the IRB, for example, is only six generously spaced pages long. The applicant's above explanations are remarkable in that she has clear, certain reasons for not leaving Iran as soon as possible, and she outlines why they do not contradict or undermine her existing fears. Ms Rostami displays a certainty and belief in her own narrative here, and she is also able to construct this story against the stock story that the decision-maker presents. She points out that these decisions had been taken out of her hands to some degree, as she had been following the orders of the smuggler.<sup>80</sup> However, she asserts her own agency in choosing to obey the smuggler rather than, as the decision-maker suggests, making an unplanned application for protection in Switzerland, Turkey or France. The applicant's departure from Iran en route to Canada is mentioned in the decision as follows, in the section entitled 'Allegations':

The claimant then had her father make arrangements to leave Iran for Canada in [XXX]. She first tried to go to Canada via Switzerland, but could not go further than Switzerland due to problems and could not stay in Switzerland. Then, she tried to get a visa for Canada but was refused ... Fearing her ex-husband would harm her and fearing persecution related to her husband denouncing her, she decided to travel to Canada illegally.<sup>81</sup>

The decision makes no further mention of the applicant's route to Canada; the above extract is accepted, and in the written decision, no explicit finding about credibility or plausibility is based on the factual finding about departure. Here, the applicant's successful rebuttal of the story as a normative standard reinforces both the form and content of the narrative. In spite of extensive questioning about Ms Rostami's 'refugee story,' the Member ultimately found in her favour. The decision stated

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<sup>80</sup> In concluding his study on refugee applicants' motives for departure and choice of host country, Barsky writes, '[o]ne of the overriding conclusions of this study is that persons who are persecuted are generally devoid of the information required to claim refugee status either in Canada or anywhere else. They therefore rely upon chance, the advice of (often self-serving) intermediaries or hearsay to make life-threatening decisions': Barsky, above n 4, 235.

<sup>81</sup> *Rostami* [2013] (IRB Decision and Reasons), [10].

‘given the claimant has presented credible evidence that she would be persecuted in her country for her religion’ she will be granted protection and that other grounds on which her claim was made would be set aside.<sup>82</sup>

*ii. The Adere Hearing*

Mr Adere’s application for protection in Australia, to which his wife was attached, centred on the danger he faced in his home country of Ethiopia on account of both his actual political opinion and his imputed political opinion. In the *Adere* hearing, significant exchanges occurred between the decision-maker and Mr Adere about why he had not left Ethiopia earlier, in direct response to the persecution he alleged on the basis of his political opinion and his work within an NGO. Another aspect of the *Adere* case was that when Mr Adere and his wife had left Ethiopia, they had departed on student visas, as they had previously been accepted into a short-term course of study in Australia. They then decided not to return to Ethiopia. The decision-maker expressed ‘concern’ that the couple’s study plans revealed that a fear of persecution may not have been the sole or main reason for departure, and that therefore they did not have a well-founded fear of harm or a credible claim to protection.

The decision-maker first raised these concerns in a discussion of the applicant’s decision to leave, examining when he had made this decision and why he had not made it sooner.<sup>83</sup> Mr Adere gave evidence that he had been abducted and summarily imprisoned, and that during his abduction his family began to organise a visa that would allow him to flee Ethiopia permanently. However, after he had been released, he had chosen not to complete the final forms required for this visa, as at that stage he had not wished to leave. The decision-maker questioned the applicant at some length about this:

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<sup>82</sup> Ibid [26], [31]; and see Appendix.

<sup>83</sup> Such questioning correlates with Herlihy et al’s finding, upon a detailed thematic review of ten UK asylum appeal decisions, that ‘credible individuals were assumed to act in accordance with their fears.’ A core theme in the decisions Herlihy et al examined was the assumption ‘that people behave “rationally” in the face of danger’ and that ‘people who continued to live in a place where they were experiencing persecution were seen as undermining their own claim’: Herlihy, Gleeson and Turner, above n 4, 358.

Member: Did you ultimately get that visa [that was organised by your family]?

Applicant: No.

Member: Why is that, do you know?

Applicant: I don't know; because I didn't submit all the documents that I should.

Member: So, why would you not submit the documents?

Applicant: [Silence.]

Member: Had you submitted the documents, do you think you would have got the visa to visit the UK?

Applicant: Yes.

Member: Would your wife get [sic] a visa if she [had] applied to visit the UK?

Applicant: Yes. Because we've been there.

Member: Okay, so I suppose my question is, you didn't submit the visa documents because you didn't want to leave your wife, why wouldn't your wife also apply for a visa so you would both leave together?

Applicant: I don't think she would agree to leave.

Member: Why would she not agree to leave, do you think?

Applicant: We both loved what we were doing in Ethiopia. We were passionate about the community work. Going back and leaving the country and being an asylum-seeker was not what we want. In Germany we also volunteered in refugee centres. We didn't want to be like that. I don't think any person would choose that situation, honestly speaking. I have travelled a lot and I have seen the people were desperate with a lot of issues and problems and I used to enjoy to go there and chat, to give them hope.

Member: I'm going back to your story on [XXX]. You were released that day because you said your father bribed the authorities, [or] someone. You went home, had a shower, you had your fingerprints done, but you didn't subsequently lodge the necessary documents to get the visa. Why would you have your fingerprints done if you didn't want to leave?

Applicant: I didn't want to disappoint my family; you know, in our culture you have to do pretty much everything that your family says.

Member: Ok, so why didn't you then provide the documents that you needed to do, to get the visa?

Applicant: Honestly speaking, half of me didn't want to go, didn't want to be there, because the way they wanted was to be an asylum-seeker and get refugee status, and really, it was not a thing that I wanted, but I just wanted to show that I listened, but at the same time I didn't submit all the documents

because I didn't want to leave the country, I didn't want to be a refugee.

Member: You wouldn't be leaving as a refugee; you would be leaving as a visitor or [on] some other basis to go to the UK at that period of time.

Two features of Mr Adere's hearing openly disrupt the linear causality and the victimhood implied in the story of becoming a refugee: the evidence he supplies that he and his wife did not want to become refugees, and the fact that they made active decisions not to apply for refugee status despite the harm that they potentially faced. The decision-maker, faced with these narrative disruptions, had a tone of incredulity when he questioned the applicant as to why he would not finalise a visa application when he believed it would be successful and believed that he would be able to leave the country on this visa.

The decision-maker also questioned an apparent contradiction in Mr Adere's evidence, namely that the applicant undertook some but not all of the requirements for the visa application. Mr Adere clearly explained that he did this because he wanted to please and obey his family—but once again, the applicant's own decision-making process and complex narrative of departure is assessed against a far simpler story and crude narrative structure.<sup>84</sup> Some of the affective complexity facing the applicant is revealed when he says, 'Honestly speaking, half of me didn't want to go.' The statement, which implies a sense of grappling with the decision, and even making a decision to maybe leave and then 'going back' on this decision, seems to the decision-maker to signify an excess of agency. Mr Adere's testimony distinctly disrupts the narrative of becoming a refugee required of the applicant.

As shown in the following extract, the decision-maker goes on to question the applicant's lack of a clear purpose for leaving Ethiopia and the lack of a direct

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<sup>84</sup> Assumptions about how families function, and a flattening of the complex relationships within families in assessing plausibility, is a theme in literature critiquing RSD. For example, Herlihy et al note (in their review of UK asylum appeal decisions) that one thread running through the decisions they examined 'was assumptions about how families behave following traumatic events, including who decides which family member gets to flee the country and who looks after whom': *ibid* 258. Rousseau et al also note that decision-makers frequently had simplistic understandings of culture and of family relations that play a part in governing applicant behaviour, particularly when these relationships are 'not like' their own families or relationships: Rousseau et al, above n 31, 62–3.

persecution–departure nexus (as mentioned, the applicant and the applicant wife left Ethiopia on a student visa in order to complete a course in Australia) (emphasis added):

Member: You said you'd applied [for the course] in January, and obviously these processes take time, because you have to get accepted into a program, which takes some time; that seems to be a longer term plan for you and your wife to study in Australia, before this most recent event of detention and interrogation occurred. When you were ultimately leaving the country in July, why were you leaving then? I mean, were you fleeing the country because of its circumstances or just coming to Australia for a program that you have been interested in for some time?

Applicant: Yes, we have been interested in the course, in community development school ... It was the best thing that could have happened; that's why we took it.

Member: It does seem to me that, people, and this obviously does happen where people legitimately have a well-founded fear of harm in their own country if they think that something is likely to happen to them or they are of adverse attention or interest to the authorities, and sometimes flee the country by any means either lawfully or unlawfully. **It seems to me that what you've done is not so much fleeing, but have waited for a course that you've been looking for some time to actually be approved, and when you were able to go on that course you've actually left the country for reasons associated with educational career rather than fleeing the country because of concerns about what was happening there. So I suppose what I'm really trying to get a sense of is this: when you left Ethiopia on that occasion, were you leaving because of concern about what had happened to you in the past, or was it solely for education and career?**

Applicant: I think that I had learned my lesson due to all incidents that had happened to me. I was involved in [a non-governmental organisation]. [The non-governmental organisation] is where people and a lot of things happen to people, and they put their eyes on you, so I learned my lesson at that time. And the reason why I didn't want to flee was, like I said, there were a lot of people I had to take care of ... People, my work, my family, and myself honestly... and the lesson I took was that I wasn't going to continue as I did before. So that was one of the reasons why I came to Australia to do the community diploma school.

Member: It may be open to me to find that the reason why you and your wife left the country in July was either predominantly or even solely because of the opportunity to come to



Australia to study, not for any reasons associated with things that were happening in Ethiopia.

Applicant: [Silence.]

As the above excerpt shows, the applicant's testimony is expected not only to demonstrate a clear decision to leave, but that the decision was made for a clear and singular purpose. In reading this transcript, it appears that the decision-maker is demanding the applicant resile from his position that his motivations for leaving could be mixed, and that more than a 'fear of persecution' could motivate the particular decisions he made.

Following this exchange, the decision-maker goes on to ask Mr Adere directly, 'If you came to Australia for educational opportunities, why is it now, after arriving in Australia, you are concerned enough to seek a protection visa? And your views about not being a refugee, what's changed since you arrived in Australia?' Mr Adere responds by describing a further raid that took place on his home after he left and explains how this event led him to decide to seek status. In the decision-maker's questioning, he openly expresses dissatisfaction with the notion that the applicant only felt 'certainty' about the decision to seek refugee status after he had left his country of origin. In response to this, the applicant dutifully creates another chain of causation (a narrative) whereby the post-departure raid is presented as a kind of tipping point. However, in the applicant's response to this line of questioning, he retains a permanent ambivalence about the decision to seek status, which is at odds with the decision-maker's demand for an unequivocal decision made because of a fear of persecution.<sup>85</sup>

In Evans Cameron's analysis of the range of responses that refugee applicants might have to risks in their home country, she writes,

Claimants often explain that they delayed in leaving their country, or chose to return home, because they pinned their hopes on a 'mirage.' They hoped that the agents of persecution would eventually lose interest in them. Faced with two unpleasant

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<sup>85</sup> Herlihy et al also make the important point that an early application relies on the assumption that asylum seekers are fully armed with information about the host country's application process—and that this may not accord with an applicant's experience of arrival, particularly in the context of diminishing access to legal aid and refugee-related social services: Herlihy, Gleeson and Turner, above n 4, 359–60.

options—live in danger or live in exile—they imagined a third, more optimistic, possibility: with time, the problem will resolve itself.<sup>86</sup>

It would be overwriting Mr Adere's own narrative with yet another narrative to impose Evan Cameron's account of common responses to risk, expressed in the above excerpt. Nonetheless, I suggest her description better accords with the evidence Mr Adere presented than does the narrative imputed by the decision-maker's questioning, which very much accords with the stock story of becoming refugee. In Mr Adere's evidence, we see the stock story rolled out via questioning and the applicant attempting to navigate his way through this narrative. We also see the extent to which he attempts to construct a different narrative of flight, and that this narrative is either misheard, reconstructed or ignored. Such is the case here, even after Mr Adere's evidence had already been 'organised' and edited with the help of his legal advocate, and after he responded to the requirements of the legislative definition of a refugee and provided appropriate answers in the written application.

The *Adere* application for review was unsuccessful due the Tribunal's findings that Mr and Mrs Adere were not credible witnesses and that their claims lacked plausibility.<sup>87</sup> After presenting a range of findings about the plausibility of the applicants' evidence, the decision-maker addressed their narrative of departure as follows:

Finally the Tribunal notes the applicants both assert arrangements were made for the first applicant to seek a visa to travel to [Country 2] after his release from detention in order to escape further harm. ... [T]he Tribunal notes the visa was ultimately not granted, and the first applicant states this was because he did not pursue it, or provide additional information to support it.

The Tribunal concludes that if he was the subject of the significant mistreatment, detention and interrogation he claimed, and had the opportunity to pursue a visa which would enable him to leave the country to avoid further harm, he would not simply have abandoned such an application. It has considered his explanation, that he did not wish to leave the country or his wife, but does not accept [that] this provides a plausible explanation, and is more consistent with the actions of a person who did not have a genuine fear of harm in Ethiopia at the time, and who was not the very recent victim of alleged detention and past harm because of a belief by government or its agents that he was opposed to that government.<sup>88</sup>

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<sup>86</sup> Evans Cameron, above n 4, 574.

<sup>87</sup> *Adere* [2012](RRT Decision and Reasons).

<sup>88</sup> *Ibid* [112]–[113]. Note, this awkward wording is reproduced as it was expressed in the written decision.

In a number of the other oral hearings, the narrative of becoming a refugee was implicit and present in subtle ways, and particularly in the structure and content of questioning. In the *Adere* hearing, by contrast, the narrative as a ‘standard’ or stock story is explicit. In the above extract, the decision-maker states, ‘if he was the subject of the significant mistreatment, detention and interrogation he claimed, and had the opportunity to pursue a visa which would enable him to leave the country to avoid further harm, he would not simply have abandoned such an application.’<sup>89</sup> According to the stock story, the applicant should have left the country of persecution at the earliest possible opportunity. In the *Adere* matter, any ambivalence about leaving—what the applicant describes as ‘half’ feelings—undermines the narrative thrust and the plausibility of the claim that harm was feared.

Another insight from the *Adere* hearing is that it provides an example of the decision-maker requiring the applicant to explain side-trips or departures from the country of origin, where such trips took place after the applicant had reason to fear persecution but were not made for the purpose of seeking protection. In the decision-maker’s questions about this point, the applicant was required to explain his non-refugee-related departure from, as well as return to, his country of origin. When Mr Adere was questioned along these lines, he provided an explanation for his deviation from the narrative of becoming a refugee:

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|------------------------|---|
| Member:                | One of the things that the delegate referred to was the fact that you travelled quite extensively in and out of Ethiopia prior to coming to Australia, and at that time the Delegate noted that if you had wanted to, you could have sought asylum in Germany or the UK or other countries you may have visited, you could have sought asylum there but you didn’t do so. Why was that?   |
| Applicant (in person): | If I had a chance, I would have explained this to her, that nobody chooses to be an asylum-seeker. [ <i>Pause.</i> ] Honestly, I was living for other people; that’s what I used to do. I had the chance to live in Germany, in a European country, anywhere I want, but honestly that wasn’t the priority of my life ... We want to live a better life, you know, sometimes people, we choose what is viable for us ... That wasn’t me, that wasn’t something that I wanted to do. |

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<sup>89</sup> *Adere* [2012](RRT Decision and Reasons) [13].

The applicant goes on to explain how and why it became necessary for him to leave Ethiopia. The applicant stated that he ‘could have lived anywhere’ prior to his decision to flee, but that he chose not to, again disrupting the form and normative content of the narrative of becoming a refugee as an onshore asylum-seeker.

The above extracts from the *Adere* hearing reveal the decision-maker’s expectation that not only should an applicant’s well-founded fear of persecution result in an immediate departure from one’s home country, but also that a person with a well-founded fear will not have taken holidays or have left the country for reasons other than final flight from the state. Where the Mr Adere was questioned about events in his testimony that related to departure or return before finally leaving Ethiopia, he was required to explain such events as deviations from what can best be understood as a standard plot. In Mr Adere’s case such deviations negatively affected the decision-maker’s assessment of the credibility and plausibility of the narrative. In other cases, however, the applicant was instead allowed to account for the discrepancies, and insofar as the account was compelling or plausibly integrated into the narrative, the return or side trips did not contribute to a negative assessment of the applicant’s credibility or the claim as a whole.<sup>90</sup>

### *iii. The Bhatti Hearing*

The *Bhatti* hearing took place before the IRB and involved a male applicant from Pakistan.<sup>91</sup> Mr Bhatti’s claim was based on his imputed homosexuality (and therefore his membership in a particular social group) as well as his imputed conversion from Islam to Christianity. After the Member had completed the formal, introduction to the hearing, his questioning turned to why and when the applicant had left Pakistan, as well as the route that he had taken in order to arrive in Canada. The Member required Mr Bhatti to explain why he had stopped in the United States but had not sought asylum there. The extract below is from the very start of the hearing, when the Member’s substantive questioning of the applicant begins. The Member’s line of questioning demonstrates that the applicant’s story is expected to address his point of departure and his decision not to proceed directly to Canada. In the following excerpt,

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<sup>90</sup> This was the case in the oral hearings of *Mena* [2014](RRT) and *Zeidan* [2014](RRT).

<sup>91</sup> *Bhatti* [2013](IRB).

the Member implies that the applicant should have made a claim to protection in the United States, as this was his earliest opportunity to seek protection:

Member: So, to clarify, you left Pakistan on [date]?  
Applicant: No, on [three days earlier than the Member suggested].  
Member: And you arrived in Canada a few days later?  
Applicant: Yes, two days later.  
Member: When did you decide to leave Pakistan on a permanent basis?  
Applicant: On [XXX].  
Member: How do you transit to get here?  
Applicant: Came to England, then America, then Canada.  
Member: I don't see any US stamps on your passport—did you get them?  
Applicant: I came through the bus.  
Advocate: No, into the US.  
Applicant: There is a stamp.  
Member: I don't see it.  
Advocate: There are pages missing from the passport.  
Member: Did you use this passport to travel to the US?  
Applicant: Yeah.  
Member: Did you have a visa for the US?  
Applicant: Yes.  
Member: [*Mumbling and partially to himself*] It's baffling that it's not there. Obviously, your passport was seized by immigration.  
Applicant: Yes.  
Member: What was your intention when you left Pakistan?  
Applicant: I left because I had fear for my life.

Directly after this, the Member's questioning goes on to address the applicant's brief stopover in the United States and his decision to travel over the border to Canada in order to make his application there:

Member: [*Heightened inquisitorial tone and inflection; emphasis on 'why' and on 'Canada'*] And why did you come to Canada?  
Applicant: A friend of mine said it would be best in Canada because in the States they were catching all the people and sending them back.  
Member: Who is this friend?  
Applicant: His name is [XXX].

Member: Where does he live?

Applicant: In [US state].

Member: And what does he do?

Applicant: He is in construction.

Member: So you were in the States; you had your friend there, so why not claim in the States?

Applicant: He told me after 9/11 that the situation for Muslims is not very good, and if they catch them, they deport them.

Member: [*Incredulous, disbelieving tone*] So the guy works in construction and he said that there's not one Muslim in the States since 9/11.

Advocate: That is not what my client said.

Member: Well, he can clarify.

Applicant: Actually, he told me about this and introduced me to one of his friends ...<sup>92</sup>

Member: So let's repeat the question, or the answer actually.

Advocate: [*interjecting*] So what exactly did your friend say?

Applicant: My friend said they give you rights and listen to you in Canada and not in the States.

Member: And are you still afraid to go back to Pakistan?

Applicant: Yes.

Member: What precisely do you fear?

Applicant: People will kill me, the police will kill me, and the public too.

In the above exchange, the Member not only asks the applicant to explain why he did not apply for protection in the United States, but also responds with open sarcasm when Mr Bhatti details why he did not make a claim prior to arriving in Canada.

Despite the Member's scepticism toward Mr Bhatti, the Member delivered a positive *ex tempore* decision on the application. The written version of the Member's reasons was shorter than usual, even for the generally short IRB decisions, and the above exchanges were not included in the written decision. There was no mention of the applicant's stopover in the United States, except for the Member's mentioning of the missing United States visa in the applicant's passport. The mention appeared as follows under the heading 'Identity':

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<sup>92</sup> A short discussion takes place here, as the applicant switches the language of his responses. The interpreter stops to inform the Member that this has taken place. The Member confirms that the interpreter is authorised to interpret the new, second language, and the hearing proceeds.

Unfortunately, we're missing pages from this passport, notably regarding the fact that the claimant would have been in the U.S. before travelling to Canada, which is unfortunate. However, given the absence of these pages, which should have been photocopied and been in the file, the Tribunal extends the benefit of the doubt to the claimant regarding the amount of time which he spent in the United States and his status in the US.<sup>93</sup>

The Member's comments do not convey a strict expectation that the applicant should not have stopped in the United States or that the applicant should have applied for asylum whilst there.<sup>94</sup> The decision-maker notes that, given the missing passport pages, the benefit of the doubt applies to the applicant's assertions about his time and status in the United States. Despite this, it is not clear to what exactly the decision-maker applies the benefit of the doubt: perhaps to the fact the applicant did stop in the United States or to the fact that he could not reasonably have claimed status there. It is worth noting that one reason why the applicant was so quickly afforded the benefit of the doubt in this matter was that this applicant, unlike others, had a large amount of documentation directly supporting his claim and evincing persecution (including newspaper articles and government documents about the applicant). The Member described the amount of the applicant's documentation of his persecution as 'voluminous' and 'considerable.'<sup>95</sup> The documentary evidence possibly outweighed the failure of the applicant's narrative to be read as plausible, which is a remarkably rare occurrence in RSD.

As described above, in the *Bhatti* hearing before the IRB, the applicant was required to explain why he did not make a claim for refugee status at the earliest possible opportunity. The Member also questioned the applicant's contemplation of the possibility of returning to Pakistan after he had arrived in Canada. In the hearing Mr Bhatti presented evidence that a fatwa had been issued against him due to his imputed homosexuality and imputed conversion to Christianity, but noted that at one point he had considered returning:

Member:	This is not a trick question or anything, but imagine the fatwa was revoked; is there any reason why you would not move to Karachi or Islamabad?
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<sup>93</sup> *Bhatti* [2013](IRB Reasons and Decision) [8].

<sup>94</sup> See above n 23 (safe third country rules).

<sup>95</sup> *Bhatti* [2013] (IRB Reasons and Decision) [11]–[12].

Applicant: Well, the people have this thing in their mind, and to go and kill an infidel is to go to heaven.

Member: Given all of this, *why* did you consider going back—didn't you try and go back?

Applicant: Yes, I did.

Member: It seems somewhat surprising given everything you've said and the evidence you've given.

Applicant: Well, I tried to pursue through my family if they [the family will] accept me [sic], but no, they don't accept me....<sup>96</sup>

This line of questioning in the *Bhatti* hearing did not lead to further interrogation or to a negative determination in relation to the applicant's credibility or the plausibility of the story, and Mr Bhatti's first instance claim was ultimately successful.

### *The Jadoon Hearing*

An important counterpoint to the narrative of becoming a refugee that I have examined in the *Rostami*, *Adere*, and *Bhatti* hearings is the *Jadoon* hearing before the RRT. In that hearing, the Member did not interrogate the failure of Mr Jadoon's evidence to accord with the stock narrative. The first question the Member asked related to the applicant's original reason for travelling to Australia, which was to study rather than to claim refugee status. In the questions that followed, the Member also confirmed that the applicant had returned to Pakistan once since arriving in Australia:

Member: Okay. You came to Australia to study originally. Is that right?

Applicant: Yes.

Member: Have you been studying?

Applicant: When my course finished and my main course was studying ... I had become sick and I did the appendix operation [sic]. Then I went back to Pakistan to my home for about a month and come [sic] back. And when I came back, the situation which I was facing, and I was under a lot of stress, so that's why I couldn't continue my studies. I couldn't concentrate on my studies.

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<sup>96</sup> After this question, the Member rendered a positive oral decision in this matter and closed the hearing.



Member: So you haven't studied since you came back from Pakistan?  
 Applicant: Yes, the second time when I came, I did not study.<sup>97</sup>

At the RRT level, the Member did not return to this point again, either in the hearing or in the final decision. This is the case even though the majority of events that the applicant described as giving rise to a well-founded fear of persecution had occurred prior to his original departure for Australia, and indeed prior to his decision to return to Pakistan to see his family. It became clear during the RRT hearing, that in the original Departmental decision the applicant was required to address this behaviour against the narrative of becoming a refugee. The Departmental delegate asserted that if the applicant had had a real fear of being killed, he would not have returned to his home village. The applicant responded to this claim in his submissions to the RRT by noting that he had returned to his home village 'solely to visit his family' and submitted that this was a compelling reason to return to Pakistan.<sup>98</sup> Here, even though the applicant was not required to address these claims in his oral testimony before the RRT, the stock narrative had been presented to him during the first-instance decision. In appealing to the RRT, Mr Jadoon accounted for the deviation in his testimony from the stock story of becoming a refugee, and one possibility as to why he was not questioned further is that the Member accepted his explanation.

The narrative form that I have traced in this section is marked by a chronological, linear causality, where A (persecution) leads directly to B (departure and flight), which is resolved by C (seeking and gaining asylum).<sup>99</sup> The causative connection is final, and the departure must directly and primarily be motivated by persecution. Any

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<sup>97</sup> *Jadoon* [2014](RRT).

<sup>98</sup> Barsky's study on motives for and the timing of refugee departure focused (amongst other countries of origin) on applicants who arrive in Canada from Pakistan. One of Barsky's interesting findings was that:

Pakistanis demonstrate a remarkable staying power, even more pronounced than is the (generally high) norm in the countries studied. Many claimants interviewed withstood long periods of torture and imprisonment, prolonged threats upon their lives, and even the murder of family members before making the decision to leave Pakistan. The primary reason for remaining, long after most people would have sought the means to depart was family relations; but it was clear after an analysis of all the cases that the claimants also felt a strong and personal commitment to Pakistan's political future.

Barsky, above n 4, 254.

<sup>99</sup> The possibility of not gaining asylum is not contemplated by this story, as it is a stock story reserved for genuine, credible refugee applicants.

departures not motivated directly by persecution, and any returns to the site of persecution, interrupt both the causality and the linear teleology of this tale, undermining its plausibility as a ‘refugee’ story. In analysing this story, the role of the refugee as the narrator, as one selectively appropriating and including past events, cannot be overlooked.<sup>100</sup> Neither I nor a decision-maker can rightfully say whether an applicant’s credibility and plausibility should be considered compromised if he or she chooses to include details of a trip over the border in his or her testimony. So too with whether the applicant mentions contemplating a return to her or his country once having reached Canada or Australia. Are these facts material? Must they be included in an applicant’s testimony? Should these trips or routes of travel be ‘explained’ if the applicant’s passport provides evidence of them? The answers to these questions depend on who is asking and why. If the story I have set out in this chapter is to be accepted as a ‘test’ for plausibility, then of course these questions are relevant. But if this is one of many stories of refugee flight, then the relevance of when and how an applicant arrived in the receiving country, of side trips, returns and contemplated returns is neither obvious nor settled, and it will vary significantly from one application to another. And when the vicissitudes of life and the possibility of ambivalence and ambiguity in relation to life events and decisions are taken into account, the significance of these ‘disruptions’ shifts once again.

*iv. Who is the Plausible Refugee? Implications of Form and Content*

The stock story referred to throughout this chapter could also be described as a particular ‘plot’ that is sanctioned as plausible and ‘true’ due to the normative meanings or purposes it imparts. As I intimated earlier, one ‘norm’ established by the narrative of becoming a refugee is a lesson about who good or ‘genuine’ onshore refugees are and how they behave, as told from the perspective of a refugee-receiving, Refugee Convention-signatory State. Dauvergne has argued that in the absence of a liberal justice standard for admitting migrants or outsiders, liberal nations rely on a

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<sup>100</sup> Recall here Ewick and Silbey definitional claim that ‘[w]ell-plotted stories cohere by relating various (selectively appropriated) events and details into a temporally organized whole’: Ewick and Silbey, above n 15, 213. Indeed, in presenting a narrative ‘what is remembered and told is situational’ and shaped by the ‘contingencies of the encounter between listener and narrator’: Eastmond, above n 67, 249–50.

‘humanitarianism consensus’ in order to shape and constrain migration law. She argues that when we are humanitarian, ‘we bestow, as a gift, something on others who have no rightful claim to it.’<sup>101</sup> Where ‘humanitarianism’ governs migration law, and refugee law in particular, the State gives permission to non-citizens to enter as ‘needy outsiders.’<sup>102</sup> This kind of humanitarianism accords with the story of becoming a refugee, and with a particular narrative arc whereby the receiving State benevolently saves the refugee applicant. In this story, the State is able to mark itself as good, while still avoiding fixed duties that might be demanded as part of ‘justice’ or ‘rights’ narrative as between State and migrant.<sup>103</sup>

The stock narrative of becoming a refugee allows the State to cast the refugee applicant as a victim whom it helps or saves.<sup>104</sup> This framing is preferable to perceiving the refugee as a rights-bearing subject who can undermine the absolute sovereignty of the State by imposing the obligation not to return him or her to face persecution or harm. What is noteworthy in the narrative of becoming a refugee is that the refugee is presented as desperate *and* certain in both the decision to leave and in the subsequent decision to seek refugee protection from the State. The refugee’s agency is limited in that he or she ‘had to’ leave in response to harm, then immediately applied for refugee status as a matter of necessity, and cannot return to the country of origin. And yet, the applicant also displays a degree of empowered individualism in that he or she leaves, arrives and seeks status with a sense of purpose and conviction. These acts must evince agency, but only the agency to act in a direct,

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<sup>101</sup> Catherine Dauvergne, *Humanitarianism, Identity, and Nation: Migration Laws of Australia and Canada* (UBC Press, 2005) 72.

<sup>102</sup> Ibid. She writes that while justice is a standard that implies and applies equality among individuals, ‘[h]umanitarianism is the opposite; it is grounded in a specific kind of difference created by material inequality. Humanitarianism defines us as good when we are able to meet the standard, and justifiable when we are not’: at 72.

<sup>103</sup> Ibid.

<sup>104</sup> See especially Liisa H Malkki, ‘Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization’ (1996) 11 *Cultural Anthropology* 377; Liisa H Malkki, ‘Refugees and Exile: From “Refugee Studies” to the National Order of Things’ (1995) 24 *Annual Review of Anthropology* 495. Focusing on humanitarian interventions into mass refugee populations, Malkki argues that such interventions are a means by which the ‘international community’ constitutes itself. In particular, she argues that ‘bureaucratized humanitarian interventions ... leach out the histories and the politics of specific refugees’ circumstances’ such that refugees ‘stop being specific persons and become pure victims in general: universal man, universal woman, universal child, and, taken together, universal family.’ Malkki’s anthropological work demonstrates the way in which such ‘dehistoricizing universalism’ creates a context in which refugees are not approached as historical actors but ‘as mute victims’: Malkki, ‘Speechless Emissaries’, 378.

linear trajectory, always moving forward and never sideways or backward—and thus, in the manner of a neat, chronological narrative.

In a critique of credibility assessment in RSD that recalls Dauvergne's notion of the benevolent State, Noll argues that evidentiary assessment in refugee status determination can best be understood in comparison to Roman Catholic auricular confession practices, as though applicants undergo rituals of confession, repentance and absolution.<sup>105</sup> Noll maintains that applicants are subject to the grace of the decision-maker, whose credibility assessment 'reproduces the assessment of remorse' in Roman Catholicism. This view of the applicant as sinner–perpetrator allows the State to 'neutralise the political agency of asylum-seekers and to recast them as mere impostors or mere "victims-to-be-saved."' <sup>106</sup> Contrite sinners are rewarded with absolution, which opens up the path to the reinclusionary sacrament of communion. Similarly, the ideal refugee applicant behaves like a penitent delivering confession and is rewarded with inclusion and entry into the State.<sup>107</sup> Crucial to this comparison of Roman Catholicism to RSD is the narrative of the applicant as penitent who seeks resolution or closure via the granting of refugee status.<sup>108</sup> Positive asylum determinations, which represent the culmination of the story of becoming a refugee, are about re-inclusion into the system of nation-states.<sup>109</sup> Noll labels this culmination 'reconciliation,' but it might just as well be called a resolution, wherein the refugee's role as supplicant–victim is central. Mapping each of these analyses onto the story of

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<sup>105</sup> Gregor Noll, 'Salvation by the Grace of the State? Explaining Credibility Assessment in the Asylum Procedure' in Gregor Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martin Nijhoff Publishers, 2005) 197. As Noll notes, though, auricular confession has lost its role and importance over time whereby today, confession is close to a stage of 'near-complete internalisation,' and appears to have been largely replaced with collective absolution before communion: at 202.

<sup>106</sup> Ibid 197.

<sup>107</sup> Ibid 201.

<sup>108</sup> Ibid 204.

<sup>109</sup> In a later piece, Jennifer Beard and Noll elaborate on this argument, writing that: recognition of a refugee is not given by right on factual grounds but demands the applicant undergo a form of spiritual conversion or transformation, 'in the form of a movement and elaboration of the subject by the subject' into a condition beyond doubt: the formation of a credible legal subject, who gives an account of facts *internal* to herself. The refugee must *testify*, prove herself ... not as a seeing body but as a body erased of any inscriptions of doubt. (Emphasis in original)

Jennifer Beard and Gregor Noll, 'Parrhēsia and Credibility: The Sovereign of Refugee Status Determination' (2009) 18 *Social & Legal Studies* 455, 471; citing Michel Foucault et al, *The Hermeneutics of the Subject: Lectures at the Collège de France 1981-1982* (St Martins Press, 2005) 15–16.

becoming a refugee provides the story with a clear meaning and a sense of closure. Although slightly different in each instance, the point of closure comes with the bestowal or denial of refugee status, and this decision resolves the ‘complication’ of the applicant leaving his or her own sovereign and citizenship status.

In work that directly addresses the refugee oral hearing, Trish Luker also examines the rhetorical structure of refugee recognition. She argues that recognition of refugee status for individual applicants takes place via ‘repetition and citation of tropes of “refugee-ness” which function to legitimate and naturalise certain representations as evidence of the grounds for protection.’<sup>110</sup> For Luker, the problem with the requirement of refugee-ness is that it places applicants in a paradoxical position: they must attempt to deliver their evidence as a performance of refugee-ness, but in order to do this, ‘the singularity, and possibly the authenticity, of the account may be lost.’<sup>111</sup>

A critical reading of the ‘plot’ of the story of becoming a refugee highlights one of this story’s animating motifs, which is that of the refugee’s agency and autonomy. This motif relates closely to the causal sequences that structure the story. The refugee must be forced to leave, thus displaying little or no agency in the initial decision. However, having been forced to leave, the applicant must not display ambivalence; instead the applicant must confidently make a decision to become a refugee at the earliest possible opportunity. The expectation that refugees apply for status as soon as they arrive in the host country also contradicts the vision of the refugee-as-victim or as desperate supplicant. Indeed, on one view, such a prompt application would require a great deal of agency and personal autonomy, just as the ability to present the ‘story of becoming a refugee’ requires a great deal of self-awareness, autonomy over one’s decisions and an internal sense of narrative about one’s motivations and choices. I return to this point in detail in Chapter Seven.

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<sup>110</sup> Trish Luker, ‘Performance Anxieties: Interpellation of the Refugee Subject in Law’ (2015) 30 *Canadian Journal of Law and Society* 91; see also discussions of ‘refugeeness’ in Marie Lacroix, ‘Canadian Refugee Policy and the Social Construction of the Refugee Claimant Subjectivity: Understanding Refugeeeness’ (2004) 17 *Journal of Refugee Studies* 147; Matthew Zagor, ‘Recognition and Narrative Identities: Is Refugee Law Redeemable?’ in Fiona Jenkins, Mark Nolan and Kim Rubenstein (eds), *Allegiance and Identity in a Globalised World* (Cambridge University Press, 2014) 311.

<sup>111</sup> Luker, above n 110, 96.

## Conclusion

As this chapter demonstrates, in the stock story of becoming a refugee, the narrative form's demand for causation and for beginnings, middles and ends manifests crudely. In the narrative of becoming a refugee, the story is resolved with the making and then the determination of a claim for protection. However, this 'natural' endpoint might not appear as such to the applicant, who may choose to appeal or challenge deportation orders if the claim is unsuccessful. The applicant may also see the granting of formal protection as a small event in the larger story of resettlement and other major life events, especially as applicants may experience ongoing discrimination or other fearful circumstances within their new community.<sup>112</sup> Indeed, this stock story forecloses the possibility that the 'end' of the story could be the return to one's country of origin. The stock story also fails to account for how the granting of refugee status may be not just the beginning of new relationships in the receiving State, but also the continuation of a life enmeshed in prior relationships with people in one's country of origin.<sup>113</sup>

In Aristotle's short work *Poetics*, often described as the first work of literary criticism, the philosopher identifies what he believes to be the essential elements of a successful tragedy. One key feature of a tragedy, he writes, is that it has a beginning, middle and end, or an 'ordered arrangement of incidents.'<sup>114</sup> He explains rather circuitously what defines each of these parts:

A beginning is that which does not necessarily come after something else, although something else exists or comes about after it. An end, on the contrary, is that which naturally follows something else either as a necessary or as a usual consequence, and is not itself followed by anything. A middle is that which follows something else, and

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<sup>112</sup> On the impossibility of complete closure in narrative, see Martin McQuillan (ed), *The Narrative Reader* (Psychology Press, 2000) 5; and on the difficulties of resettlement, see: Teresa Puvimanasinghe et al, 'Narrative and Silence: How Former Refugees Talk about Loss and Past Trauma' (2015) 28 *Journal of Refugee Studies* 69. Rousseau et al also note, 'Many authors have moved beyond traditional unilinear notions of adaptation and acculturation; some, for example, have shown that situations of marginality, alienation and poverty in the host culture impact negatively on refugee well-being more than actual experiences of violence and torture in the home country': Rousseau et al, above n 31, 50.

<sup>113</sup> And as Barsky notes: 'No study of refugee movement would be complete without some mention of the determining role that chance plays in the entire process. From being in the wrong place at the wrong time, to meeting an agent, to reading a particular newspaper article, any event has the potential to influence a refugee's choice of country': Barsky, above n 4, 186.

<sup>114</sup> Aristotle, 'The Poetics, "Plot"' in TS Dorsch (ed), *Classical Literary Criticism: Aristotle, Horace, Longinus*, (Penguin, 1965) 38–45.

is itself followed by something.<sup>115</sup>

Aristotle's explanations, like many descriptions of narrative constructions, trust that the audience and author have a shared sense of which events are connected by clear sequential relationships, and how. He implies a 'you will know it when you see it' approach to describing how to correctly 'order' incidents in a story. However, in a refugee applicant's life story, there is not one 'beginning' that 'does not necessarily come after something else.'<sup>116</sup> There are many beginnings that could all give rise to many different 'middles' and 'ends.' When an applicant draws these sequences together in an adjudicative setting, he or she cannot necessarily account for the place of each incident within a larger chain of events, nor pin down the reasons why a particular course of action was chosen, nor point to an obvious 'end' to the story. Marita Eastmond offers a particularly sharp description of the problem with a demand for narrative in the refugee context:

There is an important difference between conventional stories and those of many refugees. While 'predicament, human striving, and an unfolding in time toward a conclusion is central to the syntax of all human stories', in many refugee situations, the outcome is far from given. Refugees are in the midst of the story they are telling, and uncertainty and liminality, rather than progression and conclusion, are the order of the day.<sup>117</sup>

The narrative I have traced here, the story of how one becomes (or is expected to become) an onshore refugee, is fundamentally normative. It is not only about who onshore refugees are (or should be) and the kinds of persecution they face (or must face), but also about how they behave (or ought to behave) when faced with harm, risk and danger. I have argued that the narrative of becoming a refugee is marked by both normative content and a distinct narrative form. My reading of the refugee hearings discussed above has demonstrated that the hearings are significantly shaped by the stock story's content and form. The demand that refugees either implicitly or explicitly account for their evidence against this story suggests that the story plays a role in determining the plausibility of evidence, as well as in assessing the overall credibility of applicants. Analysed in this way, the story recalls Matthew Zagor's argument that refugees must not only speak in order to gain access to protection, but

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<sup>115</sup> Ibid 38.

<sup>116</sup> Ibid.

<sup>117</sup> Eastmond, above n 67, 251 (citations omitted).

also must speak in a recognisable idiom.<sup>118</sup> Both the form and the content of this stock story might be considered as a kind of idiom, which refugee applicants must understand and articulate in presenting their evidence at RSD hearings.

In the next chapter, I argue that in addition to being required to contend with certain ‘stock’ narratives in the hearings, such as the one addressed here, refugee applicants are also required to address expressions of the decision-maker’s own subjective, narrative-based and normative world. I argue that the narrative expectations of individual decision-makers are especially difficult for the applicant to navigate because they are often highly subjective, idiosyncratic and at times even impulsive. While this chapter has demonstrated that the ‘narrative of becoming a refugee’ is, in both form and content, one of the ‘stock stories’ that guide credibility determinations, in Chapter Five I trace narratives that cannot be sensibly be labelled ‘stock stories,’ for they reflect the decision-maker’s subjective and unpredictable understandings of the world. What links both of these contentions about how evidence is tested and appraised during the hearings is that all of these narrative standards are not necessarily ‘visible’ or obvious to the applicant, who must nonetheless respond to them. Moreover, in most instances where the decision-maker requires the applicant to contend with these narratives, the decision-maker interrupts the applicant’s own attempt to present her or his evidence.

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<sup>118</sup> Zagor, above n 110, 323.



## CHAPTER 5. PLAUSIBILITY, NARRATIVE CONTESTS AND THE USE OF COUNTER-NARRATIVES TO TEST EVIDENCE DURING THE ORAL HEARING

### Introduction

To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the "is" and the "ought," but the "is," the "ought," and the "what might be." Narrative so integrates these domains. Narratives are models through which we study and experience transformations that result when a given simplified state of affairs is made to pass through the force field of a similarly simplified set of norms.

– Robert M Cover, 'Foreword: Nomos and Narrative' (1983) 97 *Harvard Law Review* 4, 10

In this chapter I focus on how decision-makers rely on their own narrative expectations when testing evidence during RSD oral hearings. Specifically, I trace the ways in which decision-makers not only ask applicants questions about apparently implausible elements of their testimony, but also present applicants with counter-narratives of a particular element of testimony in order to test the story's plausibility. In these encounters, which I term 'narrative contests,' the applicant is required to respond to the decision-maker's presentation of an alternative narrative that sets out how the story *could* have or *ought* to have taken place. The applicant must either account for why her or his narrative is different from that expressed by the decision-maker, or in certain instances, capitulate or surrender to the decision-maker's view that an experience could not have taken place as the applicant described.

My observation that decision-makers present direct counter-narratives to applicants has relevance for how decision-makers determine plausibility, as well as for how the conduct of the oral hearing affects the applicant's ability to present evidence.<sup>1</sup> Where

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<sup>1</sup> I note that I use the term 'counter-narrative' in quite a different manner to those writing in the field of legal story-telling. The term 'counter-story' was first used in the context of law and literature by Richard Delgado, who applied the term to the stories told by outsiders or marginalised groups to challenge dominant narratives. For Delgado, these counter-stories are told by 'outgroups' and 'challenge the received wisdom.' They are 'competing versions [of reality] that can be used to challenge a stock story and prepare the way for a new one': Richard Delgado, 'Storytelling for Oppositionists and Others: A Plea for Narrative' (1989) 89 *Michigan Law Review* 2411, 2414–15. Given my critique of some of the theoretical claims of law and storytelling scholarship, it is appropriate that in this chapter the 'counter-narrative' I refer to is that of the decision-maker, who *also* uses the narrative form to challenge the applicant's (or outsider's) testimony. I also rely on the notion of

decision-makers expressed serious doubt about the applicant's narrative, the ability of the applicant to present her or his narrative was often undermined, through interruption or open expressions of incredulity. The examples in this chapter reveal that the narrative contests between decision-makers and applicants disrupted applicants' ability to construct narratives by requiring them to concentrate on versions of events that the applicants had neither articulated nor addressed in their evidence. In some instances, the applicant's failure to address the decision-maker's narrative in relation to his or her own story, or failure to recast the original narrative, became one of the bases upon which credibility was judged wanting, or the plausibility of evidence was rejected.

In these moments of narrative contest, much is demanded of the applicant: to hear the decision-maker's concerns; address them; explain how and why they were not addressed in previous written or oral testimony; and finally, to incorporate the concerns (expressed in counter-narratives) into the existing evidence. This chapter tracks how, during these exchanges, applicants were required to demonstrate great narrative competency as they explained their narratives. That is, applicants had to contend with imagined counter-scenarios presented by decision-makers, as well as their own narratives. In applicants' negotiations of these exchanges, certain applicants displayed high levels of agency and resistance vis-à-vis decision-makers' vast power to direct the hearing and evidence – a theme I address in detail in the following chapter.

A key finding in this chapter is that these narrative contests between applicant and decision-maker do not necessarily connect to larger meta-narratives about the different social and cultural norms as understood by the decision-maker and the applicant. A growing body of work has traced the imposition of certain culturally specific and colonial narratives upon refugee applicants in the context of credibility determinations, especially in relation to claims based on gender or sexual orientation.<sup>2</sup>

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narrative competition as expressed by Richard Weisberg in his analysis of narrative in contested trials: Robert Weisberg, 'Proclaiming Trials as Narratives' in Peter Brooks and Paul Gerwitz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (Yale University Press, 1996) 71.

<sup>2</sup> See generally, Thomas Spijkerboer, *Gender and Refugee Status* (Ashgate, 2000); Deborah E Anker, 'Refugee Law, Gender, and the Human Rights Paradigm' (2002) 15 *Harvard Human Rights Journal*

My findings in this study sit adjacent to, rather than completely in line with, such scholarship. I argue that the expression of the decision-maker's view and the narrative contest are often at such a high level of personal subjectivity and reflect such deeply personal views about the way the world works, that is difficult to pin these expectations to grander narratives that may be determined by the class, gender or cultural subject position of the decision-maker. This is not to say that meta-narratives do not influence the decision-maker's view of the world, or that the decision-maker's views are not products of his or her cultural position. However, in certain moments during the hearings I observed, when the decision-maker and applicant were in conflict, the decision-maker's own normative views were so shifting, idiosyncratic and at times even impulsive, that the narrative expectations were difficult to attach to broader structures or narratives. Crucially, these narrative-based expectations were not necessarily visible to the applicant or even the decision-maker.<sup>3</sup>

My argument in this chapter recalls one of the core concerns of the credibility literature: the problem of decision-maker subjectivity.<sup>4</sup> Particularly illuminating here

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133; Jenni Millbank, 'Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia' (2002) 26 *Melbourne University Law Review* 144; Susan Musarrat Akram, 'Orientalism Revisited in Asylum and Refugee Claims' (2000) 12 *International Journal of Refugee Law* 7; Jennifer Beard and Gregor Noll, 'Parrhēsia and Credibility: The Sovereign of Refugee Status Determination' (2009) 18 *Social & Legal Studies* 455.

<sup>3</sup> See also Rousseau et al, who note that errors of cultural interpretation often influence credibility assessments and that '[t]hese misunderstandings—which can determine a person's fate—occur at a subtle, seemingly invisible level, often leaving the actors oblivious to the cultural processes leading to such clashes': Cécile Rousseau et al, 'The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board' (2002) 15 *Journal of Refugee Studies* 43, 52.

<sup>4</sup> For work addressing the problem of decision-maker subjectivity in refugee decision-making, see Audrey Macklin, 'Truth and Consequences: Credibility Determination in the Refugee Context' in International Association of Refugee Law Judges (ed), *The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary* (International Association of Refugee Law Judges, 1998) 134; Michael Kagan, 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination' (2002) 17 *Georgetown Immigration Law Journal* 367; Guy Coffey, 'The Credibility of Credibility Evidence at the Refugee Review Tribunal' (2003) 15 *International Journal of Refugee Law* 377; Thomas Spijkerboer, 'Stereotyping and Acceleration: Gender, Procedural Acceleration and Marginalised Judicial Review in the Dutch Asylum System' in Gregor Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martin Nijhoff Publishers, 2005); Robert Thomas, 'Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined' (2006) 8 *European Journal of Migration and Law* 79; Arthur Glass, 'Subjectivity and Refugee Fact-Finding' in Jane McAdam (ed), *Forced Migration, Human Rights and Security* (Hart Publishing, 2008) 213; Jenni Millbank, '"The Ring of Truth": A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21 *International Journal of Refugee Law* 1; Jane Herlihy, Kate Gleeson and Stuart Turner, 'What Assumptions about Human Behaviour Underlie

is Hanna Wikström and Thomas Johansson's contention that credibility assessments function as a form of 'normative leakage.'<sup>5</sup> Wikström and Johansson's articulation of decision-makers' 'normative leakage' reflects a concern, which I share, about the often shifting, impulsive and uncontained nature of decision-makers' views during hearings.<sup>6</sup> Wikström and Johansson argue that when decision-makers assess 'different' socio-cultural narratives, their assessments represent a form of 'normative leakage,' meaning that unspoken 'class and gender norms as well as postcolonial reasoning *implicitly* become a part of the [credibility] assessments.'<sup>7</sup> Building upon Thomas Spijkerboer's argument that normative standards structure credibility assessment, Wikström and Johansson observe that normative standards are frequently 'used but not acknowledged' by decision-makers.<sup>8</sup> In a similar vein, Audrey Macklin discusses the 'gut feeling' fallacy: 'the unquestioned assumption that our gut is a uniquely trustworthy arbiter of truth.'<sup>9</sup> In this chapter, I trace how decision-makers' gut feelings manifest during the oral hearing as narratives that the applicants must contend with and incorporate into their own evidence.

This chapter's concern with the unpredictable and often invisible narrative assumptions of the decision-maker also recalls what Robert Thomas identified as the most intractable problem of refugee assessment, namely 'the decision-makers' own presence of self.'<sup>10</sup> I argue that it is when decision-makers directly impose their narrative-based views, and indeed detail their version of a more compelling or better

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Asylum Judgments?' (2010) 22 *International Journal of Refugee Law* 351; Hanna Wikström and Thomas Johansson, 'Credibility Assessments as "Normative Leakage": Asylum Applications, Gender and Class' (2013) 1 *Social Inclusion* 92.

<sup>5</sup> Wikström and Johansson, above n 4.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid 100 (emphasis added).

<sup>8</sup> Ibid 93. Spijkerboer observes that, '[w]hen deciding which statements and which behaviours are considered credible, it is necessary to use certain normative standards. These standards are hard to make explicit, and most often they are not': Spijkerboer, above n 4, 67.

<sup>9</sup> Macklin, above n 4, 139. RSD decision-makers relying (viscerally enough) on their 'gut' in determining credibility is a theme that runs through the literature. 'Instinct' and 'a feeling' are also terms that are used to describe the bases for subjective credibility assessments: Kagan, above n 4, 377. Even the Australian Credibility Guidelines set out that, '[w]hat is capable of being believed is not to be determined according to the Member's subjective belief or gut feeling about whether an applicant is telling the truth or not': Administrative Appeals Tribunal Migration and Refugee Division, 'Guidelines on the Assessment of Credibility' (2006, updated 2015) [9].

<sup>10</sup> Thomas, above n 4, 84.

version of an applicant's narrative, that the decision-maker's 'presence of self' is most acutely felt during the hearing. In Macklin's reflections on credibility assessment, she argues that decision-makers must interrogate themselves in order to determine the basis for their findings with respect to plausibility and credibility.<sup>11</sup> My observations resonate with Thomas's and Macklin's: they point to the need for decision-makers to be aware of how, why and when they pose *particular* counter-narratives to applicants during the hearing, just as much as they reveal the narrative burden placed upon applicants throughout the hearing.

To explore the above claims, this chapter is divided into two parts. In Part One, I set out how the law frames the presentation of testimony during the oral hearing in order to demonstrate the very minimal nature of the rules that govern the reception and testing of evidence during the hearing. Part Two then provides accounts of specific oral hearings in the dataset in order to support the finding that evidence was frequently tested via narrative contests, in which applicants were required to respond to and address decision-makers' impossibly normative, narrative-based understandings of the world. I present two specific hearings in detail in order to explore the narrative contests that took place between the applicant and the decision-maker: namely, the *Mena* hearing, which took place before the RRT and involved an Egyptian female applicant; and the *Adere* hearing, which involved a male Ethiopian applicant before the RRT.<sup>12</sup> This Part demonstrates that the knotty criterion of 'plausibility,' against which applicant testimony is judged in the process of determining overall credibility, forges a direct link between credibility assessment and the narrative form.

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<sup>11</sup> Macklin, above n 4, 139.

<sup>12</sup> The details of each of these claims are set out in the Appendix. While this chapter focuses on two hearings before the RRT, the findings in this chapter also apply to a majority of the Canadian hearings. For the Canadian hearings, some form of narrative contest took place in all hearings except the *Flores* [2013](IRB) hearing. The *Jabbar* [2013](IRB) hearing featured only a small number of narrative contests between the Member and applicant, primarily addressing why the applicant's persecutors (the Taliban) would have behaved in the way the applicant described. Narrative contests in relation to more than one topic took place in all of the hearings before the RRT except the *Zeidan* [2014] (RRT) hearing.

## Part One. Legal Framing of the Oral Testimonial Encounter

Part One frames my argument about the nature and effects of narrative contests during the hearing by reference to legal and procedural standards that govern the oral hearing and the assessment of plausibility within RSD in Australia and Canada. At the same time, though, this Part recalls Barsky's claim that very little of the oral hearing can be explained or understood merely by reference to the formal law and procedures that govern its processes. He argues that to examine the refugee hearing only through pre-given legal standards is to reduce the process to its barest bones and even actively impede our understanding how the oral hearing functions.<sup>13</sup> While the decision-maker and the applicant (and where relevant, the applicant's advocate) must engage with the law's framing of evidentiary assessment in the presentation and testing of testimony, the legal framing of the hearing provides a partial account of the exchanges between the applicant and decision-maker. It is for this reason that Barsky draws on critical discourse analysis and theory to examine 'the rules, conventions and the procedures which legitimate and to some degree determine a particular discursive practice' within the hearing; and it is also why I draw on narrative-based standards and expectations in the analyses that follow.<sup>14</sup>

Decision-makers are afforded an extremely wide discretion in testing and judging refugee applicants' evidence. This is due in large part to the unique nature of RSD, which generally involves cross-cultural communication, a primary reliance on uncorroborated applicant testimony, the presentation of traumatic or distressing events and findings as well as predictions about future events. Standard rules of procedure and evidence would function poorly in this context. The inquisitorial nature of the hearing, low evidentiary standards of proof and the lack of formal evidentiary rules represent an attempt to address the problem of 'bare' testimony within RSD, the limited availability of other forms of evidence and the highly speculative nature of refugee determination.<sup>15</sup> However, I suggest here that one effect of the existing

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<sup>13</sup> See Robert F Barsky, *Constructing a Productive Other: Discourse Theory and the Convention Refugee Hearing* (John Benjamins Publishing, 1994) 8.

<sup>14</sup> Ibid 10.

<sup>15</sup> The UNHCR Handbook, discussed in detail below, describes the decision-making context especially plaintively:

informal standards—which ostensibly aim to ameliorate the challenges of RSD—is to enable decision-makers’ subjective views and impulses to profoundly influence how evidence is tested and the determination of refugee applicants’ credibility.<sup>16</sup> The broadly stated criteria of credibility determination and of oral hearing procedure set the stage for the assessment of testimony to become characterised by subjectivity, and render RSD susceptible to a politics of disbelief and gate-keeping at a systemic level.<sup>17</sup>

The evidentiary and procedural standards governing the hearing do not compel the ‘cultures of disbelief’ and scepticism described in the Introduction. Nor, it should be noted, does every decision-maker embody a culture of doubt and disbelief.<sup>18</sup>

However, existing standards of evidentiary assessment certainly do not actively constrain decision-maker subjectivity nor solve the problem of how decision-maker discretion shapes the conduct and terms of the hearing. As this chapter demonstrates, a central problem raised by the existing criteria is the inherent normativity that inflects the standard of plausibility. In addition to the failure of existing standards to guide decision-makers’ approaches to evidence during the hearing, they also do little to provide applicants with a clear sense of the terms on which their testimony will be tested.

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The relevant facts of the individual case will have to be furnished in the first place by the applicant himself [sic]. It will then be up to the person charged with determining his status (the examiner) to assess the validity of any evidence and the credibility of the applicant's statements.

UNHCR, ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’ (HCR/IP/4/Eng/REV1, 3rd ed, 2011) 38 <<http://www.unhcr.org/3d58e13b4.html>> (‘the Handbook’).

<sup>16</sup> And, as I argue in Chapter 6, a similar lack of constraint exists in relation to the conduct of the hearing.

<sup>17</sup> As described in the Introduction, credibility assessment is influenced by a culture of disbelief across a number of jurisdictions. As well, the ‘credibility literature,’ taken as a whole, has consistently argued that the ‘tests’ or criteria for credibility are both narrowly applied and ill-suited to assessing the testimony of refugee applicants.

<sup>18</sup> For a nuanced overview of the different approaches decision-makers take to running the oral hearing, see Canadian Council for Refugees, ‘The Experience of Refugee Claimants at Refugee Hearings at the Immigration and Refugee Board’ (2012) 38–44 <[http://ccrweb.ca/files/irb\\_hearings\\_report\\_final.pdf](http://ccrweb.ca/files/irb_hearings_report_final.pdf)>.

*i. International Refugee Law and Credibility Standards*

Principles, rules or standards governing the structure or *process* of RSD are entirely absent from the Refugee Convention and the 1967 protocol.<sup>19</sup> The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, first published in 1979 and updated in 1992 and 2011, is the key international source of guidance on RSD procedure and the minimum standards under international refugee law for assessing refugee claims.<sup>20</sup> While the Handbook's section on procedural aspects of RSD is relatively short (a mere four pages), it directly addresses the encounter between the decision-maker and the applicant and the question of evidentiary assessment within RSD. The Handbook is the founding source of much of the language governing credibility assessment in Refugee Convention-signatory countries, particularly as it exists within domestic guidelines and jurisprudence on the determination of credibility, and this is the case in Australia and Canada.<sup>21</sup> Even though the document itself is not directly referred to domestic statutes, the criteria of plausibility, internal and external consistency and coherence frame credibility assessment in both jurisdictions.<sup>22</sup>

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<sup>19</sup> As the UNHCR Handbook notes, 'the determination of refugee status, although mentioned in the 1951 Convention (cf Article 9), is not specifically regulated.' UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', above n 15, 37.

<sup>20</sup> UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', above n 15. For an overview of the context and history of the Handbook's production, see the Introduction to this thesis at n 43. And for other UNHCR guidance on RSD processes, see Executive Committee of the United Nations High Commissioner for Refugees, 'Determination of Refugee Status' (EXCOM Conclusion No 8 (XXVIII), 12 October 1977); UNHCR, 'Global Consultations on International Protection: Asylum Processes (Fair and Efficient Asylum Procedures)' (EC/GC/01/12, 31 May 2001); UNHCR, 'Building In Quality: A Manual on Building a High Quality Asylum System' (September 2011).

<sup>21</sup> Ibid. In the decision *Chan Yee Kin v Minister for Immigration & Ethnic Affairs* (1989) 169 CLR 379, the High Court of Australia accepted the Handbook as a guiding but not binding document within Australian refugee law; see also *Chan v Canada (Minister of Employment and Immigration)* [1995] 3 SCR 593 (Canada). In the UK, Lord Steyn characterised the Handbook as 'high persuasive authority' which is 'much relied on by courts and tribunals': *R v SSHD, ex parte Adan and Aitseguer* [2001] 2 AC 477, 608.

<sup>22</sup> Ibid [204]; Immigration and Refugee Board, 'Assessment of Credibility in Claims for Refugee Protection' (Legal Services, 2004); Administrative Appeals Tribunal Migration and Refugee Division, above n 9. Notably, the Canadian document addressing credibility assessment is approximately 100 pages long and draws on a vast amount of common law to deal in detail with multiple aspects of credibility assessment. By contrast, the Australian Guidelines are eight pages long, sparsely referenced and contain general statements and principles in regards to credibility assessment.



In contemporary refugee law, evidentiary assessment often takes place either as part of, or as strongly influenced by, the determination of an applicant's overall credibility.<sup>23</sup> However, credibility is only mentioned twice in the section of the Handbook dealing with fact-finding. Instead, the Handbook focuses on establishing the 'benefit of the doubt' as the standard governing refugee testimony assessment (although this is not presented as the standard of proof as such).<sup>24</sup> The 'benefit of the doubt' principle recognises the limited access that refugee applicants may have to other forms of proof, and the fact that some statements may not be susceptible of proof at all.<sup>25</sup> The section of the Handbook entitled 'Establishing the Facts' repeats in a range of ways that the requirement of supporting evidence should not be 'too strictly applied,' and that where no solid evidence is available, the applicant should not be penalised and instead should be encouraged to give all possible evidence in 'a climate of confidence.'<sup>26</sup> The document goes on to emphasise that 'it is hardly possible for a refugee to "prove" every part of his [sic] case and, indeed, if this were a requirement the majority of refugees would not be recognized.'<sup>27</sup>

Further, the Handbook establishes that as a consequence of the applicant's inevitable difficulties in providing evidence in support of her or his testimony, the examiner should 'use all the means at his [sic] disposal to produce the necessary evidence in support of the application' and that 'the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner.'<sup>28</sup> Read as a whole, the Handbook posits a setting wherein the broad discretion of decision-makers is exercised in a manner such that evidence is interpreted in good faith and with an

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<sup>23</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.

<sup>24</sup> On this terminology see UNHCR, 'Note on Burden and Standard of Proof in Refugee Claims' (1998).

<sup>25</sup> UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', above n 15, 38. Indeed, the section addressing procedure is framed by the statement, 'It should be recalled that an applicant for refugee status is normally in particularly vulnerable situations. He [sic] finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own': at 37.

<sup>26</sup> Ibid 39.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid 38.

operating presumption that testimony is credible. In this imagined setting, the applicant's character is not being tested, so 'untrue statements by themselves are not a reason for refusal of refugee status.'<sup>29</sup> In addition, decision-makers should seek to find 'an explanation for any misrepresentation or concealment of material facts.'<sup>30</sup> The Handbook sets out that evidentiary assessment must not take 'isolated incidents out of context' and that decision-makers should evaluate any apparent inconsistencies or untrue statements 'in the light of all the circumstances of the case.'<sup>31</sup> These statements in the Handbook give an impression of the hearing as a space that is receptive, open and inclined to overlook small details and inconsistencies, favouring a generous and holistic assessment of the applicant's testimony.<sup>32</sup>

The Handbook's guidance, particularly its invocation of the 'benefit of the doubt,' is intended to operate in light of the 'special situation of the applicant.'<sup>33</sup> The standard, however, does little to structure decision-making where credibility is in doubt. In fact, under the Handbook's guidance, 'the benefit of the doubt' is only applied to an applicant's testimony *once* he or she has been found to be credible.<sup>34</sup> In the Handbook's main qualification of the benefit of the doubt principle, we are told that the benefit should only be given when 'all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility.'<sup>35</sup> This qualification seems to me to reflect the beginnings of a culture of disbelief within RSD, leading to a troubling paradox for refugee applicants. The core concessions that the Handbook makes—interpreting the refugee applicant's testimony

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<sup>29</sup> Ibid 39.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> In its 'Note on Burdens and Standards of Proof,' published in 1998, UNHCR reiterates that consideration should be given to the fact that 'due to the applicant's traumatic experiences, he/she may not speak freely; or that due to time lapse or the intensity of past events, the applicant may not be able to remember all factual details or to recount them accurately or may confuse them'; the Note warns that 'insubstantial vagueness or incorrect statements' should not be decisive factors when determining credibility: UNHCR, 'Note on Burden and Standard of Proof in Refugee Claims', above n 24, 3.

<sup>33</sup> UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', above n 15, 37.

<sup>34</sup> Ibid 39.

<sup>35</sup> Ibid. For a domestic and unambiguous restatement of this principle in Canada, see *Chan v Canada (Minister of Employment and Immigration)* [1995] 3 SCR 593.

in light of the challenges she or he might face in presenting it—only apply once credibility has already been determined in her or his favour.<sup>36</sup>

Thus, the UNHCR Handbook arguably takes us the long way around in order to reinforce the requirement that applicants must establish their credibility. The content of credibility assessment is described, though not formally defined, via the criteria that ‘the applicant’s statements must be coherent and plausible, and must not run counter to generally known facts.’<sup>37</sup> The Handbook states that any allowance made for a lack of evidence ‘does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant.’<sup>38</sup> Thus, the Handbook provides the overarching criteria (albeit in passing) of coherence, consistency and plausibility that have become absolutely central to domestic RSD and that are now the criteria of credibility assessment.<sup>39</sup> As Millbank has noted, while States have adopted some version of these criteria, they have ‘notably been less enthusiastic about importing the “benefit of the doubt” standard.’<sup>40</sup>

The *evidentiary* burdens and standards of proof for judging testimony in domestic refugee determination processes are frequently expressed in either case law or

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<sup>36</sup> Ibid.

<sup>37</sup> Ibid. This description is repeated in UNHCR’s Note on Burden and Standards of Proof: ‘Credibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed’ (emphasis in the original): UNHCR, ‘Note on Burden and Standard of Proof in Refugee Claims’, above n 24, 3.

<sup>38</sup> UNHCR, ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’, above n 15, 39.

<sup>39</sup> The Canadian Guidelines state that, ‘[a]n important indicator of credibility is the consistency with which a witness has told a particular story. The RPD may also take into account matters such as the plausibility of the evidence and the claimant’s demeanour’: Immigration and Refugee Board, above n 22, [1.1]. The Australian Guidelines refer to ‘what is objectively or reasonably believable’ and the ‘overall consistency and coherence’ of a claim: Administrative Appeals Tribunal Migration and Refugee Division, above n 9, [9], [28]. In both Australia and Canada decision-makers may also assess an applicant’s demeanour in determining credibility, though the guidelines and case law in both jurisdictions highlight that cultural differences will affect interpretations of demeanour and that ‘care should be exercised’ where demeanour is relied upon: see eg Australian Guidelines at [34].

<sup>40</sup> See Administrative Appeals Tribunal Migration and Refugee Division, ‘Guidelines on the Assessment of Credibility’ (updated 2015 2006) [34]. Reproduction of this principle in the Canadian Credibility Guidelines is followed by ‘a lengthy discussion of when that approach is not applicable’ and the Australian Credibility Guidelines express the principle via a series of double negatives which evidence Millbank’s argument that there is ‘a reluctance to embrace the principle’: at 5–6.

institutional guidelines rather than in statutes. The criteria governing credibility assessment sit alongside and intersect with the expression of more conventional ‘standards of proof,’ which are applied to the question of whether the applicant has a ‘well-founded fear of persecution’ in each setting. In Canada, the standard of proof for determining whether the applicant holds a ‘well-founded fear of persecution’ is that there must be ‘more than a minimal possibility’ that the applicant has a well-founded fear of persecution,<sup>41</sup> but there need not be more than a 50 per cent chance (or probability) that persecution will occur.<sup>42</sup> A similar ‘low’ standard exists in Australia for determining the question of whether the applicant holds a well-founded fear. Decision-makers must determine whether there is a ‘real chance’ of persecution; the Australian High Court has set out that this test is concerned with ‘degrees of probability’ rather than the balance of probabilities.<sup>43</sup> Although these conventional evidentiary standards apply to the determination of whether an applicant has a well-founded fear of persecution, they are necessarily connected to credibility assessment and the ‘benefit of the doubt’ principle that governs the global assessment of applicant testimony. As with the benefit of the doubt principle, though, the difficulty with this jurisprudence is that before these lowered standards of evidence apply, the applicant must first be found to be credible.

In the following part I demonstrate the extent to which the circular relationship that the Handbook establishes between low evidentiary standards and credibility determination manifests in the hearing, with decision-makers testing credibility via narrative contests that do not account for the difficulties refugee applicants face in presenting and proving their claims. In order to further explore how the framework of the oral hearing and credibility criteria permit the narrative contests addressed in the

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<sup>41</sup> *Adjei v Canada* (1989) 7 Imm LR 169, 173. Though, the *facts* that form the basis of the claim must be proved on the balance of probabilities in both jurisdictions: at 171.

<sup>42</sup> *Ibid.* In *Salibian v Canada* [1990] 3 FC 250, 258 the Federal Court of Appeal explained that ‘the fear felt is that of a reasonable possibility that the applicant will be persecuted if he returns to his country of origin.’

<sup>43</sup> See *MIEA v Wu Shan Liang* (1996) 185 CLR 259, 282–3; *MIEA v Guo Wei Rong* (1997) 191 CLR 559, [25]. In *Chan Yee Kin v MIEA* (1989) 169 CLR 379, [35] McHugh J found, ‘Obviously, a far-fetched possibility of persecution must be excluded. But if there is a real chance that the applicant will be persecuted, his or her fear should be characterised as ‘well-founded’ for the purpose of the Convention and Protocol.’

next part of this chapter, I first examine the limited rules that govern the testing of evidence and credibility *during* the hearing in Australia and Canada.

*ii. The Domestic Legal Framework: Australian and Canadian Approaches to Testing Refugee Testimony*

Having established these standards, what governs the assessment of evidence, and the testing of credibility during the oral hearing? In Australia, as noted, the enabling statute sets out that the formal standards of evidence do not apply to the RRT.<sup>44</sup> Similarly, in Canada, all hearings before the Board must be dealt with ‘as informally and quickly as the circumstances and the considerations of fairness and natural justice permit,’<sup>45</sup> and the RPD is not bound by ‘any legal or technical rules of evidence.’<sup>46</sup> In both Australia and Canada it is the decision-maker who governs exactly how the hearing will proceed and therefore selects which events will be addressed during the hearing and in what order. From start to finish, as long as certain procedural fairness standards are met, exactly how evidence is tested is at the decision-maker’s discretion (I return to this point in detail in the following chapter).

The most significant procedural fairness limitation on how evidence and credibility is tested during the hearing is the ‘fair hearing’ rule before the IRB and the ‘adverse inference’ rule before the RRT.<sup>47</sup> In Australia, adverse inferences or findings must be put to the applicant and the applicant must be given the opportunity to respond.<sup>48</sup> As the RRT Credibility Guidelines set out the applicant must be ‘made aware of the case against him or her ... the Tribunal is under a duty to ensure that an applicant has an opportunity to be heard on the issues to be decided.’<sup>49</sup> The IRB must also give the applicant the opportunity to make representations, either in person or through a

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<sup>44</sup> *Migration Act 1958* (Cth) ss 420(1), (2).

<sup>45</sup> *Immigration and Refugee Protection Act*, SC 2001, c 27, s 162(2).

<sup>46</sup> *Immigration and Refugee Protection Act*, SC 2001, c 27, s 170(g).

<sup>47</sup> Australia: *WACO v MIMIA* [2004] 131 FCR 511; *Kioa v West* (1985) 159 CLR 550; and in Canada: *Baker v Canada* [1999] 2 SCR 817.

<sup>48</sup> The RRT must give the applicant ‘clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review’ and give the applicant the opportunity to ‘comment or respond’; this may be done during the oral hearing or in writing: *Migration Act 1958* (Cth) ss 424AA, 424A; see also *Kioa v West* (1985) 159 CLR 550.

<sup>49</sup> Administrative Appeals Tribunal Migration and Refugee Division, above n 9, [17].

representative.<sup>50</sup> While none of these rules determines *how* evidence will be put to the applicant, they constitute the most protected aspect of the applicant's right to be heard (albeit primarily on evidence adverse to her or his claim) within RSD processes.

There is also some limited guidance in both countries as to the manner in which the hearing should be conducted. The RRT Credibility Guidelines state that '[a]pplicants are best able to present their case at a hearing which respects the dignity of the applicant and is conducted in a fair and non-intimidating manner.'<sup>51</sup> Members are expected to 'ask appropriate questions in a courteous, non-threatening or non-intimidating manner'<sup>52</sup> with no additional guidance as to what may be considered appropriate.<sup>53</sup> During the hearing, Members must also 'listen' and 'be aware of the possible barriers to communication.'<sup>54</sup> In the testing of evidence, the RRT Member must not intimidate applicants or constantly overbear an applicant who is giving evidence – though there is a high threshold as to what will be considered intimidating or an unacceptable level of interruption.<sup>55</sup>

In Canada, IRB Members must remain 'objective, dispassionate and impartial' during the hearing in order to avoid an apprehension of bias.<sup>56</sup> The IRB is required not to display 'excessive zeal' in an attempt to find contradictions in an applicant's testimony during the hearing<sup>57</sup> but may question applicants extensively or

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<sup>50</sup> *Immigration and Refugee Protection Act*, SC 2001, c 27, s 170(e). The IRB is also, in limited circumstances, required to afford the applicant and other witnesses the opportunity to clarify evidence and to explain perceived inconsistencies or contradictions: *Gracielome v Canada (Minister of Employment and Immigration)* (1989) 9 ImmLR (2d) 237 (FCA); though for a more recent reading down of this position see Immigration and Refugee Board, above n 22, [2.5].

<sup>51</sup> Administrative Appeals Tribunal Migration and Refugee Division, above n 9, [15].

<sup>52</sup> *Ibid.*

<sup>53</sup> Though note, the RRT (now AAT) Guidelines on Gender, under the heading 'Credibility' set out questions establishing credibility should be directed towards the applicant's 'realisation and experience of sexual orientation and gender identity rather than questions that focus on sexual acts': Administrative Appeals Tribunal Migration and Refugee Division, 'Guidelines on Gender' (1996, updated 2015) [21].

<sup>54</sup> Administrative Appeals Tribunal Migration and Refugee Division, above n 9, [15], [16].

<sup>55</sup> In *Re Refugee Review Tribunal; Ex parte H* (2001) 179 CLR 425 the High Court of Australia held that the RRT Member's constant interruptions to the applicant's evidence and constant questioning of credibility formed the basis of a reasonable apprehension of bias in the decision-maker.

<sup>56</sup> Immigration and Refugee Board, above n 22, [2.6.4]. See also *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817.

<sup>57</sup> *Attakora v Canada (Minister of Employment and Immigration)* (1989) 99 NR 168 (FCA).

energetically.<sup>58</sup> The IRB guidance on credibility notes that there may be circumstances where the questioning is ‘excessive or overly aggressive or the interventions are improper,’ which will include the making of inappropriate comments or demonstrating an unfavourable attitude.<sup>59</sup> Very notably, jurisprudence in Canada requires that credibility (and plausibility) findings are based firmly on the available evidence and not on assumptions or speculation.<sup>60</sup> There is clear authority that the Board cannot ‘simply draw implausibilities “out of a hat,”’ and that where assessments of plausibility are ‘highly speculative and a claimant has not been given an opportunity to address them, a reviewing Court will give the conclusion little weight.’<sup>61</sup> This jurisprudence imposes a considerable constraint on discretion that is not replicated in the Australia case law. It also reflects the more general fact that judicial review of credibility determinations and first instance decisions in Canada has been far more robust than the comparable jurisprudence in Australia.<sup>62</sup>

None of these requirements or guidelines, however, radically constrains how evidence is tested during the hearing. Decision-makers must ensure their *findings* in relation to credibility are based on the evidence taken as a whole and not in isolated parts.<sup>63</sup> In my observations, this has not resulted in circumstances where decision-makers *test*

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<sup>58</sup> *Rajaratnam v Canada (Minister of Employment and Immigration)* (1991) 135 NR 300 (FCA).

<sup>59</sup> Immigration and Refugee Board, above n 22, [2.6.4]. *Yusuf v Canada (Minister of Employment and Immigration)* [1992] 1 FC 629 (CA); *Kumar v Canada (Minister of Employment and Immigration)* [1988] 2 FC 14 (CA). Though, once again, the threshold for breaching these standards is high. For example, the Member in *Yusuf* made ‘sexist, unwarranted and highly irrelevant observations.’ There is a gendered element to the successful appeals, in that ‘inappropriateness’ often relates to sexist comments or insensitive responses to allegations of sexual assault: *Reginald v Canada (Minister of Citizenship and Immigration)* [2002] 4 FC 523 (TD).

<sup>60</sup> *Canada (Minister of Employment and Immigration) v Satiacum* (1989) 99 NR 171 (FCA); *Vallejo, Juan Ernesto v MEI* (FCA, no A-799-90).

<sup>61</sup> *Arumugam Kandasamy v MEI* (FCTD, no IMM-1406-93).

<sup>62</sup> Connected, no doubt, to the fact that protection visa decisions in Australia are subject to a privative clause, which limits the availability of judicial review to decisions infected by jurisdictional error: *Migration Act 1958* (Cth) s 474. See further Steve Norman, ‘Assessing the Credibility of Refugee Applicants: A Judicial Perspective’ (2007) 19 *International Journal of Refugee Law* 273, 273; Mary Crock, ‘Judging Refugees: The Clash of Power and Institutions in the Development of Australian Refugee Law’ (2004) 26 *Sydney Law Review* 51; *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476.

<sup>63</sup> Immigration and Refugee Board, above n 22, [2.1.1]; Administrative Appeals Tribunal Migration and Refugee Division, above n 9, [7]. *Hilo v Canada (Minister of Employment and Immigration)* (1991) 15 ImmLR (2d) 199 (FCA); *Sein v Minister for Immigration and Multicultural Affairs* (2011) 113 FCR 370; *Minister for Immigration and Multicultural Affairs v Rajalingham* (1999) 93 FCR 220.

evidence as a whole or refrain from using isolated elements of evidence to test credibility. As well, while there is clear support for the proposition that not *all* inconsistencies in evidence will lead to an adverse credibility finding (in a characteristic negative formulation),<sup>64</sup> and in Canada, that inconsistencies should not be examined ‘microscopically’ during the hearing,<sup>65</sup> these standards establish only modest constraints on the handling of evidence during the hearing. Relevantly, an explicit credibility determination was made in all of the included hearings. Significantly, though, at no point were any of formal credibility guidance documents in either jurisdiction directly referenced in the hearings or in non-standardised sections of the written decisions.

All of the above leaves RSD before the IRB and RRT with a fairly hollow general framework for the assessment of testimony and credibility during the hearing. These standards reflect the preservation of Members’ broad discretion in how the hearing is run. As this chapter and Chapter Six will show, the manner in which evidence is tested affects the applicant’s ability to meet the demand for narrative and to present evidence that is considered credible. As noted in the Introduction, there have been a series of practical and thoughtful engagements with how credibility assessment should be conducted since the publication of the UNHCR Handbook, the most recent of which is the UNHCR *Beyond Proof—Credibility Assessment in EU Asylum Systems* report.<sup>66</sup> The *Beyond Proof* report was motivated by the need for a more harmonised approach to credibility assessment within the EU, as well as by UNHCR’s identification, in exercise of its supervisory responsibility, of ‘a trend

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<sup>64</sup> Administrative Appeals Tribunal Migration and Refugee Division, above n 9.

<sup>65</sup> *Attakora v Canada* (1989) 99 NR 168 (FCA).

<sup>66</sup> UNHCR, ‘Beyond Proof: Credibility Assessment in EU Asylum Systems: Summary Report’ (May 2013) 7 (‘Beyond Proof report’). The broader project, of which the *Beyond Proof* report forms a part, was undertaken by UNHCR in partnership with the International Association of Refugee Law Judges, Asylum Aid (UK) and the Hungarian Helsinki Committee, with financial support from the European Commission’s European Refugee Fund: at 7. See also International Association of Refugee Law Judges, ‘Assessment of Credibility in Refugee and Subsidiary Protection Claims under the EU Qualification Directive - Judicial Criteria and Standards’ (2013); Council of the European Union, *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 (recast)*, 20 December 2011, art 4; *Directive 2013/32/EU on Common Procedures for Granting and Withdrawing International Protection (recast)*, 26 June 2013.



across [EU] Member States whereby first instance negative decisions on applications for international protection often seem to result from the fact that key elements of the applicants' statements are not accepted as credible.'<sup>67</sup> The report reinforces the identification of credibility assessment as the 'core task' of RSD. It also attempts to identify and amend many of the incorrect, unsubstantiated but entrenched normative practices that have guided credibility assessment within RSD processes.<sup>68</sup>

The *Beyond Proof* report addresses credibility assessment in the EU (rather than in Australia or Canada) and does not alter existing international refugee law criteria in relation to credibility. For the purposes of this chapter, *Beyond Proof* and other recent reports are significant because they attempt to address *how* credibility is tested *during* applicant interviews and oral hearings.<sup>69</sup> The *Beyond Proof* report engages with credibility determinations in practice and summarises the problems that have arisen in the testing of evidence and suggests better approaches to credibility testing and the conduct of the oral hearing.<sup>70</sup> My aim in this chapter is not to suggest that a better

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<sup>67</sup> UNHCR, 'Beyond Proof: Credibility Assessment in EU Asylum Systems: Summary Report', above n 66, 7. And for a detailed and lucid review of the history of initiatives in relation to credibility assessment and gender, see Debora Singer, 'Falling at Each Hurdle: Assessing the Credibility of Women's Asylum Claims' in Efrat Arbel, Catherine Dauvergne and Jenni Millbank (eds), *Gender in Refugee Law: From the Margins to the Centre* (Routledge, 2014) 98; see also Hana Cheikh Ali, Cristel Querton and Elodie Soulard, 'Gender-Related Asylum Claims in Europe: A Comparative Analysis of Law, Policies and Practice Focusing on Women in Nine EU Member States (GENSEN)' (May 2012) <[http://www.asylumaid.org.uk/data/files/Genderrelated\\_asylum\\_claims\\_in\\_Europe.pdf](http://www.asylumaid.org.uk/data/files/Genderrelated_asylum_claims_in_Europe.pdf)>.

<sup>68</sup> Indeed, although the *Beyond Proof* report only relates to EU Member States, the authors note that 'there is a pressing need for comprehensive and up-to-date guidance on credibility assessment'; that UNHCR has 'embarked on the review of its own guidance with a view to producing updated guidelines on credibility assessment that reflect recent developments in international refugee law'; and that the report's findings will be taken into account in the preparation process for new UNHCR standards: UNHCR, 'Beyond Proof: Credibility Assessment in EU Asylum Systems: Summary Report', above n 66, 8–9.

<sup>69</sup> See also Amnesty International and Still Human Still Here, 'A Question of Credibility: Why so Many Initial Asylum Decisions Are Overturned on Appeal in the UK' (April 2013) <[http://www.amnesty.org.uk/sites/default/files/a\\_question\\_of\\_credibility\\_final\\_0.pdf](http://www.amnesty.org.uk/sites/default/files/a_question_of_credibility_final_0.pdf)>; Canadian Council for Refugees, above n 18; Canadian Council for Refugees, 'The Experience of Refugee Claimants at Refugee Hearings in the New System' (April 2014) <<http://ccrweb.ca/sites/ccrweb.ca/files/refugee-hearing-report-2014.pdf>>.

<sup>70</sup> The *Beyond Proof* report directs that the decision-maker, *during* the oral hearing, 'uses appropriate questions, remains impartial and objective during the interview both in his or her verbal and non-verbal communication'; 'takes age, gender, cultural and ethnic background, education, social status, sexual orientation and/or gender identity into account in the way questions are put to the Applicant, responses are analysed, assessed and interpreted, and follow-up questions are phrased'; and 'provides the Applicant with an opportunity to clarify any apparent lack of details, omissions, inconsistencies, and implausibilities.'; UNHCR, 'Beyond Proof: Credibility Assessment in EU Asylum Systems: Full Report' (May 2013) 254. I return to this point in the Conclusion to this thesis.

framing of credibility criteria would lead to perfect decision-making; or that yet further guidelines, rules and principles will lead to perfectly conducted hearings (even in the event that they are uniformly followed). However, in my analysis of the RSD oral hearing transcripts, the discretion of Members in how evidence was tested, and how the hearing was run, was conspicuous and remarkable. When placed against my argument that applicants must meet a demand for narrative during the hearing, these features of the hearing become salient. As noted in the Introduction, an important body of scholarship has been devoted to critiquing the criteria for credibility determination, and decision-makers' application of such criteria in credibility *determinations*. These later chapters build on that scholarship by investigating how the testing of refugee testimony and credibility takes place during the hearing, attending in particular to the role of the narrative form and the assessment of plausibility.

## **Part Two. Counter-narrative and Narrative Contest in the Hearings**

### *i. Overview of the Mena Hearing*

The applicant discussed in this section, Ms Mena, appeared before the RRT in Melbourne.<sup>71</sup> Ms Mena's country of origin was Egypt and her claim to protection was based on her fear of a forced marriage; her membership of the particular social group, young and unmarried women; her Christian religion; and her imputed political opinion. Like the majority of the other hearings addressed in this thesis, the *Mena* hearing did not deal with every aspect of the applicant's claim that ultimately featured in the written decision, and the topics that were addressed were not discussed in any kind of discernible order. Instead, the hearing focused on a select events and details within Ms Mena's testimony. In the hearing, some aspects of the applicant's testimony were raised for the explicit purpose of allowing the Member to fulfil the duty to put all adverse inferences to the applicant. However, not all topics that the Member raised were addressed for such a clear or explicit purpose. One such recurring topic and site of narrative contest was evidence of a shoulder injury that Ms Mena referred to in her testimony.

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<sup>71</sup> *Mena* [2014] (RRT).

ii. *Ms Mena's Dislocated Shoulder*

In this section, I focus on one incident relayed by Ms Mena during the hearing, an encounter with a taxi driver that culminated in her allegedly dislocating her shoulder. The Member addressed the alleged shoulder dislocation in detail, both when Ms Mena initially described the events surrounding it, and then again when the Member returned to the subject two further times during the approximately four-hour-long hearing. The shoulder incident was also included in the Member's written reasons. Ms Mena's evidence was that the dislocation occurred when she escaped from a taxi in order to avoid a potential sexual assault by the male taxi driver. The exchange between Ms Mena and the Member regarding this incident is an example of the narrative contests described above. In particular, the discussions of Ms Mena's shoulder injury show the extent to which the Member, when testing the applicant's evidence based on a sense of plausibility, presents the applicant with a counter-narrative or evidence in narrative form.

The exchange (excerpted below) indicates that the applicant in this instance was expected to respond to this hypothetical story of what should have happened by either accounting for the differences between the narratives and giving another, new narrative, or by accepting the Member's determination that the original narrative was implausible and embracing the alternative narrative suggested by the Member. The following excerpt details both the incident and the Member's initial response to this evidence when it was presented for the first time.<sup>72</sup>

Member:	You mentioned in your written claims an incident with the taxi driver. Can you tell me when that incident took place?
Applicant:	On the [XXX] of May. It was on my sister's anniversary.
Member:	Are we talking about 2011?
Applicant (in person):	Yeah. [ <i>Inaudible comment</i> ]
Member:	I'm sorry.
Applicant (in person):	[ <i>Plaintive/upset</i> ] I wasn't lucky this year.
Member:	I'm sorry?

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<sup>72</sup> Directly preceding this exchange, the applicant was questioned about the details of her fear of being forced to marry her Muslim neighbour. Note that at some points in the exchange above, the applicant, who had a good command of English, interjected and presented her testimony directly to the Member.

- Applicant (in person): I wasn't lucky this year. I wasn't lucky this year.
- Member: *[Interrupting]* Can you tell me what happened in that instant? I just need you to pause because I need to hear your evidence.<sup>73</sup>
- Applicant: So it was my, uh, my sister had her two children and it was their birthday. She wanted to buy things for the birthday but she couldn't leave the house because she had, uh, three young, uh, ones. I told her don't go, don't take your children out because it's ... It wasn't safe. I will take a taxi and I will buy everything you need. Uh, it was ... She lives 20 minutes away from us in [XXX], as well. So, uh, I took the taxi and I was, uh, talking to her on the phone. Uh, you need the cake, uh, what do you need, uh, other than that? ...
- Applicant (in person): Just one thing. It's not the kid's birthday. It's the anniversary for my sister.
- Applicant: Uh, it was anniversary, not the kid's birthday, my mistake. Uh, so when I was talking on the phone, I found that he [the taxi driver] turned left. So I told my sister, that's not the street I need. Uh, I know ... Uh, I don't need ... I don't know this street. I know, uh, [XXX] street so I told her I'll call you again because, uh, I have to tell the taxi the directions because we're going in a wrong way because I know that this street will lead you to the highway. Uh, so, uh, I, I told the, uh, taxi driver. I told him, um, 'Please go back to the main street I know because I don't know this street and I can't go back. So, if you can just drop me off at a shop, I will be there five minutes and you can drop me back. Uh, I just want to buy a cake.' And then he told me, uh, there is another word but I can't remember, but they call it infidel. So he said, 'You infidel, you won't tell me how, uh, how to drive or how to ... Where to go.' Uh, so, uh, he told me, uh, no. So I told him, 'Drop me here and I will go back.' So he said no and he locked the ... He pushed the central lock so I started screaming. He tried ... He ... He was driving on the left and I was behind the right passenger. So he tried to, uh, stop me from screaming. He put his hands on my, on my face, on my mouth. Um, and it was on the highway. There were no cars. I, uh, in Egypt we don't have seatbelts. So I tried, I opened the window and I started screaming, and I put my arms, uh, outside, um, and told him stop and let me get out. He said no, I will educate you, and he started swearing. Uh, so, he tried to slow down, uh, to grab me because half ... Half of my body was outside. I was screaming so he, um, he opened the centre [sic] lock because he wanted to grab me. Um, and then at that time, he was driving at 15 or 20Ks. So I jumped from the car.

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<sup>73</sup> This is an example of an applicant's emotional or affective response being prevented, dismissed or redirected by the decision-maker.

Applicant (in person): It was panic. He took many things at the same time. I was just keeping scream, scream, scream. How the hell? There is no one.

After the applicant presented this quite detailed and mostly uninterrupted account of what had taken place, the Member immediately asked about any injuries she may have acquired as she escaped the car:

Member: Were you injured when you jumped out of the car?

Applicant: I felt that my, um, right, uh, shoulder was dislocated because I couldn't lift it up.

Member: Did you go to hospital?

Applicant: My father had, uh, this, these symptoms before and he knew from, uh, um, he knew some exercises and some physiotherapy. How to, um, get it back to normal and from karate, I, uh, I knew, uh, some exercises to help with dislocated shoulder. Um, because if, when you're playing karate, you can use these exercises.

Member: I understand that a dislocated shol ... shoulder is excruciatingly painful and would definitely require hospital attention to put it back on its socket if nothing else.

Applicant: It wasn't dislocated. May, maybe it was cracked. I couldn't lift it up. I could, uh, move it to the front but not to the back and not, uh, I couldn't lift it up.

Member: So did your father's physiotherapy help?

Applicant: Um, I did some exercises, but until now, I feel the pain if I sleep on this shoulder. Uh, I, I hear cracks and I can't lift anything heavy.

Member: What happened after you'd gotten out of the car?

The other questions that the Member asked before moving on from this incident altogether addressed whether the applicant had gone to the police, and then whether she had ever seen that particular taxi driver again. The Member did not question the applicant about the details of the assault. What is lost in the text of this dialogue is the insistence in the Member's voice when she states that a dislocated shoulder is 'excruciatingly painful' and would 'definitely require hospital attention to put it back in its socket if nothing else.' Equally lost is the speed with which the applicant accepts that her shoulder therefore had not been dislocated and had 'maybe' been cracked. The applicant then testified with a comparatively great deal of certainty that it was still a painful injury and that she was unable to lift her arm at the time.

The above exchange raises two initial questions. First, of all the details that might have led to further questioning in the hearing, why was a dislocated shoulder addressed? Second, what is the true nature of the alleged injury? Significantly, the Member's claim that whether medical attention is required for a dislocated shoulder—or rather, for all dislocated shoulders—is presented as a fact capable of an objective truth, whereby the only correct answer is yes. This is a form of deductive reasoning: if a shoulder is dislocated, it must require hospital attention, and inversely, if a person does not go to the hospital, a shoulder cannot be dislocated. Implicit in the Member's questions is a patently normative, prescriptive quality: 'people with dislocated shoulders ought to go to the hospital.' The Member's certainty here determines the outcome of the exchange.<sup>74</sup> Neither the applicant nor the Member is in a position to present 'expert' opinion on the treatment required for dislocated shoulders, but it is the Member's subjective certainty that determines the truth of the applicant's claim and the sequence of events that must necessarily follow the dislocation of one's shoulder. As Wikström and Johansson note, such judgments, if acknowledged at all, are often described as 'common sense,' but they could equally be labeled 'discretion, stereotyping, or acting based on cultural norms/normative standards.'<sup>75</sup>

A close reading of the exchange about the shoulder injury further reveals not only that the Member presents a counter-narrative of what should have happened (which wins out in this narrative contest), but also that the Member's narrative frame redirects and

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<sup>74</sup> Note that this is a reflection of the Member's deeply personal normative worldview, which is not necessarily part of a grander 'dominant' narrative, or necessarily in direct accordance with details of the Member's cultural, racial or class background. Although it is certainly arguable that those in Global North countries have greater access to medical assistance and therefore are more likely to attend hospital, not every similarly located person would go to the hospital in such circumstances. Given the fights I have with my own family in trying to get them to seek basic medical advice, it is not my experience that the Member's response is necessarily that of, for example, a stably employed, educated Australian.

<sup>75</sup> Wikström and Johansson, above n 4, 95. On common sense reasoning in RSD, see also Spijkerboer, above n 4; Laurence J Kirmayer, 'Failures of Imagination: The Refugee's Narrative in Psychiatry' (2003) 10 *Anthropology & Medicine* 167, 167–8. Kagan also found that determinations of plausibility often cite 'common sense' as a basis decision-making: Kagan, above n 4, 390. Robert Thomas cites UK decision-making bodies *encouraging* asylum decision-makers to rely on 'common sense and experience' in determining credibility: Robert Thomas, 'Risk, Legitimacy and Asylum Adjudication' (2007) 58 *Northern Ireland Legal Quarterly* 49, 51. Though as Kagan (as well as 'outsider' storytelling scholars and countless others have noted) common sense is rarely as common as it seems, and this is even more so in an RSD context where 'what seems to be common sense about how things work in the country of asylum may not apply in the applicant's country of origin': at 390.

shapes the evidence that is subsequently presented. By insisting that the shoulder was not dislocated, a fact which the applicant accepts, the Member dictates that the story then proceed on the basis that the shoulder was ‘maybe’ hurt (as the applicant says, ‘maybe it was cracked’) but not dislocated. The applicant did originally submit that she had dislocated her shoulder, and her account is overwritten by the Member during the hearing.

The Member revisited the topic of the applicant’s shoulder later in the hearing. As well, the applicant’s advocate returned to the topic after having identified it as a source of doubt for the Member. In the final statement made by Ms Mena’s advocate to the RRT, she addressed the extent to which Ms Mena’s own, lay diagnosis may have affected the Member’s assessment of Ms Mena’s credibility. The exchange below took place after the completion of the Member’s examination of Ms Mena’s testimony and after two other witnesses had given evidence on unrelated topics.

- Advocate: Um, just really briefly to touch on the injury. I think it, it's possible that Ms Mena is overstating and self-diagnosing the dislocation. I think um, I certainly have a tendency to do that and we all do. Um, and, and it sounds as though it could have been jarred. I guess she's had no diagnoses of the injury when she fell out of ... she jumped out of the taxi, sorry. Um, and so her explanation about the father um, knowing a way to do physio- to, to help her overcome that jarring and her also knowing that from her physical activity being involved in karate is I think a reasonable explanation for her loosening up that jarring. If the Tribunal is going to have an issue with that. Um ...
- Member: Well, I wouldn't accept on any evidence before me that her shoulder was dislocated.
- Advocate: No. So I just wanted to indicate that there was actually no diagnosis of dislocation um, as an untrained person with no medical training, she’s given herself that diagnosis but that's not actually an assertion that it was diagnosed as being dislocated and then not having any medical treatment. It's just her own feeling about it.

In this exchange, in the face of the Member’s certainty that the shoulder could not have been dislocated, the applicant’s advocate accepts this ‘fact’ remarkably quickly. The advocate goes on to generate a series of counter-narratives, all of which accept the Member’s assessment, and which explain or make up for the deemed ‘implausibility’ of the dislocation. The ‘dislocation’ is replaced with the possibility

that the shoulder ‘could have been jarred.’ The dislocation is also explained as a ‘self-diagnosis’ and therefore implicitly wrong. Finally, in an attempt to bridge the gap between the earlier claim of dislocation and the subsequent diagnosis of a ‘jarring’ or a ‘crack,’ the advocate describes Ms Mena as overstating her injury, remarking, ‘I certainly have a tendency to do that, and we all do.’ This final statement represents an attempt to persuade the Member to accept a further narrative, that ‘exaggeration’ is a common response to one’s own illness or ailment.<sup>76</sup> At the same time, the new narrative reinscribes plausibility as a standard that can reasonably be based upon common sense, which is informed by common experience.<sup>77</sup> But here, the ‘experience’ of the Member determines the question of common sense and plausibility, and critically, the narrative that the Member constructs from her experience changes the course and content of the applicant’s evidence.

The question of the dislocated shoulder appears in the Member’s written reasons. The Member summarises the issue as follows:

[The applicant] did not seek medical attention for her injured shoulder following the assault in the taxi because although her injury was like a dislocation it was not actually a dislocated shoulder, rather dislocation was her self-diagnosis. She didn’t go to the doctor because she had injuries like this before from karate and knew how to treat it. Her father also knew ways to help an injury like this and they used to fix things like this at home.’<sup>78</sup>

In the above, we find another account of the injury, this time in the Member’s words, as being ‘like a dislocation,’ but we are informed, ‘it was not a actually dislocated shoulder, rather dislocation was her self-diagnosis.’ Also amended was the applicant’s original narrative: that she had not gone to the doctor because she knew how to treat a dislocated shoulder. In the Member’s report of the hearing, the applicant did not go to

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<sup>76</sup> As is common practice after the hearing, the applicant’s representative submitted a further statutory declaration, addressing matters raised during the hearing as potentially subject to an adverse finding or as negatively affecting Ms Mena’s credibility—and the post-hearing statutory declaration again revisited the issue of the dislocated shoulder.

<sup>77</sup> In the UK, the Independent Asylum Commission’s extensive study into RSD noted the frequent use of ‘speculative arguments’ about what the asylum seeker could have done, in order to determine plausibility and that decisions were made without considering the impact of ‘different political, social and cultural contexts’: Independent Asylum Commission, ‘Fit for Purpose Yet? The Independent Asylum Commission’s Interim Findings’ (2008) 20 <<http://www.independentasylumcommission.org.uk/files/Fit%20for%20Purpose%20Yet.pdf>>.

<sup>78</sup> *Mena* [2014](RRT Decisions and Reasons) [23].



the doctor because she had had injuries ‘like this’ before (ie, not a dislocated shoulder) and knew how to treat them. The Member’s final findings about the dislocated shoulder, its plausibility and any bearing it might have on Ms Mena’s credibility were then reported in the decision under the heading ‘Consideration of Claims and Evidence’ and the subheading ‘Credibility’:

... the Tribunal notes the applicant’s evidence at hearing that her shoulder was dislocated during the assault upon her by a taxi driver in May 2011, but that she did not seek medical attention. When the Tribunal indicated that it was having difficulty accepting she would not require urgent medical attention for a dislocated shoulder, the applicant stated that perhaps her shoulder was cracked and not dislocated. In her statutory declaration made [after the hearing] she clarifies that although her injury was like a dislocation, it was not actually dislocated rather dislocation was her self-diagnosis...<sup>79</sup>

In her conclusion about the shoulder, the Member writes that, ‘[w]hile the Tribunal considers it indicates a tendency to exaggerate her evidence, the nature of the injury itself has little bearing on her claims.’<sup>80</sup> The Tribunal then finds that little weight should be given to this aspect of the applicant’s evidence when assessing the applicant’s overall credibility.<sup>81</sup> Ultimately Ms Mena’s application for review was unsuccessful. The Member found that there were issues which caused the Tribunal to ‘hold serious concerns about the applicant’s credibility’ and these issues were based primarily on the Member finding ‘inconsistencies’ in Ms Mena’s account of her evidence during the hearing.<sup>82</sup> The RRT did not accept Ms Mena’s evidence as credible in relation to her primary claim that she would be subjected to a forced marriage if she returned to Egypt and found there was not a ‘real chance’ of persecution on the basis of her religion, political opinion or her status as an unmarried Christian woman.<sup>83</sup>

While the hearing did primarily focus on the applicant’s evidence, the decision-maker’s story or stories featured heavily during the exchange. The counter-narratives presented by the Member revealed significant details about the Member’s outlook and narrative-based world. The presentation of counter-narratives also compelled the

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<sup>79</sup> Mena [2014](RRT Decisions and Reasons) [39].

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid [38]. I have not addressed these inconsistencies in this chapter.

<sup>83</sup> Ibid [41]–[80].

applicant to respond to hypotheticals of the Member's invention, all of which related to the Member's own expectations about how anyone (or, actually, the Member herself) would have behaved.<sup>84</sup> Indeed, the Member's contributions should not be overlooked in an understanding of how the hearing runs and of how the applicant's testimony is expressed in the hearing room. In Dauvergne's assessment of the oral hearing as a site of identity construction, she observes that the decision-maker's identity emerges through the matrix of personal and role expectations that he or she expresses. But Dauvergne points out that while the decision-maker can choose how to construct his or her identity, the identity of the applicant during the RSD hearing is either assigned by others or adopted in an attempt to gain access to status and protection.<sup>85</sup>

Observations that a decision-maker's identity, background and social position influence the decision-making process are of course not new. Indeed, such observations recall mid-twentieth century legal realism, as well as critical legal studies and feminist scholarship about the 'gender of judging' and the relationship between judicial decision-making and the social position of members of the judiciary.<sup>86</sup> However, my point here is not so much that an objective judgment, free from the influence of the social context and the personal views of the decision-maker is possible. Rather, my point is that in the context of refugee hearings, when these views are presented to the applicant, the applicant is required, or at least asked, to respond to the decision-maker's counter-version of events. Furthermore, in certain instances, the applicant is required to account for the discrepancies between the two or more versions of the story that 'ought' to have taken place—and critically these

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<sup>84</sup> This is similar to Herlihy et al's findings from their review of UK asylum decisions and the assumptions about human behaviour that they contain, whereby *all* of the determinations they reviewed 'contained assumptions concerning what judges considered people "would have done" in the situations described': Herlihy, Gleeson and Turner, above n 4, 258.

<sup>85</sup> Catherine Dauvergne, *Humanitarianism, Identity, and Nation: Migration Laws of Australia and Canada* (UBC Press, 2005) 101.

<sup>86</sup> See especially Reg Graycar, 'The Gender of Judgments: Some Reflections on Bias' (1998) 32 *University of British Columbia Law Review* 1; Reg Graycar, 'The Gender of Judgments: An Introduction' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 2009) 262. As Graycar puts it, 'it seems apparent that we need to pay careful attention to what judges know about the world, how they know the things they do and how the things they know translate into their activity as judges': 'The Gender of Judgments: An Introduction' at 267.

(re)negotiations alter the factual matrix and therefore *remake* testimony that is finally presented for assessment.<sup>87</sup>

### *iii. Overview of the Adere Hearing*

The *Adere* hearing was one of the most adversarial hearings that I observed.<sup>88</sup> The level of conflict between the applicant and the decision-maker exceeded my expectations, despite my extensive exposure to literature addressing the problems associated with testing credibility and critiques of RSD hearings as at times hostile and more adversarial than inquisitorial in nature. In the *Adere* hearing, the points of contention between the decision-maker and the applicant did not pertain to significant elements of the definition of a refugee, as it is expressed in the Refugee Convention and domestic legislation. Topics that form the core of the definition were not addressed at any length in the *Adere* hearing; there was little attempt to establish that the harm the applicant experienced was persecutory; that the applicant had attempted to gain protection from state forces; or that the story was corroborated in secondary sources of information and country information.<sup>89</sup> This recalls my framing of this research in the Introduction, which noted that frequently the evidence addressed during the hearings did not relate to the requisite elements of the statutory definition of a refugee in Australia or Canada.

The most intensive questioning of the applicant, Mr Adere, and of his wife, who appeared as a witness focused on the plausibility of particular discrete and fragmented

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<sup>87</sup> That narratives are ultimately defined by *narrative transactions* is a foundational claim of much narrative theory, particularly scholarship on the sociology of narrative. It is a claim that I address in the following chapter on the oral hearing as a narrative occasion. Herrnstein Smith highlights the fact all narratives are social rather than individual productions and that the norms governing narrative transactions shape the content of narrative *and* who may create narratives, when they may be interrupted and which narratives will be interrogated: Barbara Herrnstein Smith, 'Narrative Versions, Narrative Theories' (1980) 7 *Critical Inquiry* 213. The transactional nature of narrative is also highlighted in Conley and O'Barr's widely-cited work on the role that judges play in shaping the oral evidence of lay litigants and witnesses in lower level courts: John M Conley and William M O'Barr, *Rules Versus Relationships: The Ethnography of Legal Discourse* (University of Chicago Press, 1990); and see Ewick and Silbey's discussion of this literature: Patricia Ewick and Susan S Silbey, 'Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative' (1995) 29 *Law & Society Review* 197, 208–9.

<sup>88</sup> *Adere* [2012](RRT).

<sup>89</sup> *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) art 1A(2).

aspects of his story. The questions I explore here relate to three different topics: a phone number, the behaviour of a hired driver, and a laptop. Once again, in each instance, the Member's questioning took the form of presenting a fully formed counter-narrative to the applicant, ie, the Member's own version of how things must or should have gone. The Member in this hearing demonstrated a tendency to universalise his own experience when seeking to determine plausibility and narrative causality in order to correctly 'apprehend the authenticity or the duplicity of the story being told.'<sup>90</sup> As I seek to demonstrate, the topic and content of the Member's counter-narratives appear to be both idiosyncratic and impulsive.

As noted in Chapter Four, Mr Adere's country of origin was Ethiopia, and he was the primary applicant. His claim addressed the persecution he would face as a person working in a non-governmental organisation, and therefore as a member of a particular social group. His RRT hearing took place over the course of approximately three hours. Unlike the majority of other applicants, Mr Adere spoke in a mix of English and his native tongue, and for parts of the hearing, he did not use the services of the interpreter, who was present also to allow Mrs Adere to give evidence.

#### *iv. The Phone Number and the Hired Driver*

One of the topics of extended dispute during the hearing concerned the abduction of the applicant from an Ethiopian airport after he had returned from an overseas trip, and his subsequent transportation to a rural prison. The applicant reported that at the time of the abduction, he did not know where he was being taken or why, and he had no time to contact his wife or family. He then reported that he yelled out his home phone number to the government-employed driver of the abduction vehicle, and requested that the driver tell his (the applicant's) wife where he was being taken. Mr Adere recounted that the government-employed driver did call Mrs Adere and inform her of his whereabouts, and consequently, his family was able to find him and help him get out of prison.

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<sup>90</sup> Cécile Rousseau and Patricia Foxen, 'Constructing and Deconstructing the Myth of the Lying Refugee: Paradoxes of Power and Justice in an Administrative Immigration Tribunal' in Els van Dongen and Sylvie Fainzang (eds), *Lying and Illness: Power and Performance* (Het Spinhuis, 2005) 67.

The Member took issue with a number of aspects of this part of the applicant's evidence. First and foremost was the Member's view that if he (the Member) could not remember the number, despite having heard it twice during the applicant's oral testimony, then it was implausible that the government driver would recall it. The Member also insistently expressed disbelief that a government-employed driver would contact the applicant's wife on the applicant's behalf. The counter-narratives here appear to be that people cannot ordinarily memorise phone numbers if they have only heard the number a couple of times and that government-employed drivers certainly do not assist government abductees. The expression of these counter-narratives took place as follows:

- Member: When did they find out you were in prison?
- Applicant (in person): On the way to [XXX] prison I told the driver, I gave him my number, I told him this is my wife's number, please call her and let her know what happened to me.
- Member: So when you say the driver, was that a police driver?
- Applicant (in person): I don't know. Could be a police driver or maybe they hired a car; a rental.
- Member: I understand that you've been taken out from the first prison, so they take you in a vehicle, to the second prison, who was in that vehicle?
- Applicant (in person): Two officers and a driver.
- Member: And you.
- Applicant (in person): Yes.
- Member: Okay, so, you say you asked the driver to ring your wife.
- Applicant (in person): Yes.
- Member: And tell her what?
- Applicant (in person): Tell her I'm in [XXX] prison.
- Member: What did the police say when you told the driver to do that?
- Applicant (in person): I said this is the number, ring my wife. I screamed it. I wasn't hoping that he would tell her or call her. But he did.
- Member: There's some difficulty, Mr [XXX], that you have mentioned your wife's number twice now, and I have difficulty in remembering the number, but he remembered that, and he chose to make a communication with person as a result of a request from a somebody who was in custody. I just find it unusual that a driver, whether a police driver or a hired driver, would be able to do that.

Directly after this comment, the applicant tried to account for the situation that the Member deemed ‘unusual’ by noting that he (the applicant) also found it ‘surprising’ but nonetheless the events had taken place:

Applicant (in person): I was surprised too. I was in a desperate situation. [*Pause*]  
The only thing I could do was to tell the driver to do this.

Member: I understand that you were in a desperate situation; I’m just having a difficulty [sic] being able to accept that in the circumstances that you’ve described, that you will be able to say to a driver of a vehicle in which you have been detained, as you have just described to me, to yell out a telephone number once, and the driver remembered it although he had no interest in doing it, why would the driver want to communicate that?

Applicant (in person): It was a compassion [sic]; and the number wasn’t long, it was just a 6-digits [sic] number. Honestly, I told him like, 4X-4X-1X, that’s it.

The Member then repeated that even though he had heard the number four times, he still could not remember it. He then compared his own situation to the anonymous driver of the car, who the Member concluded was in an even worse position than himself to memorise a phone number:

Member: You’ve repeated it about four times, and I still couldn’t actually recite that number back to you. I’m not trying to drive a car or while there are police officers sitting next to me, worrying about what might happen to me if I was to do what a prisoner had suggested, I just have difficulties in accepting that would be plausible. That, one, he would remember it, and secondly that he would actually then go ahead and do that for no reason other than you have asked.

After the above comment, the Member again repeated the ‘difficulties’ he was having with the applicant’s testimony. Rather than conceding the point or perhaps not responding at all, the applicant tried to reconcile his own story with the Member’s expectations. Quite unexpectedly, he tried to create an ‘Australian’ point of comparison for the Member in regard to the phone number, and attempted to explain a particular view of plausibility whereby unexpected things do happen because people can be unexpectedly compassionate:

Applicant (in person): For example, 1331 is a well-known number in Australia; if you yell out that number people will know it, and in my country a 6-digits [sic] number is not very long, people can

remember. And also sometimes people do unexpected things; maybe he was hearing the conversation we had in the car, like I was trying to explain to them who we are and this and that, and I was yelling a lot of times, I was begging them to let me call my family, let me tell them, and out of compassion he was seeing how desperate I was to communicate with my family ... just so, out of compassion he might do this. It is for me as well out of compassion people do unexpected things.

The exchange above is a clear instance in which the decision-maker presented a neat counter-narrative or counter-narratives and both invited and expected a response from the applicant. Here, in contrast to the *Mena* hearing, where the applicant conceded the Member's narrative, Mr Adere refused to do this and displayed a great deal of conviction in presenting his own narrative. He attempted to dispel the Member's disbelief and to explain the discrepancies between his testimony and the Member's view of what was 'likely' or 'compelling.' As well, he tried to create a shared reality as between himself and the Member, similar to the advocate's attempt in the *Mena* hearing to ground plausibility in the common experience of exaggerating illness when engaging in self-diagnosis. Here, Mr Adere was not merely required to present testimony in a narrative form; he had to make his story compelling to the decision-maker by responding to the Member's own story or stories.

#### *v. The Laptop*

Another subject of narrative contest during the *Adere* hearing was a laptop. In this section, the narrative contest over a laptop demonstrates the extent to which the Member's highly subjective, idiosyncratic and seemingly impulsive views were presented to the applicant as a counter-narrative to the applicant's own evidence. The dispute about the laptop reveals the way in which applicants find themselves constructing a narrative around events in their testimony that they might not have anticipated that the decision-maker would deem central or important. Or, to put it another way, events that an applicant did not initially focus on when presenting her or his narrative may become the decision-maker's focus during the hearing. Another significant point about this laptop narrative is the materiality of the laptop itself, as a tangible object. In contrast to the Refugee Convention's intangible requirement that the applicant display a 'well-founded fear' and an inability or unwillingness (due to fear) to avail her- or himself of state protection, Mr Adere's laptop and phone

number, and Ms Mena's dislocated shoulder, are or signify concrete, physical things in the world.<sup>91</sup>

The exchange about the laptop revolved around a raid that had taken place on the applicant's former home after he had arrived in Australia. In his testimony, Mr Adere recounted that government officials had come to his family home looking for evidence of his anti-government activity, and found his laptop. Mr Adere reported that although the authorities had found nothing of interest to them on his computer, this incident was critical in increasing his fear of returning to Ethiopia. Of relevance to the laptop exchange is that the applicant's original visa to Australia was granted on the basis that he and his wife were coming to complete a short, professional course of study. In questioning the applicant on the raid, the Member focussed on his own belief that if he were in the applicant's position, leaving his country of origin to complete an educational course abroad, he would have taken the laptop:

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|------------|--|
| Member:    | I want to take you back to the [XXX] incident where you said your house was visited. You told me that they questioned and detained your father. Did they do anything else? |
| Applicant: | They looked for documents related to me, but the only thing they could get was my previous work report.  |
| Member:    | Okay. They didn't take anything else other than those documents?   |
| Applicant: | They took my laptop, but they couldn't find anything. So they dropped it.  |
| Member:    | Sorry; they took your laptop and they couldn't find it. What that does mean?   |
| Applicant: | They couldn't find anything, like they opened my laptop.   |

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<sup>91</sup> This role of 'material' facts and knowledge is at the heart of the challenges posed by processes of RSD and credibility determination. Indeed, the requirement that an applicant's evidence be 'externally' (as well as internally) consistent constitutes a requirement that evidence accords with independent country information: that is, documents, 'reports' or material evidence that certain 'things' have happened. While the events surrounding the laptop and shoulder are hardly verifiable by reference to external sources, they do recall the problem of 'material' facts and the law's preference for proof via *objective* and tangible sources. See generally Robert Gibb and Anthony Good, 'Do the Facts Speak for Themselves? Country of Origin Information in French and British Refugee Status Determination Procedures' (2013) 25 *International Journal of Refugee Law* 291; Nicole LaViolette, 'Independent Human Rights Documentation and Sexual Minorities: An Ongoing Challenge for the Canadian Refugee Determination Process' (2009) 13 *The International Journal of Human Rights* 437; Catherine Dauvergne and Jenni Millbank, 'Burdened by Proof: How the Australian Refugee Review Tribunal Has Failed Lesbian and Gay Asylum Seekers' (2003) 33 *Federal Law Review* 299.



Member: They actually accessed your laptop.

Applicant: Yes.

Member: Okay. You're coming to Australia as a student on a course; wouldn't you bring your laptop with you?

Applicant: I didn't want to.

Member: Why is that?

Applicant: I don't know, nothing special.

Member: Most people these days, when they do courses they use laptops. So, you left your laptop at home?

Applicant: Yes. [In the professional school in Australia] mainly you do it by works, by action.

Member: People quite often use laptops for things like emails, and communicating with family; things like that.

Applicant: We had email access in the office ... And our goal was to go back to Ethiopia in six months.

The Member then repeats his own narrative, that people travelling for work take their laptops with them:

Member: Okay, my understanding is that you were here for six months; people usually take laptops with them to wherever they go. It's just a little unusual that people would leave a laptop, particularly if they're using it as a part of their work, that they would leave it when they are going on a training course for a 6-month period rather than simply pack it in their bag and take it with them?

Applicant: I use my laptop only to check my emails; that's it. In the office we had computers, not laptops.

The Member again returned to the topic of the left-behind laptop when questioning Mrs Adere, who had not been present during the questioning of Mr Adere:

Member: You came to Australia to study; why would your husband leave his laptop in Ethiopia?

Applicant wife: Well, we didn't bring all our stuff with us; we left our belongings there. One thing was our laptop. We left it there.

Member: I would have thought people coming for studying would bring their laptop with them.

Applicant wife: I know that, but in our country we are not that much involved with laptops; we write on papers.

The Member then moved to questioning the applicant's wife on a different topic.

As noted in the previous chapter, the *Adere* application for review was unsuccessful due the Member finding that Mr and Mrs Adere were not credible witnesses and that their claim lacked plausibility.<sup>92</sup> The laptop exchange is recorded in the final decision, with the Member noting that ‘[t]he Tribunal observed it seemed unusual that a person travelling to Australia for an extended study program would leave their laptop in their home country rather than bring it with them.’<sup>93</sup> No credibility or plausibility finding is made directly in relation to the question of leaving or taking the laptop. However, in the paragraph addressing evidence about laptop, the Member restates that ‘the Tribunal considers neither applicant was a credible witness,’ and asserts that he does not accept there was ever a raid on the applicant’s home after the applicant’s departure or a seizure of the applicant’s possessions.

In the written decision, the Member also addresses the topics of the phone number and the driver directly in relation to his finding that the applicants were not credible. On the topics of the ‘compassionate’ driver and the phone number, the Member finds that the Tribunal has:

some difficulty accepting the driver of a police vehicle would remember a number shouted to him, or that he would agree under those circumstances to telephone the family of a prisoner he was driving. It also expressed concern the driver would be able to remember a telephone number shouted under the circumstances described ... [repetition in original.] The first applicant said the driver just heard his communication, and may have acted out of compassion ... The Tribunal observed it had now heard him repeat that number about four times, and could not recite that number and was not trying to drive a car in the presence of police, or worrying what might happen if they did what a prisoner asked.<sup>94</sup>

In reaching a conclusion that the applicant was never abducted or detained in a rural prison, the Member writes:

The Tribunal does not accept as plausible the assertion that a driver of a vehicle in which police were transporting a detainee or prisoner would involve himself in such activity [of calling the applicant wife], nor does it accept as plausible that a driver in those circumstances, even if willing to assist, could memorise and recall a telephone number yelled at him in the presence of two police officers whilst he was driving.<sup>95</sup>

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<sup>92</sup> *Adere* [2012](RRT Decision and Reasons) [57].

<sup>93</sup> *Ibid* [104].

<sup>94</sup> *Ibid* [43].

<sup>95</sup> *Ibid* [105].

Finally, the Member finds that evidence about the driver, prison and the telephone call to the applicant wife was ‘a story concocted to create a basis on which to claim past adverse treatment prior to departure from Ethiopia.’<sup>96</sup>

## Conclusion

In Catherine Dauvergne’s observations of refugee oral hearings, published almost ten years ago, she noted how little ‘we’ or decision-making bodies know of the ‘other.’<sup>97</sup> She observed that processes used to construct a refugee applicant’s identity often reduced that identity to ‘a pinpoint—a passport printed on the correct type of paper, a number registered in the correct way, a nursery rhyme recalled, the scars of a regime’s favourite torture exposed.’<sup>98</sup> I would add to Dauvergne’s remark that these ‘pinpoints’ of identity are points of reference in broader narratives, which often centre on material, tangible claims made by the applicant in an attempt to resolve the question of plausibility in a way that is fixed, testable and knowable. Decision-makers answer the difficult question of what is plausible with reference to their own sense of the world. The *decision-maker’s* narratives, upon which plausibility assessments are based, only become apparent when decision-makers assess not only the applicant’s testimony but their ‘own values, prejudices, orientation and perspective—and ask [themselves] *why* [they] choose to find a particular contradiction crucial.’<sup>99</sup> For Robert Cover, quoted in the epigraph opening this chapter, that critical self-awareness would involve understanding how one’s narrative perceptions create and connect one’s sense of the ‘is,’ the ‘ought,’ and the ‘what might be.’<sup>100</sup>

In this chapter, I have traced a process of narrative contest, by which evidence was tested during RSD hearings I observed. The chapter has also explicated ways in which applicants were expected to respond to decision-maker narratives with a form ‘narrative competency.’ In these narrative-based exchanges, the decision-maker and

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<sup>96</sup> Ibid [106].

<sup>97</sup> Dauvergne, above n 85, 118.

<sup>98</sup> Ibid. Dauvergne goes on to state, ‘the pinpoint is what it is to be other: to be reduced to almost nothing, a blank space against which we can imagine otherness’: at 118.

<sup>99</sup> Macklin, above n 4, 140.

<sup>100</sup> Robert M Cover, ‘Foreword: Nomos and Narrative’ (1983) 97 *Harvard Law Review* 4, 10.

the applicant enter into a narrative contest, and it is frequently the applicant who must either explain her or his narrative as plausible, or fall into line with the decision-maker's alternative version of events could or should have taken place. Applicants were required to account for how and why their own narratives differed from the decision-makers' idiosyncratic narrative-based views of the world and notions of what amounted to plausible evidence. In this sense, my argument in this chapter echoes the existing literature's concern with decision-makers' subjective impulses in credibility determination. Simultaneously though, it adds to these concerns by centring on how this subjectivity manifests in the hearing, the burden it places on applicants seeking to present testimony, and its capacity to remake the testimony that the applicant is seeking to present.

At the start of this chapter, I described the criteria that govern credibility assessment and the testing of evidence during RSD hearings. While minimal in terms of content and the constraints they place on Members, these standards and existing guidance on credibility, if interpreted in good faith, could ameliorate the burden of testimony and the challenges of credibility assessment. Indeed, the applicant *is* in a special circumstance and requiring she or he prove every claim, or explain the plausibility of isolated actions are unreasonable expectations—and the existing jurisprudence confirms as much. However, once the principle of good faith is abandoned, the informal hearing and criteria of consistency, coherence and plausibility in particular facilitate and enable the exercise of a troubling subjectivity on the part of the decision-makers.

Indeed, the UNHCR Handbook anticipates the problems that may arise when decision-makers exercise a broad, discretionary power without an awareness of the challenges of presenting detailed and consistent testimony for refugee applicants or of the fact that much refugee applicant testimony simply will not be susceptible to proof. Yet, it simultaneously reinscribes these standards as an imperative of admitting only credible refugees. The Handbook, for all its recognition of the difficulty of the refugee's position, adumbrates the subjectivity that nonetheless characterised the hearings I observed for this project. At the end of the Handbook's short section on fact-finding, the text freely acknowledges that 'the examiner's conclusion on the facts of the case and his [sic] personal impression of the applicant will lead to a decision

that affects human lives.’<sup>101</sup> The Handbook goes on state that this fact obligates the examiner to ‘apply the criteria in a spirit of justice and understanding.’ My observations of the hearings, though, repeatedly affirmed that decision-makers operated with a great degree of subjectivity and, where the plausibility of evidence was in doubt, subjective impulses often were not attended by a sanguine ‘spirit of understanding’ suggested by the Handbook.<sup>102</sup>

The narrative contests described in this chapter reveal decision-makers’ willingness to indulge their ‘personal impressions’ and to share their own narrative-based views of the world. What is more, the adversarial nature of these narrative contests reveal a significant deviation from the law’s framing of these hearings as inquisitorial, as existing allegedly for the benefit of the applicant or in light of her or his ‘special position.’ In the case of the narrative contests I have traced here, the principle of adversarial justice, the notion that the ‘truth of any matter emerges through the clash of informed adversaries,’ seemed to prevail, whereby the decision-maker considered her or himself to be the applicant’s informed adversary.<sup>103</sup> This is not to say that all decision-makers were openly aggressive or hostile, but certainly in instances where narrative plausibility was doubted, the decision-maker took on the role of testing the applicant’s evidence: not by working with the applicant to jointly ‘discover’ the truth, but by raising doubts as to the plausibility of certain pieces of evidence.

In Dauvergne’s view, one reason that accounts for the failure of the oral hearing to function as an inquisitorial forum is that when the norms of the adversarial system that operates in Australia and Canada are taken away, ‘inquisitorial norms do not simply flow in to take [their] place.’<sup>104</sup> Susan Kneebone made a similar observation of the RRT in the very early phases of its operation, noting that ‘members and advisers are uncomfortable with an inquisitorial role in the hearing, and indeed tend to be

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<sup>101</sup> UNHCR, ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’, above n 15, 39.

<sup>102</sup> Ibid.

<sup>103</sup> Dauvergne, above n 85, 101.

<sup>104</sup> Ibid. She goes on to point out that ‘since lawyers represent most claimants, and many tribunal members are legally trained, implicit norms of the adversarial system do tend to dominate the proceedings’: at 99.

confrontational in their approach to questioning.’<sup>105</sup> The notion that the norms of the adversarial system persist within the RSD oral hearing, and that members and lawyers frequently have little or no training in the procedures and values of inquisitorial processes, helps to explain the narrative-based contexts I have described in this chapter.<sup>106</sup>

This finding, that the norms of adversarial systems persist within RSD, also frames the next chapter. The following chapter explores how individual decision-makers ran the oral hearings I observed and asks to what extent applicants were able to present their evidence during the hearings. One of the key observations made in the next chapter is that, despite the hearings’ ‘informal’ and inquisitorial nature, applicants were rarely assisted by decision-makers to present their claims. Instead, the applicants’ capacity to present their testimony was impeded by the hearings’ fragmented and decision-maker-driven nature. The narrative contests I have outlined here certainly entailed the fragmentation and interruption of applicants’ evidence. The following chapter explores a range of other qualities of the RSD oral hearing as a ‘narrative occasion’ through which applicants are impeded rather than enabled to meet the demand for narrative that is the focus of this thesis.

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<sup>105</sup> Susan Kneebone, ‘The Refugee Review Tribunal and the Assessment of Credibility: An Inquisitorial Role’ (1998) 5 *Australian Journal of Administrative Law* 78, 94.

<sup>106</sup> Dauvergne, above n 85, 100.

## CHAPTER SIX. ‘I’LL JUST STOP YOU THERE’: FRAGMENTATION IN REFUGEES’ ORAL TESTIMONY

### Introduction

This chapter investigates the conduct of the oral hearings I observed, in order to explore the extent to which the hearings did and did not permit applicants to articulate testimony either on their own terms or in narrative form. Building upon the previous two chapters’ demonstration of the demand for narrative in the RSD oral hearings I observed, I explore to what extent applicants were able to present, or were prevented from meeting this demand. In addressing this question, I return to the argument made in Chapter Three that the hearing does not proceed as an opportunity for the applicant simply to present testimony, but that instead it operates as a mechanism of gate-keeping for, and appeal-proofing of, asylum applications.

Through a close reading of RSD hearings, I argue here that applicants are both expected to present evidence in a narrative style and also actively impeded in their efforts to do so. In a majority of the hearings observed, the applicant’s testimony was frequently and severely fragmented as the result of the control exercised by decision-makers, particularly decision-makers’ manner and style of questioning.<sup>1</sup> As a result of this, decision-makers denied applicants the opportunity to construct narratives, in favour of directing and driving the testimony themselves. This direction by the decision-maker is problematic when the applicant’s evidence, taken as a whole, is expected to fulfill the criteria of a ‘consistent’ and plausible story, in which the evidence comes together as a persuasive, linear narrative. In short, an applicant for

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<sup>1</sup> Based on the processes of fragmentation described below, I found that seven out of the eight observed Australian hearings fit the criteria I have used to describe a fragmented hearing (*Adere* [2012](RRT); *Malik* [2013](RRT); *Mbassi* [2012](RRT); *Mena* [2014](RRT); *Pillai* [2013](RRT); *Zahau* [2012](RRT); *Zeidan* [2014](RRT)); and four out of the six Canadian hearings (*Bhatti* [2013](IRB); *Perera* [2013](IRB); *Rostami* [2013](IRB); *Valdez* [2013](IRB)) also fell into this category. I also briefly address the hearings that I determined not to meet these criteria (*Flores* [2013](IRB); *Jabbar* [2013](IRB) before the IRB; and *Jadoon* [2014](RRT) before the RRT) below. In analysing the hearings, a significant overall finding was that while a majority of the Canadian hearings were fragmented, all of these hearings except the *Rostami* hearing were considerably less concerned with dates, numeric details and the precise temporal sequencing of events than the Australian hearings included in the dataset. While these findings may not be representative, the comparisons are productive as they allow particular elements of each hearing to be analysed and considered against other possible approaches; in this instance the comparatively limited focus on timing and dates in the Canadian hearings allowed applicants a greater opportunity to present evidence outside of a strictly linear narrative.

refugee status is expected to construct his or her past experiences into an orderly, sequential narrative in the context of a hearing that actively undermines the applicant's ability to present evidence that is orderly and sequential, and to construct discrete events into a comprehensible narrative arc.<sup>2</sup>

My observations in this chapter correlate with findings within the credibility literature that RSD oral hearings are characterised by cultures of disbelief and scepticism. The processes of fragmentation that I discuss here often resulted in hearings that were unreceptive, hostile or interrogative.<sup>3</sup> As well though, this chapter expands on and contributes to concerns expressed in the credibility literature by focusing on the relationship between cultures of disbelief, the conduct of the hearings and the demand that applicants present evidence in a narrative form. My point here is that the way in which the hearings were conducted, combined with RSD's culture of disbelief, not only shapes how each applicant's narrative is assessed, but also profoundly affects the narratives that are presented during the hearing, and thus, that are available for assessment.<sup>4</sup> In this sense, this chapter relates to and builds upon my argument in the previous chapter that the decision-maker actively inserts her- or himself into the applicant's evidence and, in so doing, alters and remakes the course of the applicant's narrative.

In making these claims, I utilise the idea of a 'narrative occasion,' drawn from narrative theory. David Herman, relying on Mikhail Bakhtin, argues that narratives are by definition situated within the particular context of their telling and shaped not only by the broader socio-communicative environment in which they are produced,

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<sup>2</sup> Patricia Ewick and Susan S Silbey, 'Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative' (1995) 29 *Law & Society Review* 197, 200. See also Chapter One, Part Three.

<sup>3</sup> As noted, literature exploring refugee credibility assessment has repeatedly described the spaces of refugee determination as characterised by a 'culture of disbelief': James Souter, 'A Culture of Disbelief or Denial? Critiquing Refugee Status Determination in the United Kingdom' (2011) 1 *Oxford Monitor of Forced Migration* 48, 48–49; James A Sweeney, 'Credibility, Proof and Refugee Law' (2009) 21 *International Journal of Refugee Law* 700, 703; or by adversarial posturing: Susan Kneebone, 'The Refugee Review Tribunal and the Assessment of Credibility: An Inquisitorial Role' (1998) 5 *Australian Journal of Administrative Law* 78, 94; or a presumptive scepticism: Rosemary Byrne, 'Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals' (2007) 19 *International Journal of Refugee Law* 609, 609.

<sup>4</sup> As Marita Eastmond writes, 'Stories are never transparent renditions of reality, but partial and selective versions of it, arising out of social interaction': Marita Eastmond, 'Stories as Lived Experience: Narratives in Forced Migration Research' (2007) 20 *Journal of Refugee Studies* 248, 260 (my emphasis).



but also by the occasion of their telling.<sup>5</sup> The concept is useful because it brings into sharp focus the setting of the hearing as governing what can and cannot be said, as well as shaping the meaning ascribed to narratives as they are performed or conveyed.<sup>6</sup> All narrative meaning depends upon the context of narrative production, and applying this insight to refugee testimony helps to highlight the ways in which applicants' abilities to speak are both constrained and enabled by the occasion of the hearing.

In addition to the concept of narrative occasion, another concept framing this chapter is what Macklin calls the 'audibility' of the asylum applicant within the hearing.<sup>7</sup> Macklin assesses different aspects of the Canadian legal system's treatment of onshore refugee applicants via the frame of whether 'asylum seekers' audibility is enabled or muted'; she focuses on the idea of audibility in order to ask what can be heard 'from the other side of a cultural divide, a hearing room, or a border.'<sup>8</sup> Following Macklin, in this chapter I ask to what extent an applicant's narrative is audible in the space of the oral hearing.<sup>9</sup> Audibility as a concept is necessarily connected to the problem of overly sceptical credibility assessments and the problem of decision-makers' doubts and disbelief:

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<sup>5</sup> David Herman, *Basic Elements of Narrative* (John Wiley & Sons, 2011) 9, 17–8; Mikhail Bakhtin, 'Forms of Time and of the Chronotope in the Novel' in Michael Holquist (ed), Caryl Emerson and Michael Holquist (trans), *The Dialogic Imagination* (University of Texas Press, 1981) 84, 216; and see also Mikhail Bakhtin, 'The Problem of Speech Genres' in Michael Holquist and Caryl Emerson (eds), VW McGee (tran), *Speech Genres and Other Late Essays* (University of Texas Press, 1986) 60.

<sup>6</sup> Robert F Barsky, *Constructing a Productive Other: Discourse Theory and the Convention Refugee Hearing* (John Benjamins Publishing, 1994) 79, 98–102. Barsky relies on the foundational work of both Pierre Bourdieu and Michel Foucault to argue that what is sayable can only be truly discerned by reference to the broader discursive context of the hearing: at 102. See Pierre Bourdieu, *Language and Symbolic Power* (Harvard University Press, 1991); Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (Vintage Books, 1970). The latter argues that history and the historical conditions of discourse determine the limits of knowledge and of what is knowable.

<sup>7</sup> Audrey Macklin, 'Asylum and the Rule of Law in Canada: Hearing the Other (Side)' in Susan Kneebone (ed), *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (Cambridge University Press, 2009) 78.

<sup>8</sup> Ibid 78.

<sup>9</sup> Ibid 93. Macklin makes an interesting distinction between the way the Canadian legal system treats the 'narratives' of refugees *once believed*, and the 'audibility' of asylum seekers themselves. She contends that while Canada has earned a reputation for its liberal and receptive jurisprudential interpretation of the refugee definition and refugee law more generally, the same cannot be said for how Canadian institutions in general hear and interpret refugee claimants themselves: at 93.

A jurisdiction may create doctrinal openings to recognize refugee status that other jurisdictions do not, but if the decision makers reject asylum seekers on grounds of credibility, the doctrinal doors are never reached, much less opened.<sup>10</sup>

In order to support my claim that the hearing, as a narrative occasion, simultaneously demands and impedes the applicant's ability to create a narrative, I present a two-part argument. In Part One of this chapter, and perhaps as a means of disrupting expectations of linearity, I return to the opening of the oral hearing in each jurisdiction in order to examine the ways in which the hearings were explained to the applicants and how individual decision-makers set up the hearings. These 'opening statements' are critical as they frame the hearing and establish what the applicant can expect of the hearing. They also reveal the wide discretionary power that each decision-maker holds over how the hearings proceed. Part Two then addresses my contention that the conduct of the hearings has led to fragmented and decision-maker-driven narratives. In order to explore how narrative fragmentation occurred in the hearings I observed, I discuss four distinct means of fragmentation: reverse-order questioning; the form and tone of decision-makers' questions; questions of time and timing; and topic-jumping.

In a majority of the hearings, decision-makers afforded applicants only a limited opportunity to speak and to be heard on their own terms.<sup>11</sup> In certain instances, decision-makers began by allowing applicants the opportunity to direct their own evidence, but then intervened and reverted to directing the hearing according to decision-makers' own questions, resulting in fragmentation of the evidence. Another significant finding of this chapter is that in some cases, applicants did ultimately present evidence in a narrative form in circumstances that were adverse to the expression of narrative-based testimony. Indeed, some applicants did the work of pulling together a narrative *in spite of* decision-makers' fragmenting question styles. Applicants either interrupted the decision-maker to present evidence the applicant believed to be important or—as explored in the previous chapter—persisted in presenting their version of events in the face of decision-makers' counter-narratives and interruptions. Critically, while these interruptions were not always hostile, they

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<sup>10</sup> Ibid 95.

<sup>11</sup> See above n 1, for an overview of fragmentation in each of the hearings included in the dataset.

did frequently stop the applicant from meeting the demand for evidence in a coherent narrative form.

Finally, the hearings that did involve the fragmentation of evidence contrasted with the three hearings in which the applicant was led through the evidence in a manner that accorded with the narrative form against which the evidence was ultimately assessed.<sup>12</sup> In these less fragmented hearings, decision-makers primarily responded to applicant testimony in a manner that explored the issues and concerns raised by the applicant. Ultimately, this meant that four forms of fragmentation that I describe in Part Two did not significantly feature in these hearings. Instead, the form and tone of questions predominantly permitted the applicant to speak; the applicant was not questioned extensively about the timing and sequence of events; and rather than jumping without explanation from topic to topic, decision-makers ‘signposted’ to inform the applicant what was coming up next, and in some cases explained why they were asking particular questions.

### **Part One. Setting the Applicant Up: How Decision-makers Opened and Explained the Hearing to Applicants**

This section explores the opening of each hearing. It asks what applicants were led, from the outset of the hearings, to expect from the event as a narrative occasion. I set out what decision-makers told applicants in relation to three matters: the purpose of the hearing; what would be expected of them; and the opportunities they would have to present their evidence. These questions, which frame the extracts below, provide some insight into how decision-makers ran the hearings observed for this research. The extracts also reveal the variations in the practice (at least as stated) among decision-makers.<sup>13</sup> Such variance in how decision-makers conduct hearings is a

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<sup>12</sup> As noted, these were: *Flores* [2013](IRB); *Jabbar* [2013](IRB); and *Jadoon* [2014](RRT).

<sup>13</sup> This finding is supported by Susan Kneebone and Savitri Taylor’s earlier research on the RRT. Kneebone also found variance in each member’s style of conducting the hearing: Kneebone, above n 3, 85. Taylor found that:

The precise manner in which an RRT hearing is conducted varies from member to member. Some members prefer to start by putting one or more very open-ended questions, which basically invite the claimant to narrate his or her story. ... Some members prefer to question the claimant in a way which takes the claimant step by step. ... Yet others prefer to limit themselves to asking the specific questions which have arisen in their minds following their perusal of the claimants' files.

Savitri Taylor, ‘The Right to Review in the Australian On-Shore Refugee Status Determination Process: Is It an Adequate Procedural Safeguard against Refoulement?’ (1993) 22 *Federal Law Review* 300, 324–25.

critical finding since, as the following sections reveal, a decision-maker's style has a profound impact on applicants' ability to present testimony.

Chapter Three described in detail the Australian and Canadian oral hearings and Chapter Two noted that while the respective jurisdictions' hearings take place at different stages of the RSD process, they are remarkably similar. In each instance, the decision-maker reads in advance the applicant's written application and supporting documentation.<sup>14</sup> Also in both jurisdictions, the hearings are formally 'informal'—that is, the 'informal' nature of the hearing is dictated by statute.<sup>15</sup> It is the decision-maker who structures the hearing, and few rules govern how the decision-maker should order the hearing.<sup>16</sup> This fact not only means that the format of hearings may vary from decision-maker to decision-maker, but also that decision-makers may vary their hearing style from one hearing to the next.

In terms of the structure and content of the opening section of the hearings, little has changed since Barsky's observation of Canadian RSD hearings in the late 1980s.

Barsky describes the opening of the hearing as providing 'chronotopical' information,

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<sup>14</sup> In the IRB, decision-makers have had access to the applicant's evidence and file, but no prior decision has been made. In the RRT, the decision-maker has also read a departmental decision-maker's negative first-instance decision. The first-instance decision is often detailed, with extensive reasons provided. In some of the Australian files, where I had access to the first-instance decision, the decision was up to 30 pages long (*Zeidan* [2014](RRT)). As noted in the Introduction, this is significant, as by the time the applicant has reached the hearing, he or she has been required to articulate her or his narrative repeatedly—and in regards to the RRT, the decision-maker already has a version of the narrative and one departmental delegate's *interpretation* of the evidence and a credibility determination.

<sup>15</sup> *Migration Act 1958* (Cth) s 420. This section sets out that the RRT 'is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.' The *Immigration and Refugee Protection Act*, SC 2001, c 27, s 162(2) sets out that all divisions of the IRB shall deal with all proceedings before it as 'informally and quickly as the circumstances and the considerations of fairness and natural justice permit.'

<sup>16</sup> The absence of direction does not reflect a trend of minimal regulatory policy in relation to RSD. In relation to the RRT, the President of the Tribunal or head of Migration and Refugee Division may give directions and issue guidelines regarding the operation of the Tribunal and how hearings are conducted: *Migration Act 1958* (Cth) s353B, s420B. While there are 27 current practice directions, guidelines or policy directions in total for the MRT and RRT (now the Migration and Refugee Division of the AAT), the directions and guidelines concerning oral hearings do not dictate or standardise exactly how hearings should proceed. For the RPD of the IRB, there is one set of regulations, two sets of rules, eight Chairperson's guidelines and ten policy statements or Chairperson's instructions. While the RPD rules govern the order of questioning, they do not dictate the conduct of the hearing. Guidance and rules on the use of interpreters, which I do not address in here, structure the interpreter's role during the hearing. In both jurisdictions, guidelines on gender, credibility, and on vulnerable persons provide limited direction on the manner and tone in which hearing should be conducted, though they do not 'structure' the hearing as such: see Chapter 5, Part 1.

and as establishing the limits of what may be said during the hearing.<sup>17</sup> Barsky also notes that in this opening section of the hearing, ‘a whole realm of legal knowledge that is needed to understand how [the hearing] is initially construed is glossed over,’ as are the many discursive rules and norms governing what is ‘sayable’ or pertinent.<sup>18</sup> Indeed, in the specialised discursive and legal context of the hearing, the decision-makers’ statements describing how the hearing will run barely scratch the surface of the constraints and expectations that govern applicants’ testimony. These statements nonetheless guide and structure the applicant’s expectations about the hearing that is immediately to follow. In both jurisdictions, the opening script was relatively standardised. The members’ script and the topics addressed in the openings appeared to be based on an informal, non-mandatory template, which I accessed through Access to Information (ATI)/Freedom of Information (FOI) requests. Interestingly, while I requested all documents provided to decision-makers to guide their conduct of the hearing, the templates provided primarily addressed the ‘opening’ section of the hearing in detail, with no direct script or guidance for ‘the rest’ of the hearing.<sup>19</sup>

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<sup>17</sup> Barsky, above n 6, 3, 95, 98–102. Barsky writes that ‘the refugee is called upon to say certain things and not others. There is a limit to the *sayable*, which will set out the limits of the acceptable, or the privileged elements of discourse throughout this hearing’: *ibid* 101. Mikhail Bakhtin gives ‘the name *chronotope* (literally, “time space”) to the intrinsic connectedness of the temporal and spatial relationships that are artistically expressed in literature.’ He borrows term from mathematics as kind of metaphor to express the ‘inseparability of space and time’ and he describes the extent to which the *chronotope* has generic significance. That is, the time/space in literature defines genre and generic rules and distinctions: Mikhail Bakhtin, ‘Forms of Time and of the Chronotope in the Novel: Notes Toward a Historical Poetics’ in Brian Richardson (ed), *Narrative Dynamics: Essays on Time, Plot, Closure, and Frames* (Ohio State University Press, 2002) 15, 15–16. Barsky uses the term, I think, to describe the extent to which the hearing’s opening attempts to establish the generic distinctions that govern the hearing. Although Barsky’s study pre-dates the IRB in its current form, in his description of the hearing’s opening section, Barsky records that in 1987, alongside a recital of the rules governing the hearing, the opening amassed ‘the basic facts of the case by reference to information provided in the Basic Form’: Barsky, above n 6, 3. Even this short summary of the applicant’s claim by the decision-maker does not take place at the start of the hearing anymore, or necessarily at any point during the hearing—which exacerbates the processes of fragmentation I describe below.

<sup>18</sup> Barsky, above n 6, 79, 98–102.

<sup>19</sup> These templates or scripts were ‘suggested’ rather than mandatory in both jurisdictions. They both broadly guided Members to first introduce themselves; explain the role of the Board/Tribunal and the definition of a refugee; swear in the applicant and interpreter; outline how the hearing would run and the role of the interpreter; confirm the interpreter and applicant could understand one another; and in Canada, require the applicant ‘confirm’ the contents of her or his written application. The Canadian document also provided guidance on ‘dealing with counsel’ and on receiving ‘submissions by counsel’: Migration Review Tribunal-Refugee Review Tribunal, ‘Member introductory remarks at RRT hearings’ (not dated), FOI Request 2015/0011 (on file with author); Immigration and Refugee Board, ‘RPD New Member Training’ (not dated), ATI Request A-2015-00798 / DSA (on file with author).

In the observed hearings, decision-makers often presented one of two ‘versions’ of the hearing to the applicant, one being more common in Australia and the other more common in Canada. The first version explained the hearing as a site where the decision-maker would ask ‘further questions’ about evidence she or he had already read, and the applicant would then be able to add ‘anything’ she or he wished to at the end. This version was frequently expressed to applicants appearing before the RRT. The second version, often featured in the IRB hearings, described the hearing first and foremost as a place where the decision-maker would address specific ‘issues’ within the applicant’s evidence, and which would not necessarily give the applicant the opportunity to present any ‘additional’ evidence. In the hearings where the applicant was told she or he would be able to present ‘any’ evidence she or he wished, the majority of these hearings did not meet this expectation.

*i. Opening the Hearings at the RRT*

Member: Now, when you launched your application with the Tribunal, it obtained your immigration files, which I have here. And I’ve read the materials that’s [sic] in those files, and I’ve listened to the interview that you had with the immigration officer. I’ve also read your statutory declaration and submissions that your advisors submitted to the Tribunal.

Interpreter: What was the second? I’m sorry.

Member: Um, sub ... and submissions made by your advisor. So I may not go over every aspect of your claims today because I sort of know a lot about them before coming into this hearing. But I will be asking you some questions today, and if you don’t understand my questions, please says so and I will try and rephrase the question. And today is also your opportunity to provide any further information that you think is relevant and evidence you think I should take into account in deciding your fate.

In the above extract from the *Jadoon* hearing before the RRT, as with many of the hearings, the Member gave the applicant a rather informal and short outline of how the hearing would run.<sup>20</sup> The explanation above was given at the outset of the hearing. I suggest that this explanation fits with the profile of the hearing as a space for Members to ask ‘some questions’ about the evidence, with which Members are already familiar, and as an opportunity for the applicant to say anything she or he

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<sup>20</sup> This description accorded with the informal template available to RRT decision-makers and described above: *ibid*.

wishes to in support of the claim. However, in this case, the Member qualified the applicant's opportunity to present his story by stating that he may present 'any *further* information' that he believes is relevant (my emphasis) rather than present his evidence in full.

After this explanation to the applicant, the Member stated that at the end of the hearing the applicant's advocate would have the opportunity to make submissions, and the Member herself would also present any information to the applicant that she, the Member, believed would be adverse to the applicant's case and give the applicant the opportunity to comment. The Member's explanation, read as a whole, made it quite clear that the applicant's claim would not be presented in full during the hearing. The above extract also provides an example of the applicant being told two things at once: that the applicant would be questioned on the decision-maker's terms because the Member 'knows a lot' about the claim, and that the applicant would be given the opportunity to speak.

A very similar explanation was provided in the *Adere* hearing, with the Member clearly stating that the hearing's purpose was two-fold:

Member: I already have information that's available on the file; the Tribunal's file and the Department's file, so I have some understanding of the issues that you are raising and the claims that you've made. The purpose of this hearing is two-folded [sic]; it's my chance to ask you and your wife questions and to give evidence about matters in order to help make me to form a decision, and it's also your opportunity to tell me anything else that you think I need to know to properly understand your case.<sup>21</sup>

Among the hearings I observed, such examples as the above represented the most common way in which RRT Members explained how the hearing would proceed. This explanation, slightly modified in some circumstances, was part of a longer, non-mandatory script, in which RRT Members explained the process of de novo review

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<sup>21</sup> The decision-maker in the *Mena* [2013](RRT) hearing, for example, presented a very similar account of how the hearing would run:

I have before me all the information you've provided to the Department. I also have an audio recording of the Departmental interview that you undertook in the original assessment of your claims. During the hearing this morning, um, I'm going to ask you a series of questions to try and get as clear a picture of your circumstances as I can. I'll also be asking you to comment on information I have before me from independent sources about the situation in your country. ... After answering my questions this morning, I'll give you an opportunity to raise any other matters that you feel are relevant to your claims. I'll also ask your representative if there are any other matters that she wishes to raise.

and the law in relation to refugee status and complementary protection.<sup>22</sup> In each of the above excerpts, the Member indicated that the applicant could present additional information but did not state that the applicant would be given an opportunity to present the claim in full, or independently of the decision-maker's knowledge. By contrast, the introduction to the *Zeidan* hearing before the RRT demonstrated that in some cases the hearing was explained as a far more open space for the articulation of testimony. In the extract below, the Member emphasised that the applicant should not feel restricted to the questions asked:

Member: The role of the Tribunal is to take a fresh look at the applications and make a new decision in relation to them. The role of the hearing is to give you an opportunity to put forward any information that you want me to be aware of before reaching my decision. So I have some questions based on the information that you already provided, but you should not feel restricted to those questions. If there is any information you want me to be aware of, please feel free to tell me.<sup>23</sup>

The RRT Member in the *Pillai* hearing similarly described the hearing as a space that was created for the sake of the applicant to present his claim:

Member: Hearings before the Tribunal are informal; if you require a break, just speak to your agent. Just let me know; I'll facilitate that and switch off the recording. If you don't understand my questions, just say so, and I'll clarify them. This is your opportunity to present all relevant evidence in support of your claim. You have provided quite a lot of evidence already. It may not be necessary to canvas all of that, but I have access to that information.

As shown in the *Pillai* hearing, applicants before the RRT were given the impression that the decision-maker would direct the hearing, but also, to a greater or lesser degree, that the applicant would be able to present 'all' evidence that she or he wished. As Part Two reveals, such openness was frequently not granted during hearings. Part Two demonstrates that neither Mr Pillai nor Ms Zeidan were given the

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<sup>22</sup> Migration Review Tribunal-Refugee Review Tribunal, FOI Request 2015/0011, above n 19. As noted in the Introduction, I do not address access to complementary protection in this research. At the time of writing, the Australian government was considering major reform to existing complementary protection mechanisms, including removing RRT oversight of complementary protection determinations: Jane McAdam and Kerry Murphy, 'Punishment, Not Protection behind Morrison's Refugee Law Changes' *The Conversation*, 26 January 2014 <<http://theconversation.com/punishment-not-protection-behind-morrison-refugee-law-changes-28512>>.

<sup>23</sup> After this statement, the applicant indicated that she did not understand what the Member had said, and the Member repeated the entire explanation in full.



open opportunity to present their claims during their hearings, as the above explanations of the hearing implied would be possible.

*ii. Opening the Hearings at the IRB*

In the IRB hearings that I observed, when the IRB Member introduced the hearing, she or he often set out *specific* issues that the hearing would address and did not generally indicate to applicants that they would be given a chance to present ‘their evidence.’ The following extract from the *Jabbar* hearing provides a representative example:

Member: So today’s hearing will focus on the following issues, that is your credibility and the internal flight alternative, and this is how we are going to proceed. First, I will ask you questions, then your counsel may ask questions, and I could come back with some questions and then your lawyer will make submissions. If you ever don’t understand, please say so.

Applicant (in person): [Softly.] Okay.<sup>24</sup>

In hearings before the IRB, these comments also appeared as part of a standardised script to introduce the hearing.<sup>25</sup> The following extract from the *Flores* hearing before the IRB provides a further representative example. After the formalities, the IRB Member explained how the hearing would run:<sup>26</sup>

Member: So, the key issues as I see them are, as in every refugee claim, credibility, fear of persecution and grounds. I will also talk a bit maybe about the hearing agenda. The hearing is scheduled for three hours, and we will proceed as follows. I will be asking you some questions, and after that your counsel may have some questions for you or not and then I may have further questions and she [the applicant’s counsel] will make conclusions and submissions [sic]. I recognise the importance of this hearing for you. I have read all documents submitted by you, but nevertheless I will be asking you many questions. The questions reflect the need for me to have all the information I need.

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<sup>24</sup> As noted, the overall structure and content of the hearing before the IRB differs from the RRT hearing in that IRB hearings provide advocates with the opportunity to directly question their clients at the end of their evidence, and this opportunity is generally taken up.

<sup>25</sup> Immigration and Refugee Board, ‘RPD New Member Training’ (not dated), above n 19.

<sup>26</sup> Formalities at the start of each hearing included sorting through the submitted documents, requiring the applicant and interpreters to swear an oath or affirmation and confirming the contents of the applicant’s written application form.

In the *Perera* hearing before the IRB, the Member very specifically sets out the particular issues that will be discussed, and her explanation of the hearing procedure is remarkably direct:<sup>27</sup>

Member: You have the screening sheet, which lists the issues. What I am going to do is list the issues that I will be focusing on. We will be looking at internal flight alternative, subjective fear, and being an ethnic minority, and persecution versus harassment or discrimination. And I will have some questions for you about the agent of persecution to try and understand who [sic] you fear in Sri Lanka and based on who [sic] you fear, I may have some questions on state protections. ... I'll explain to you what we are doing here this morning. We are going to begin with myself asking you some questions, then the Minister's Counsel will have some questions, then your counsel will ask some questions.

As these extracts reveal, once their IRB hearings began, the applicants I observed were not told that they would be given a chance to present their claims outside of the Member's concerns and 'some' questions raised by their own advocates. This observation contrasts with the majority of the extracts from the RRT, which explain those hearings as spaces where applicants will have their testimony questioned by the decision-maker, and where they will be given an opportunity to present their evidence. What was common to both descriptions is that in neither setting were applicants given a particularly robust or thorough sense of what was about to take place and what exactly would be expected of them. This omission is significant given that an applicant is one of two key speakers for the majority of her or his hearing. The shortest hearing I attended was two and a half hours, and the longest was just over six hours—and in each instance, the applicant was directly questioned for at least half of that time.

Given the high stakes of the hearing and the applicant's central role in it, it is troubling that applicants were frequently not told what was expected of them as givers of testimony. The descriptions were not only short and sparse, especially in the Australian context. Moving into the next section of this chapter, what is noteworthy is that despite these relatively standardised descriptions of the hearing, there was a large degree of slippage between the 'versions' of the hearing presented and the actual course of the hearings. Also, decision-makers' styles varied significantly. One finding

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<sup>27</sup> This description of the hearing is an accurate reflection of the IRB's move to reverse-order questioning during the hearings, which I address below in Part Two.

of this chapter is that this decision-makers' foregrounding does little to frame the applicants' testimony or to predict the nature of the exchanges with the decision-maker that would follow. As Part Two reveals, in both the IRB and RRT hearings, applicants had very limited opportunities to present the evidence that they wished to during the hearing. Equally, though, in both jurisdictions, at times applicants *were* given an uninterrupted opportunity to present their testimony; arguably, though, the opening of the IRB hearing does not prepare the applicant for this opportunity.

In the *Jadoon* hearing, which opened this section, the hearing involved the Member questioning the applicant at length about discrete and disconnected parts of his evidence. At the end of this questioning, the following exchange took place:

Member: All right. Is there anything else you wanted to say to me?  
Applicant: No. That's all, I suppose.

This style of question, with slight variations on the above, was commonly posed at the end of hearings in both jurisdictions.<sup>28</sup> Each time such a question was posed, the tone and timing of the question strongly indicated that the questioning of the applicant was coming to an end and the opportunity for applicants to speak, if they wished to do so, was at this very moment. Yet it was difficult to conceive of applicants at this particular moment setting out their evidence in full, or indeed any significant element of their evidence, and the question was always asked in a manner that indicated the applicant's turn to speak was really at an end.

Finally, I note the affect of the statements of explanation and introduction that I have examined here. In instances where applicants were told they would be given the chance to add their own testimony, the tone of these statements set up an expectation that applicants would be 'given a chance' to 'say anything.' The statements implied that the hearing was open and receptive, and that the applicant would be invited to speak. But especially in the Australian hearings, the phrase 'you can tell me anything' and indications that the applicant could convey 'anything else you want to add'<sup>29</sup> were

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<sup>28</sup> For example at the close of the *Valdez* [2013](IRB) hearing:

Member: Is there anything else you think it would be important for me to know about the things we have been talking about?

And from the *Zahau* [2012](RRT) hearing:

Member: Did you want to say anything else or would you like me to sum up what my issues are?

<sup>29</sup> See *Malik* [2013](RRT).

at odds with how the hearing ran, the power that decision-makers ultimately exercised over what applicants could and could not say, and whether they could speak at all. The second part of this chapter examines the fragmentation of the hearings, and the nature of the hearing as a ‘narrative occasion.’

## **Part Two. Impediments to Narrative in RSD Hearings**

He said, ‘Can you tell me your story, and I will ask you questions as we go along.’ That was helpful because it gives you the opportunity to be heard and not just based on what he read—hearing the story from me, not just my file. He gave me the opportunity to tell him what I wanted him to know—he never stopped me from saying anything. I felt like I had a fair hearing.<sup>30</sup>

The problem is you can’t talk in the hearing, you can’t explain anything. You can’t explain anything to the judge because automatically she says, ‘I’m just asking you something. You have to answer what I ask you, and nothing else!’ You can’t give an explanation, you can’t talk, nothing! You feel like you were a criminal. They just ask you one thing, that’s it.<sup>31</sup>

This part examines how applicants’ evidence was presented during the hearings included in this research, and it describes the fragmented and decision-maker-driven nature of the narratives ultimately presented by applicants during the hearings. The first section explains what I mean by ‘fragmentation’ and why I have deployed this term, and the second section then describes the four means of fragmentation that I observed. My purpose in doing so is to demonstrate how the fragmentation of narrative functioned to impede the applicant’s ability to meet the demands of narrative and plausibility.

My observations in this section raise critical questions about the possibility for narrative during the oral hearings and about the extent to which the nature of the RSD hearings I observed were more adversarial than inquisitorial. The findings I outline below echo the findings of one of the more extensive reports on the conduct of the RSD oral hearing in Canada, which was undertaken by the Canadian Council for

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<sup>30</sup> A refugee applicant in Canada, interviewed for the report of the Canadian Council of Refugees on the conduct of IRB protection hearings: Canadian Council for Refugees, ‘The Experience of Refugee Claimants at Refugee Hearings at the Immigration and Refugee Board’ (2012) 5, 38 <[http://ccrweb.ca/files/irb\\_hearings\\_report\\_final.pdf](http://ccrweb.ca/files/irb_hearings_report_final.pdf)>. (‘CCR Report’) See also the follow-up report, undertaken to assess the impact of the 2012 reforms described in Chapter 3: Canadian Council for Refugees, ‘The Experience of Refugee Claimants at Refugee Hearings in the New System’ (April 2014) <<http://ccrweb.ca/sites/ccrweb.ca/files/refugee-hearing-report-2014.pdf>>.

<sup>31</sup> A refugee applicant in Canada, interviewed for the CCR Report: Canadian Council for Refugees, ‘The Experience of Refugee Claimants at Refugee Hearings at the Immigration and Refugee Board’, above n 30, 39.

Refugees (CCR) between 2011 and 2012.<sup>32</sup> The CCR report found that ‘the Board Member’s style of questioning the claimant was, perhaps, the aspect of the hearing that most shaped refugees’ perceptions of the experience as a whole’<sup>33</sup> and that for the ‘vast majority of claimants, comments about the fairness and appropriateness of the hearing were almost always framed in terms of the behaviour of the Board Member.’<sup>34</sup> The CCR report also found that applicants’ impressions of the Board Members ranged ‘from respectful praise to scathing critiques.’<sup>35</sup> These findings point not only to the absolutely central role of Members during the hearing, but also to the substantial variance in Members’ styles of running the hearings and the major impact of the Members’ behaviours and approaches on applicants.<sup>36</sup>

In addressing the processes of how fragmentation occurs in the hearings, this Part must begin by considering the role and presence of interpreters. Indeed, interpretation was the first and foremost means by which applicant testimony was fragmented. Most applicants’ use of an interpreter, and the process of interpretation during the hearing, meant each applicant’s testimony was, quite literally, ‘broken up.’ Indeed, in every hearing I attended, the decision-maker explained to the applicant that she or he must ‘break up’ her or his responses in order to allow the interpreter to translate what was being said.<sup>37</sup> In some instances, issues that arose in relation to interpretation were translated for the benefit of the decision-maker—although at other times extended discussions between the applicant and the interpreter were not explained. Generally, due to my inability to speak the applicant’s mother tongue, I was unable to assess the effects of interpretation on the applicant’s presentation of evidence. However, the perhaps obvious but important observation is that all applicants using an interpreter were required to present any testimony just one or two sentences at a time and then wait for, and rely upon, the interpreters’ translation of it.

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<sup>32</sup> Ibid 3. The study undertook interviews with 70 refugee claimants across 11 Canadian cities, where claimants had undergone their hearing before the IRB in the six months prior to the interview. The report aimed ‘to explore the perspective of refugee claimants as they went through their hearings, including their positive and negative impressions of the process.’

<sup>33</sup> Ibid 38.

<sup>34</sup> Ibid 2.

<sup>35</sup> Ibid.

<sup>36</sup> For similar findings, see also Kneebone, above n 3; Taylor, above n 13.

<sup>37</sup> In hearings where the applicant failed to do this, the decision-maker frequently stopped the applicant and explained again the need for her or him to speak in short segments in order to give the interpreter a chance to translate.

The next consideration is the relationship between the fragmentation I observed in the hearings and the written application that applicants must complete in order to found their claims. While the written application in both jurisdictions already structures the claim into a form of narrative, the hearing does not allow this narrative to be presented in the hearing. The three relevant written application forms are the former Canadian ‘Personal Information Form’ (‘PIF’) (required for onshore refugee applicants in Canada until December 2012); the current Canadian ‘Basis of Claim Form’ (‘BOC’); and the Australian ‘Form 866 Application for a Protection (Class XA) visa’ (‘Form 866’). The former PIF is 16 pages long and includes three pages of instructions on how to complete the form in an Annex at the end of the document.<sup>38</sup> In the body of the PIF, the requirement for narrative is expressed directly. Under the heading, ‘Why you are Claiming Refugee Protection in Canada?’ is a section entitled ‘Narrative.’ After this, there are instructions in dot point form and two blank, lined pages. The requirement for a temporally connected and ordered narrative of events is present in a different form in the newly-introduced BOC. Directions under the heading ‘Why are you claiming refugee protection?’ state:

**When you answer the questions in this section, please explain everything in order, starting with the oldest information and ending with the newest. INCLUDE EVERYTHING THAT IS IMPORTANT FOR YOUR CLAIM. INCLUDE DATES, NAMES AND PLACES WHEREVER POSSIBLE.**<sup>39</sup>

In the Australian Form 866, there is no specific mention of ‘narrative’.<sup>40</sup> However, the areas where the applicant must detail the reasons for seeking protection are also blank spaces (whereas the rest of the form is a series of questions followed by small, bordered boxes for short answers). Here, the applicant is instructed to answer all following questions ‘in your own words’. This instruction is not attached to any of the preceding sections dealing with, for example, employment history and educational history. Along with the written directions, the formatting of each document makes clear that, as compared to the rest of the form, a different form of expression is

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<sup>38</sup> Immigration and Refugee Board of Canada, ‘Personal Information Form’: <[http://resources.lss.bc.ca/pdfs/pubs/personalInformationForm\\_eng.pdf](http://resources.lss.bc.ca/pdfs/pubs/personalInformationForm_eng.pdf)> (this is a copy of the former PIF, archived by the Legal Services Society of British Columbia).

<sup>39</sup> Immigration and Refugee Board of Canada, ‘Basis of Claim Form’, 2: <[http://www.irb-cisr.gc.ca/Eng/res/form/Documents/RpdSpr0201\\_e.pdf](http://www.irb-cisr.gc.ca/Eng/res/form/Documents/RpdSpr0201_e.pdf)> (bold typeface and upper case in original).

<sup>40</sup> Department of Immigration and Border Protection, ‘Form 866 Application for a Protection (Class XA)’, 11: <<https://www.border.gov.au/Forms/Documents/866.pdf>>

required when the applicant is asked about her or his substantive reasons for claiming protection. In these sections, in all three forms, there are large, blank pages or boxes.

The forms require those details to be narrated in predominantly chronological order. The instructions in both the former and current Canadian forms require a chronological account of events: the PIF explicitly demands chronology,<sup>41</sup> while the BOC instructs the applicant to ‘explain everything in order, starting with the oldest information and ending with the newest.’<sup>42</sup> In conjunction with the requirement for an ‘ordered’ narrative, both Canadian forms express a requirement for ‘dates, names, and places wherever possible’.<sup>43</sup> The requirement for a chronological account is not expressed directly in the Australian form, which gives significantly fewer instructions; though it repeatedly informs the applicant of the imperative of giving ‘as many names, dates, and locations as possible.’<sup>44</sup>

As noted in the Introduction, the substantive questions that refugee law requires applicants to address frequently did not dominate the presentation and testing of evidence during the hearing. Nonetheless, in Australia, the questions the applicant must answer in order to initiate a claim to protection each represent a particular element of the statutory definition of a refugee.<sup>45</sup> While these questions *already* fragment and shape an applicant’s evidence, the process of fragmentation in the hearing did not even allow for these questions to be addressed in a faintly predictable manner.

Finally, I note that in this small dataset, it was evident that applicants in the Canadian hearings were given a greater opportunity to articulate their evidence without the

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<sup>41</sup> PIF, above n 38, 10–11, where it states: ‘On the following 2 pages, set out in chronological order **all the significant events and reasons** that have led you to claim refugee protection in Canada’ (emphasis in original).

<sup>42</sup> BOC, above n 39, 2.

<sup>43</sup> This formulation is used in the BOC: *ibid* 3. Twice in its general instructions, the PIF instructs the applicant to ‘include dates wherever possible’; and to include ‘dates and names of people and places.’

<sup>44</sup> Form 866, above n 40, 7.

<sup>45</sup> After the applicant confirms she/he cannot return to her or his country of origin, the questions are in Form 866 are:

Why did you leave [that] country(s)? What do you think will happen to you if you return to that country(s)? Did you experience harm? [if yes]... Give details; Did you seek help within the country(s) after the harm? Did you move, or try to move, to another part of that country(s) to seek safety? Do you think you will be harmed or mistreated if you return to that country(s)? Do you think authorities of that country(s) can and will protect you if you go back? Do you think you would be able to relocate within that country(s)?

Member interjecting or redirecting the applicant to sequence the evidence or to recall particular dates or temporal details, such as time between events. In particular, in the two ‘non fragmented’ Canadian hearings,<sup>46</sup> the applicants were more frequently able to address parts of their claim that pertained to the core requirements of the refugee definition under Canadian law (such as alleged incidents of past persecution), rather than respond primarily to the decision-maker’s unpredictable concerns. Even though decision-makers still played a central role in directing the hearing, in these hearings and in the Australian *Jadoon* hearing, the decisions-makers’ genuinely open questions related more closely to the narrative that applicants were required to provide in their written application. As well as this, questioning did not lurch, out of chronological sequence, from topic to topic, and where the Member did change topics, this was signposted with comments such as: ‘You mentioned earlier your involvement in [XXX] group, I am going to ask you about that...’<sup>47</sup>; and ‘You explained that you would not be safe in Jalalabad; can you now explain what would happen if you moved to Kabul?’<sup>48</sup> These factors combined to significantly change the tone of the hearing and to provide, at least to some extent, applicants with an opportunity to meet the hearing’s narrative mandate.

#### *i. Fragmentation*

The word *fragment* is listed in the Oxford English Dictionary (OED) as deriving from the 16<sup>th</sup> century French *fragment* or the Latin *frangere*, both meaning to break.<sup>49</sup> The OED’s first definition of the noun ‘fragment’ is, ‘[a] part broken off or otherwise detached from a whole; a broken piece; a (comparatively) small detached portion of anything.’<sup>50</sup> A secondary, figurative definition of the term is ‘a detached, isolated, or incomplete part,’ and a third is, ‘an extant portion of a writing or composition which as a whole is lost; also, a portion of a work left uncompleted by its author; hence, a part of any unfinished whole or uncompleted design.’<sup>51</sup> According to all of these definitions, a fragment is a small, detached part of a whole, whether material object or

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<sup>46</sup> *Flores* [2013](IRB); *Jabbar* [2013](IRB).

<sup>47</sup> *Flores* [2013](IRB).

<sup>48</sup> *Jabbar* [2013](IRB).

<sup>49</sup> *The Oxford English Dictionary* (2<sup>nd</sup> ed, 1989), s.v. ‘fragment’.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.* And, the word ‘fragmented’ is defined as ‘[b]roken into fragments, made fragmentary.’



figurative. The word necessarily implies or relies upon the existence of a former whole, even where that whole has been lost or destroyed.

In this chapter, then, my use of the words ‘fragment’ and ‘fragmented’ necessarily implies the existence of a ‘complete’ narrative, of which the oral hearing only ‘hears’ or examines particular, fragmented parts. The ‘complete’ narrative upon which the concept of fragmentation is predicated is the narrative that refugee applicants are required to present, even where their biographical history and details of their claim do not constitute some kind of ‘whole’ story. I find the word ‘fragmented’ useful in describing my experience of how testimony was examined and received because it conveys my experience of the narrative being, at the end of each hearing observation, ‘broken up’ or incomplete. The testimony I witnessed and heard certainly did not consistently start at what might be labeled a chronological ‘beginning’ or end at an ‘end,’ even though this was frequently how evidence was presented in the decision-makers’ subsequent written decisions. Thus, in speaking of personal narratives as ‘fragmented,’ I am not suggesting that applicants do have otherwise naturally complete and coherent narratives. Rather, I am arguing that the conditions of speech and the narrative occasion of the hearing functioned to fragment applicants’ testimony in such a manner that made it difficult and in some cases impossible for applicants to meet the demand for narrative during the hearing, and to tell their stories in a comprehensive, coherent and orderly way.

## *ii. Means of Fragmentation*

The fragmentation of the narrative precludes the applicant from providing a coherent narrative account, an expectation and burden that the hearing itself places upon the applicant. In this section, I explore four interrelated means of fragmenting the oral hearing, all of which primarily involve decision-makers’ modes of questioning and of eliciting evidence. Although each decision-maker I observed had a unique style, the four features of the hearing that I describe here formed the basis of strong, recurring themes in the process of coding the hearings.<sup>52</sup>

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<sup>52</sup> As noted, the four distinct means of fragmentation that I discuss are the use of reverse-order questioning, the form and tone of questions, questions related to timing and time sequences, and topic jumping.

A major conclusion that runs through the following section is that even when applicants were able to present their evidence, they only could do so under the close direction of decision-makers. Further, when applicants did ultimately present evidence in narrative form, they did so in circumstances that I argue were adverse to the expression of narrative-based testimony. Applicants either interrupted the decision-maker in order to present evidence that the applicant believed to be important, or persisted in presenting their own version of events in the face of decision-maker questioning styles that impeded the presentation of evidence.

### *Reverse-order Questioning*

Chapter Five described the minimal governance over the conduct of the oral hearing, as provided by statute, regulation or administrative guidelines, and consequently, the wide discretion that decision-makers hold as to how the hearing proceeds. In Canada, one quite significant exception to the absence of uniformly applied standards governing the hearing process is the guideline on ‘reverse-order questioning,’ which France Houle describes as ‘one of the most controversial policy instruments issued by the IRB.’<sup>53</sup> Issued by the Chair of the IRB in 2003,<sup>54</sup> the guideline sets out that during IRB hearings, the decision-maker is to question the applicant *in the first instance*, to be followed by the counsel for the applicant where an advocate is present.<sup>55</sup> This is the ‘reversed’ element of reverse order questioning, since in most adjudicative settings (and particularly in adversarial ones) the applicant is given the opportunity to present evidence before it is tested or interrogated. In the IRB Guideline that introduced reverse-order questioning, the reform is justified as follows:

Beginning the hearing in this way allows the claimant to quickly understand what evidence the member needs from the claimant in order for the claimant to prove his or her case.<sup>56</sup>

Reverse-order questioning is now standard practice in Canada. In all of the Canadian hearings I attended, the reverse-order questioning guideline was followed.<sup>57</sup> This was

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<sup>53</sup> France Houle, ‘Thamotharem and Guideline 7 of the IRB: Rethinking the Scope of the Fettering of Discretion Doctrine’ (2008) 25 *Refuge: Canada’s Journal on Refugees* 103, 103.

<sup>54</sup> Immigration and Refugee Board, ‘Guideline 7 Concerning Preparation and Conduct of a Hearing in The Refugee Protection Division: Guidelines Issued by the Chairperson Pursuant to Section 159(1)(h) of the Immigration and Refugee Protection Act’ (2003, updated 2012, Immigration and Refugee Board Ottawa). And see also *Refugee Protection Division Rules*, SOR/2012-256, r 10.

<sup>55</sup> Note this is what happens in Australia, but without a direct, publically available guideline.

<sup>56</sup> Immigration and Refugee Board, above n 54, [19]–[22].

evident in the excerpts set out in Part One of this chapter, where Members consistently explained that they would ‘ask some questions first,’ and then allow advocates to question applicants afterwards. Reverse-order questioning was not always the norm in Canada, however. According to Macklin, prior to 2003, the decision-maker may or may not have indicated specific areas of concern at the outset of the hearing. After this,

[c]ounsel for the asylum seeker would begin by posing questions to the claimant to enable her/him to recount the significant events leading up to the decision to seek asylum. ... The decision maker might also pose questions directly to the claimant.<sup>58</sup>

In hearings before the RRT, the Member is the only person who directly questions the applicant. Consequently, the questioning order is not ‘reversed’, since advocates are not given the opportunity to question applicants at all, even though they are generally permitted to make submissions at the close of the hearing.<sup>59</sup> All of the Australian hearings I attended proceeded in this way. However, just as with the IRB oral hearing, applicants before the RRT are not given a chance to put their case first or in full. This is the case even though in the various guidelines and directions governing the RRT, there is no explicit direction for how the hearing will run.<sup>60</sup> This process is, however, arguably an entrenched procedural norm within the RRT because, unlike in Canada,

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<sup>57</sup> The IRB Member vary the order of questioning in exceptional circumstances, including where a vulnerable claimant must be accommodated; and for the purposes of the RPD Rules, a ‘vulnerable person’ means a ‘person who has been identified as vulnerable’ under the Immigration and Refugee Board of Canada, ‘Chairperson Guideline 8: Procedures With Respect to Vulnerable Persons Appearing Before the IRB’ (2006, updated 2012); see also *Refugee Protection Division Rules*, SOR/2012-256, r 1 (definition of a “vulnerable person”), 10(5).

<sup>58</sup> Immigration and Refugee Board, above n 54. Macklin also notes that generally the Refugee Protection Officer (RPO) would question the applicant first. The RPO position within the IRB has been abolished, but previously the RPO’s role was to assist the Member and to address concerns the Member had identified in relation to the applicant’s case. Variations would often arise in this procedure, as sometimes the RPO would be absent or the decision-maker would question the applicant first: Macklin, above n 7, 97.

<sup>59</sup> In the RRT hearings I observed, none of the advocates (all of whom were solicitors and migration agents) directly questioned their clients. At certain points during some hearings, advocates asked for clarification of a Member’s questions on behalf of their clients. In some hearings, advocates sought permission, at the end of a Member’s questioning, for the applicant to clarify certain issues; however, this was either done by requesting the Member ask further questions, or by the applicant independently addressing particular issues, at times with gentle memory prompts from the advocate (ie ‘Mr [XXX] wished to clarify his role within [organisation XXX]...’).

<sup>60</sup> Though the Credibility Guidelines do note that ‘[t]he nature of Tribunal proceedings is such that it is the Member who asks questions of the applicant and other persons giving evidence’: Administrative Appeals Tribunal Migration and Refugee Division, ‘Guidelines on the Assessment of Credibility’ (2006, updated 2015) [16].

advocates appearing before the RRT have never been given the opportunity to open the hearing or to ‘lead’ evidence their clients’ cases.

Macklin argues that the introduction of reverse-order questioning reforms in Canada are best explained as a consequence of two of the Canadian Government’s concerns at the time. The first was efficiency. Macklin notes that although this was the rationale provided, no evidence was ever proffered to show that reverse-order questioning is in fact faster or more efficient than conventional questioning methods.<sup>61</sup> The second concern, according to Macklin, pertained to the Government’s desire to control and contain the ‘audibility’ of the asylum applicant within the hearing.<sup>62</sup> These motivations resonate with Chapter Three, which argued that the history of the oral hearing demonstrates that the hearing is best understood as a means to determine the ‘genuineness’ and credibility of claims, whilst providing a hearing that allows for efficient and final findings of fact.

Here, I think it is illuminating to draw an analogy between an adversarial and an inquisitorial approach to trial and evidentiary procedures. The adversarial system’s approach to discovering ‘the truth’ or fact-finding has generally entailed allowing each party the opportunity to present its case in full and to define the relevant issues without undue interference by the other party and with only ‘minimal intervention by the decision-maker.’<sup>63</sup> Witnesses are able to present their ‘evidence-in-chief’ first. Only once this has occurred may the other side, in cross-examination of witnesses, test or challenge the other party’s evidence.<sup>64</sup> For all of the critiques of this approach,

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<sup>61</sup> Macklin, above n 7, 101.

<sup>62</sup> Ibid.

<sup>63</sup> See Felicity Nagorcka, Michael Stanton and Michael Wilson, ‘Stranded between Partisanship and the Truth: A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice’ (2005) 29 *Melbourne University Law Review* 448.

<sup>64</sup> Australian Law Reform Commission, ‘Review of the Federal Civil Justice System (Federal Tribunal Proceedings)’ (Issue Paper 24, 1998) [2.13]; and for the final report, see Australian Law Reform Commission, ‘Managing Justice: A Review of the Federal Civil Justice System’ (Report 89, 1999). Indeed, cross-examination and the competition among parties is presented by some as ‘the greatest legal engine ever invented for the discovery of truth’: John Henry Wigmore et al, *Evidence in Trials at Common Law* (Little, Brown, 1974) 32. This is of course at odds with the classic conception of an inquisitorial hearing, which is ‘judge-led’ and where parties are not adversaries, but jointly endeavouring to uncover the truth.

in the RSD oral hearing, the fact is that applicants never get a chance to present what would be evidence-in-chief.<sup>65</sup>

As discussed in Chapters Two and Five, Dauvergne and others have observed that in practice in both Australia and Canada, the oral hearing does not function in an informal, inquisitorial and non-adversarial manner; in the absence of an inquisitorial style of decision-making, both decision-making bodies fall back on adversarial norms and approaches to fact-finding and decision-making.<sup>66</sup> What is more, even where the hearing may resemble an adversarial trial in that the applicant's evidence is tested and interrogated by the decision-maker, the applicant is rarely afforded one of the procedural rights of adversarial trials, namely the right to present his or her evidence in full. Simultaneously, the theoretical advantages of an inquisitorial approach—particularly of an informal hearing and the decision-maker and applicant *jointly* endeavouring to ascertain the facts—are also absent from the hearing. Although the decision-maker actively intervenes, the nature of these interventions is more frequently to test facts rather than to establish them.

Macklin's concept of 'audibility' captures the crux of these concerns. Reverse-order questioning plays a central role in determining the 'audibility' of applicants – and this is before the significant issue of 'cross-cultural' communication is taken into account.<sup>67</sup> As a procedural norm, reverse-order questioning is perhaps best thought of as an issue of who gets to go first and who gets to direct the hearing. In both jurisdictions, it is the decision-maker who takes on this role. This norm, combined with the three processes of fragmentation of the hearing described below, limits the applicant's ability to present testimony, and has profound implications for the structure of the hearing as a narrative occasion.

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<sup>65</sup> While applicants who sought to present or clarify a particular piece of evidence were generally able to do so, such requests or interventions by the applicant often took place at the close of the hearing, in a fragmentary manner, and after the decision-maker had already explored the evidence that she or he had prioritised.

<sup>66</sup> Catherine Dauvergne, *Humanitarianism, Identity, and Nation: Migration Laws of Australia and Canada* (UBC Press, 2005) 99–100.

<sup>67</sup> Macklin also discusses the reverse-order questioning reforms in the context of a broader exploration of the administrative law right to be heard within the Canadian asylum regime. In Canada, two failed legal challenges to reverse-order questioning argued that it breached principles of natural justice and fettered RPD members' discretion in the conduct of the hearing: *Canada (Minister of Citizenship and Immigration) v Thamotheam* [2006] FCJ No 8 (QL); *Benítez v Canada (Minister of Citizenship and Immigration)* [2006] FCJ No 631 (QL). See also Houle, above n 53 who argues in favour of the various Courts' rejection of these arguments.

One means of classifying types of questions is by using the dichotomy of open and closed questions. Social scientist Alan Bryman defines open and closed questions broadly, writing that ‘with an open question, respondents ... can reply however they wish,’ and ‘with a closed question, they are presented with a set of fixed alternatives from which they have to choose an appropriate answer.’<sup>68</sup> The open/closed dichotomy classifies questions requiring a yes/no answer as ‘closed.’ Questions about ‘personal,’ ‘factual’ or quantitative data can also be classified as closed, as they seek to elicit a fixed answer or particular fact.<sup>69</sup> By contrast, open questions may be defined as those which allow respondents to construct and determine an answer themselves, and which do not contain ‘some implicit indication of categories such as ‘yes/no responses, a number or quantity, or a single noun.’<sup>70</sup>

This taxonomy is helpful in assessing the conduct of the hearing, although it is oversimplified and some questions and inflected statements are difficult to classify.<sup>71</sup> Still, in analysing the hearings, the open/closed dyad allowed me to identify where decision-makers used questions that invited yes/no or short, factual answers, as distinct from questions where applicants were invited to give longer answers that allowed them to choose or direct the content of their response to some extent. A key finding in this section is that in each of the observed hearings, the dominance of closed over open questions was patent. The closed questions that featured in the hearings often required ‘yes or no’ answers, rather than providing the applicant with a range of possible closed answers from which to choose. As I assessed the hearings through the schema of open/closed questions, it also became clear that the possibility of longer-form answers was only available when the decision-maker granted permission—and this was true even in the context of open questions. The extent to which both open and closed questions did invite longer responses, and did ‘give the floor’ to the applicant, depended upon the tone of the question. Not all open questions

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<sup>68</sup> Alan Bryman, *Social Research Methods* (Oxford University Press, 2nd ed, 2004) 145.

<sup>69</sup> Andrea Fontana and James H Frey, ‘Interviewing: The Art of Science’ in Norman K Denzin and Yvonna S Lincoln (eds), *Handbook of Qualitative Research* (SAGE Publications, Inc, 1994) 361.

<sup>70</sup> Jane Ogden and Danielle Cornwell, ‘The Role of Topic, Interviewee and Question in Predicting Rich Interview Data in the Field of Health Research’ (2010) 32 *Sociology of Health & Illness* 1059, 1063.

<sup>71</sup> See Fontana and Frey, above n 69. For example, nominally ‘closed’ questions about timing or quantities (such as ‘when did you..?’ or ‘how many times..?’) arguably permit more open-ended responses, as do inflected statements. For eg, ‘So after that, you returned home?’: *Malik* [2013](RRT).

appeared to invite longer responses, and some closed questions permitted the applicant to give relatively open, detailed accounts of their evidence. That said, the majority of closed questions sought specific, closed replies and elicited short responses.

In order to test my impression that closed questions were significantly more common than open ones in the observed cases, I undertook a counting exercise of open versus closed questioning with one randomly selected hearing from each jurisdiction.<sup>72</sup> In the *Pillai* hearing before the RRT, of the Member's 145 contributions that could be classed as questions, 96 questions were closed and 49 were open.<sup>73</sup> In the *Perera* hearing before the IRB, of 129 questions in total, 83 were closed questions and 46 were open.<sup>74</sup> The process of counting questions in the hearings revealed the decision-makers' substantial, constant and directive participation in the hearing. When looking over the typed transcripts of most hearings, it is striking that only in a minority of instances were the applicants' answers longer than the decision-makers' questions. Beyond this, the asking of both closed and open questions were means by which the decision-maker controlled and directed the hearing. Where closed questions were used, the decision-maker was able to exercise more direct control (this is also clear in relation to 'time questions,' discussed below).

Indeed, in some instances where the applicant began to answer an open question in detail, the decision-maker abruptly interrupted the applicant in order to redirect the answer-in-progress or to pose another question. The following example from the *Pillai* hearing before the RRT demonstrates this practice:

Member:	Why did you decide to come to Australia, since you have been travelling around the world on numerous occasions as part of your professional career? Why did you decide to come to Australia in July [XXX]?
Applicant:	I was working in [XXX] province as an assistant to [XXX]. At the time, there were a lot of life-threatening situations

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<sup>72</sup> It is not always clear which questions are open and which are closed. For example, sometimes the Member would put a proposition to the applicant, ie, 'What if I said...', or, 'In my view...' or 'It seems to me that...'. The implication was that the applicant should respond. I classified these inflected statements as open when they began with a 'what.' Where the decision-maker simply presented a view and awaited a response, I classified this as a closed question.

<sup>73</sup> *Pillai* [2013](RRT).

<sup>74</sup> *Perera* [2013](IRB).

- happening. So to take care of my life, I decided to come to Australia.
- Member: Sure, we'll get into the details of why you left. I am just wondering why you chose Australia as the country of destination?
- Applicant: Because I was working under Mr [XXX], there was a lot of life-threatening situations, especially letter and telephone threatening [sic]. So I had to come out of Sri Lanka very quick. At the time, I had the visa for Australia; that's why I chose to come.
- Member: What type of visa was it? What period of time was it valid?
- Applicant: One-year visa.
- Member: Okay. So you retired in February [XXX]?

In the above extract, the Member posed an open question, 'Why did you decide to come to Australia?' When the applicant attempts to respond with details of his persecution, the Member responds, 'Sure, we will get to the details of why you left,' and redirects the applicant by asking another open question. The Member's subsequent questioning focuses at length on the applicant's visa, passport and previous trips out of Sri Lanka. About halfway through the hearing, the Member again indicates that they 'will get to' evidence about persecution later in the hearing.<sup>75</sup>

In general, decision-makers appeared to use open questions to signal an invitation to the applicant to present a longer, more detailed answer—and yet after these invitations were extended, the decision-makers did not always follow through by letting applicants respond at length. By contrast, in some instances, applicants chose not to give extended responses to open invitations to speak. My observation was that this was either because of the predominance of closed questions surrounding more open ones (establishing a pattern of short and direct answers), or because the applicant could not or did not wish to give evidence on the topic raised by the open question. Members' open questions certainly did not always coincide with topics that the applicant wanted to or indeed was prepared to discuss. This is an observation that immediately recalls the narrative contests discussed in the previous chapter. The excerpts in Chapter Five revealed that when a decision-maker is directly challenging the applicant's story, the questions are quite openly posed, inviting the applicant to

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<sup>75</sup> In the final third of the hearing, approximately two hours in, the Member addressed the question of the applicant's persecution directly for the first time. The topic was not addressed at length, and the applicant was not given an opportunity to explain the details of his persecution or the 'life-threatening' situations he refers to above.



‘explain’ or ‘account for’ a particular course of action, asking why, what or how certain events took place.<sup>76</sup>

In the *Pillai* hearing, a significant amount of time was spent on the applicant’s claim that, as part of his work, he had produced a report that had caused him to be targeted by anti-Government groups in Sri Lanka.<sup>77</sup> The Member asked repeated and extensive open questions about the ‘methodology’ that the applicant had employed to produce the report. While I am unable to say how accurately the relatively technical term ‘methodology’ was translated into Tamil (the applicant’s mother tongue), my observation was that the applicant appeared to understand the repeated open questions about the ‘methodology’ of the report. However, his short answers were not satisfactory to the Member, who repeated the question several times. After the applicant provided relatively short responses to the Member’s inquiries, the Member pressed the applicant further, asking several questions in quick succession:

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|---------|---|
| Member: | Could you tell me about what working methodology you used to produce this report? ... |
| Member: | What was your brief? ...  |
| Member: | What did [the applicant’s superior] request in the report? ...                        |
| Member: | How did you go about preparing the report? ...  |
| Member: | But what was your methodology? <sup>78</sup>  |

After the applicant failed to answer these open but interrogative questions to the Member’s satisfaction, the Member went on to say,

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|---------|---|
| Member: | I’m finding that you cannot express how you went about producing that report. And that’s a concern for me, because if you were the author of the report I would expect you would be able to explain how you went about preparing it. So I am giving you an opportunity to give that evidence. |
|---------|---|

The applicant then identified some of the people whom he had contacted when he began writing the report, and he started to list the report’s findings, which he alleged were a cause of his persecution. The applicant’s responses here were short and did not

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<sup>76</sup> In such circumstances, questions were often begun with openly contrary statements and in a disbelieving tone, ie, ‘But why would/wouldn’t you?’ For example in the *Adere* [2012](RRT) hearing discussed in Chapter Five:

Member: [To the applicant wife.] You came to Australia to study; why would your husband leave his laptop in Ethiopia?

<sup>77</sup> Details are omitted here for the purpose of anonymity.

<sup>78</sup> Again, details are omitted here for the purpose of anonymity.

directly address the question of methodology, to which the Member then returned, asking the following questions:

- Member: So tell me more about your methodology; what did you do to prepare the report? ... If you are producing a report on the issue of [XXX] in the region—tell me about what research you did?
- Applicant: I was considering population, as well as [XXX], as well as [what was permitted under] the gazette.
- Member: Okay. Tell me more, please.

After the applicant was unable to answer these questions, the Member began asking closed questions in quick succession, such as whom the applicant had contacted; when he had contacted them; and how he had made particular findings in the report.

The above excerpts reveal that open questions are not ‘the answer’ to the presentation of testimony in the oral hearing, particularly where the applicant is unwilling or unprepared to answer the questions. However, the predominance of closed questions (alongside the fact that open questions were not always posed in a way that invited open responses) evinces the decision-maker-directed nature of the hearings. Indeed, the CCR report on the conduct of Canadian oral hearings reported that applicants were often troubled by decision-makers asking questions that applicants perceived to be ‘irrelevant’ and their failure to address the substance of the applicants’ claims:

Some claimants complained that their hearings were negatively impacted by irrelevant or inappropriate questions. Others were deeply concerned that their Board Members failed to ask them about key aspects of their claim.<sup>79</sup>

This report points to another issue, the significance of decision-maker tone in the running of the hearing and in posing questions. In the hearings I observed, members’ affective modes or tones of expression varied significantly. Beyond the open or closed nature of the questions being asked, the hearings revealed the deep significance of *how* decision-makers asked and responded to questions during the hearing.<sup>80</sup> The

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<sup>79</sup> Canadian Council for Refugees, ‘The Experience of Refugee Claimants at Refugee Hearings at the Immigration and Refugee Board’, above n 30, 2. Claire Bennett made a similar finding in her interviews with women in the UK who had sought refugee status on the basis of their sexuality. In reflecting on their substantive interviews and court appearances, participants found the ‘style of questioning, how the interview was conducted... the inability to refuse any questions, and not being believed’ to be stressful. Some women interpreted the style of questioning to be ‘specifically designed to “confuse” or “infuriate.”’ Claire Bennett, ‘Lesbians and United Kingdom Asylum Law: Evidence and Existence’ in Efrat Arbel, Catherine Dauvergne and Jenni Millbank (eds), *Gender in Refugee Law: From the Margins to the Centre* (Routledge, 2014) 138, 145.

<sup>80</sup> The interpretation process is crucial here. In most instances, the Member’s questions were interpreted and then delivered to the applicant by an interpreter. However, the Member in all the

open questions extracted above, for example, were asked directly, forcefully, and repeatedly. In the hearings where applicants were able to present longer, uninterrupted tracts of testimony, questions (both open and closed) were asked in a tone that did not convey disagreement, impatience or dissatisfaction with an applicant's responses.

Where applicants provided uninterrupted testimony, it was often in response to an affectively calm and inviting questioning style. Some examples of such questioning included, 'Can you tell me what happened in that instance?';<sup>81</sup> 'Tell me more about that group [of which the applicant was a member]';<sup>82</sup> 'Please explain to me why the Taliban would want to hurt you';<sup>83</sup> 'You mentioned your [agents of persecution] are more powerful than before; can you explain that to me?';<sup>84</sup> These are all examples of questions that invited the applicant to speak freely about a particular piece of evidence. Additionally, where decision-makers acknowledged answers as heard (rather than as 'correct') with a comment, or some form of affirmative gesture or sound, applicants continued to provide further, mainly uninterrupted testimony.

As noted above, closed questions did in some instances elicit long, narrative-based and applicant-directed responses. For example, in the *Flores* hearing before the IRB, the Member elicited several long and extensive answers from the applicant by posing mixed open and closed questions. In that hearing, the applicant alleged persecution on the basis of her political opinion, and her status as an artist, and gave evidence of her inability to show her works in her country of origin due to Government censorship. The Member posed several closed questions that elicited short replies, as well as both open *and* closed questions to which the applicant responded at length. An example of the latter is, 'Did at any moment in Cuba did [sic] the authorities say anything about

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observed hearings spoke directly to the applicant. While my sense of the tone of questions is highly subjective, where tone was conveyed through the phrasing of particular questions or via the repetition of a particular question, I believe this was evident to the applicant *even though* the Member spoke in English. Tone was especially affected by Members' responses to questions, and where the Member responded by affirming a piece of testimony (for example by saying, 'yes', 'thank you' or 'okay') as compared to where the Member did not respond at all.

<sup>81</sup> *Mena* [2013](RRT).

<sup>82</sup> *Flores* [2013](IRB).

<sup>83</sup> *Jabbar* [2013](IRB).

<sup>84</sup> *Ibid.*

your performances. ... I will be more specific, did [at] any moment the authorities say to you [you] are not allowed to perform because of whatever?’<sup>85</sup>

The style and tone of questions I observed, and the predominance of closed short-answer questions, must also be understood as means of credibility-testing in the context of the cultures of disbelief described in Chapter Three. Often, I observed that a long series of closed questions would be used to test the credibility of a particular piece of evidence or an applicant’s knowledge of a particular event. Questions that were repeated; that were asked in a tone that conveyed doubt, disbelief or impatience; or that were framed as closed questions in quick succession, were common in all but three of the hearings. These kinds of questions created an unreceptive and hostile atmosphere and impeded applicants’ ability to construct evidence in narrative form.

Of the hearings I observed, the three ‘non fragmented’ hearings sounded and felt more like an examination in chief than a hostile or unpredictable cross-examination of evidence. Applicants were asked open questions in a roughly chronological manner and were given the chance to respond to most (though not all) of the questions without being interrupted or redirected. In these hearings, the applicant provided a greater number of longer-form answers than in the rest of the hearings, and presented evidence that went to the nature of their fears, their reasons for departure, past persecution and the inability to seek home state protection or to relocate.

Arguably, even a very small number of genuinely open questions, alongside a number of open-ended prompts, might allow the applicant to present his or her evidence in full and therefore have the opportunity to create a narrative through a series of extended responses. In the observed hearings, however, the manner in which open questions were posed was not necessarily so as to allow the applicant to direct his or her own evidence. The questions were not used to elicit unbroken or applicant-directed narrative. On one view, the written application has already allowed the applicant to offer such a narrative, and that ought to be sufficient. But given that one of the core functions of the oral hearing is to test credibility, and given that credibility rests on the criteria of consistency and plausibility, the applicant should be given an

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<sup>85</sup> *Flores* [2013](IRB).

opportunity to demonstrate these criteria during the hearing when they are being tested.

### *Questions of Time and Timing*

Questions related to time, dates and quantities constitute an important category of closed questions. I address them specifically because questions relating to dates, months, years and sequencing consistently featured in a manner that interrupted the applicants' testimony. I would characterise such questions as disruptive and fragmenting, both where the applicant was able to confidently recall the date/sequence at the centre of the question and where applicants were unsure of an accurate answer. As well as fragmenting the applicant's testimony, 'time questions' also clearly evinced decision-maker demands for evidence in a narrative form. That is, they revealed an expectation that evidence was capable of being expressed sequentially, with events being both causally and temporally linked. Without exception, across all of the hearings observed in this study, there were questions about times, dates and quantities. In a study of IRB in the mid to late 1990s, Rousseau et al found that difficulty with dates and time sequences were often met with the 'growing impatience of board members.'<sup>86</sup> The hearings I observed confirmed that time, dates and order of events persist as time-consuming elements of the hearing, and that they were often the source of tense exchanges between applicants and decision-makers.

By way of example, I now detail the interactions between the decision-maker and the applicant in the *Zeidan* hearing in relation to time and timing. The *Zeidan* hearing was before the RRT and involved a female applicant from Lebanon and her daughter, who were making a claim with the mother as the primary applicant. The daughter also appeared at length before the Tribunal. In the hearing, the decision-maker's approach to issues of time was such that she was concerned with sequencing, as well as the exact year and month in which particular events had occurred.

This hearing is particularly relevant to a discussion of questions of time and timing due to an exchange that the applicant initiated with the Member concerning the applicant's self-identified difficulty with remembering the dates and timing of events.

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<sup>86</sup> Cécile Rousseau et al, 'The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board' (2002) 15 *Journal of Refugee Studies* 43, 57.

The exchange took place at the beginning of the hearing, after the Member had explained the hearing process and after the applicant had amended some errors in her written application:

- Member: [Exasperated.] Is there anything further you want to change or add to your claim?
- Applicant: No, but there is one thing that we can concentrate on. I have a problem with dates.
- Member: Do you want to explain that? What do you mean you have a problem with dates?
- Applicant: I have a problem with dates because I went through so many things and so many events happened one after the other and ... I have a problem with dates—I can't say this happened on that date, I can't say that.
- Member: That's fine—when I am talking to you about the timing and when various things happened, what I'd like you to try and do is think about the order things happened and how long it was between various things happening. If you are able to give me approximate dates, that is also useful.
- Applicant: Yeah, yeah.

In the above exchange, even though the Member said that it was 'fine' that the applicant had issues with dates, the Member then went on to confirm the requirement for the applicant to place events in order, and 'if able,' to give approximate dates. This placed the applicant in the invidious position of being reassured that her inability to remember dates was 'fine,' but still being expected to try to do so and provide temporal details where possible.<sup>87</sup> It is worth noting that the applicant submitted a psychological report indicating that the applicant mother had diagnoses of post-traumatic stress disorder, major depression and symptoms of 'worsening in memory and concentration.'<sup>88</sup> The Member referred to and quoted the report but did not rely upon it in his final credibility assessment of the applicant.

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<sup>87</sup> Indeed, this contradicts a mostly standard element of the opening section of the hearing in both jurisdictions, in which decision-makers emphasise that if an applicant does not know the answer to a question, she or he should 'not guess,' with some decision-makers adding that guessing may affect credibility assessment later on.

<sup>88</sup> *Zeidan* [2014](RRT Decision and Reasons) 11. The author of the report (which was extracted in the decision) continued: 'She told me she has difficulties concentrating and remembering things in the hearing of her case, and in my view it is common with traumatised and depressed patients to exhibit symptoms of worsening in memory and concentration...': *ibid*. The report was relied upon to support the finding that expecting the applicant to relocate would be unreasonable; the Member found that it was not far-fetched or mere speculation that relocation would cause a deterioration in the mother's mental health.

Throughout the *Zeidan* hearing, the Member did not refrain from asking questions about timing and time, despite the applicant's comments. To the contrary, the Member asked extensive questions about the dates of particular events, the amount of time between events and the order of events. When the applicant was unable to answer these questions, the Member nonetheless pressed her to attempt to do so.<sup>89</sup> The following three excerpts reflect some of the numerous instances in the hearing when the Member questioned the applicant about time, timing or dates; or about quantities or amounts.

The first excerpt I draw upon below is lengthy. It was difficult to listen to the audio recording of the exchange without some level of personal discomfort, due to the applicant's palpable difficulty in providing dates. Despite the applicant's continual expression of distress and her attempts to communicate that she was having difficulty, the Member persisted with questions that required quantitative calculations of time, either of the length of time between events or the duration of individual events. The Member's questions also required the applicant to identify the year or date of events relating to the applicant's work as a beauty salon owner.

Member:	When did you open your beauty salon in [XXX]?
Applicant (in person):	[ <i>Pause.</i> ] Umm, oh my god ... I'm sorry. [ <i>Sigh.</i> ]
Applicant:	The problem is I say a date, that's it, the date goes away from me.
Member:	Do you remember how long you had your salon in [XXX]?
Applicant (in person):	I have had it for years; I am not sure. [ <i>Sigh.</i> ]
Member:	In your statement, you said you opened it around mid-2007. Would that be about right?
Applicant (in person):	Yeah, yeah.
Member:	And before that, what were you doing?
Applicant:	I was working at a salon called [XXX], and after that, I opened the salon.
Member:	And how long did you work at the other salon, roughly?
Applicant:	[ <i>Pause.</i> ] About a year. More or less, around that [sic].
Member:	And what days and hours were you working in your own salon?
Applicant:	At my salon?

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<sup>89</sup> I end each extract where the discussion about timing stopped and the Member moved the applicant on to a new topic.

Member: Yes, when you opened your own salon.

Applicant: From morning, say nine or ten, till six; it depends on the work.

Member: And what days?

Applicant: Ahh ... sometimes all week, sometimes if I had something to do on Sunday, Sunday as well, sometimes Saturday ... No, I always worked Saturdays.

Member: Do you remember how long before you left [the country] you stopped working at the salon?

Applicant: *[Long pause.]* Few months.

*[Applicant interjects to correct the interpreter as she has heard 'four months' as the response but the interpreter confirms she has said 'a few months' and the applicant confirms it was about this amount of time.]*

Applicant (in person): Sorry I don't, I don't...

Member: So do you remember roughly what month the salon closed?

Applicant (in person): Um, um I think. *[Pause for three or four seconds.]* I think... I think three or four, I think March or April.

Member: In 2004?

Applicant: Yes.

Member: So how long before the salon closed had you stopped working, or were you working right up until it closed?

Applicant: I just stopped working because there was no more work to do, and then after I was attacked I stopped working for about a month. ...

Member: *[Interrupting.]* Sorry, so you were attacked and you stopped working for about a month?

Applicant: About a month and a half.

Member: A month and a half. Sorry, did you then go back to work or was the store closed?

Applicant: The store was closed.

The second excerpt relates to key events in the applicant's life, including the birth of her child, her marriage and her divorce. It strikes me as the Member's attempt to coax the applicant into creating something of timeline. Each time the applicant struggled to recall a particular date, the Member sought a further detail.

Member: And when did you get married?

Applicant (in person): Just a year before my daughter was born, in '87. My daughter was born in '89, maybe in '88, no sorry, no '98.

Member: So your daughter was born in '98?

Applicant: Yes.

Member: So you got married around 1997, is that right?



Applicant: Yes.

Member: And when did you get divorced?

Applicant (in person): Ummm. [*Sigh.*] I remember ... I had a big celebration in 2011.

Member: And how long before that did you actually separate from your husband?

Applicant (in person): [*Pause. Sigh.*] From when he left ... umm, 2007. 2007, yes, '07.

Member: And why did he leave?<sup>90</sup>

The third excerpt relates to the husband's contact with the applicant's daughter. In this extract, the Member tries to establish how many times the husband saw his daughter. The applicant was unable to respond to these questions with any degree of certainty. The Member did not explain why she was asking these questions or why she viewed them to be significant.

Member: Was that the last time that your husband saw your daughter?

Applicant: No, he saw her a lot.

Member: He saw her a lot?

Applicant: After that.

Member: Oh, after that. So when did he see her?

Applicant: [*Pause.*] A few times.

Member: So when was the last time before you left, do you remember roughly how long before you left?

Applicant: [*Long pause.*] I am not quite sure when he saw her the last time. He saw her a few times. Umm, once when he was signing the permission for us, I think that was the last time.

[*Applicant interrupts the interpreter. The exchange is not interpreted.*]

Applicant: He saw her a few times, maybe twice.

These three excerpts demonstrate the extent to which questions about time and quantities are, fundamentally, attempts to sequence events and to 'get the story straight.' The Member repeatedly pressed the applicant to put things in order, even when those things were not 'in order' for the applicant. We can discern this from her responses, and from the indications that the applicant had not reflected on the dates or sequence of events, or how many times a particular event had taken place. Even

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<sup>90</sup> This final question is also an example of a decision-maker moving from closed to open questions, as described above. It demonstrates the extent to which applicants are not warned when or why they will be asked to move from the general to the specific or visa versa.

where questions in the above excerpts on time and timing were not asked in an interrogative manner, or did not ultimately have any bearing on credibility findings, much time was spent on the dates and order of the evidence.<sup>91</sup> The questions were closed and demanded that evidence be temporally located. Yet as the excerpts reveal, neither the order of events nor the exact years or dates of their occurrence were central to Ms Zeidan's understanding of her evidence; she did not actively posit a causative relationship between the events she described. Yet, these factors were central to the decision-maker's reception and interpretation of the evidence. The Member's fixation on timing, combined with the applicant's inability to pinpoint particular years or sequences, makes the applicant appear as uncertain and unreliable.

The timing of events is not necessarily crucial to providing evidence of persecution. Indeed, RRT and IRB guidelines and documents about evidentiary assessment in RSD explicitly set out that the failure to recall the chronology or dates of events should not necessarily be interpreted as discrediting the applicant or the evidence as a whole.<sup>92</sup> My question here has been to what extent questions about time featured during the hearing and how this affected the applicant's presentation of testimony.<sup>93</sup> In this

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<sup>91</sup> In this matter, the applicant alleged that she had a well-founded fear on the basis of three different instances of persecution. While the Member did not make a direct finding as to the applicant's overall credibility, she found two of the three claims not to be plausible and therefore not credible. The applicant's daughter also gave testimony, and in assessing the daughter's credibility, the Tribunal found that 'While the Tribunal has some concerns in relation to the applicant mother's claims which are discussed above, it found the daughter applicant to be a credible and persuasive witness and is satisfied she holds real fears...': *Zeidan* [2014](RRT Decision and Reasons) [93]. In rejecting two out of three of the mother's claims of persecution, the Member did not mention its extensive questioning of the applicant in relation to the timing of events or her failure to remember exact dates or sequences.

<sup>92</sup> Administrative Appeals Tribunal Migration and Refugee Division, above n 60, [30]–[31]: 'A person may remember events that affected him or her most in emotional or physical terms but not necessarily in time sequence. Such confusion and forgetfulness do not necessarily imply that a person is not telling the truth... A person may forget dates, locations, distances, events and personal experiences due to a lapse of time or other reasons'; see also Immigration and Refugee Board, 'Assessment of Credibility in Claims for Refugee Protection' (Legal Services, 2004) [2.3.6].

<sup>93</sup> There is guidance available in relation to questioning applicants deemed to be 'vulnerable', particularly those who are deemed to have a psychological impairment or illness. The Australian Guidelines on Vulnerable Persons provide guidance for accommodating impairments associated with psychological and psychiatric conditions and note that certain psychiatric conditions disrupt the flow of thought and association and can impair memory and 'affect the consistency and coherence of testimony': Administrative Appeals Tribunal Migration and Refugee Division, 'Guidelines on Vulnerable Persons' (2009, updated 2015) [71], [76]. The Guidelines present a detailed account of the differing effects of a number of psychological illnesses and direct Members to ask short, clear questions and to provide applicants with more than one opportunity to recall particular events. They also suggest that to 'assist people who have experienced traumatic events', Members should not rely on 'chronology or dates' but ask about 'other contextual events': [94]. The Vulnerable Persons Guidelines are unique in that they provide numerous *strategies* to assist Members in their conduct of hearings. The IRB's Guideline 8 Concerning Procedures with respect to Vulnerable Persons suggests a number of 'procedural accommodations' (such as varying the order of questioning and providing a Member of a

dataset, it was clear that several decision-makers did not abide by existing guidelines insofar as questions about timing and minor details in relation to dates featured frequently during the hearings. My sample size does not permit me to draw any final conclusions about the effect of the guidelines or the conduct of all hearings; however, for the hearings I observed, questions regarding dates, sequencing and quantities of time did persist as a focal point, and they were often posed in order to test the applicant's knowledge of events, with the expectation that he or she should be able to accurately answer these questions.<sup>94</sup>

Ms Zeidan's claim was ultimately successful. However, the applicant's claims were made on the basis of multiple grounds, and the Tribunal did not accept that there was a 'real chance that the applicant mother (Ms Zeidan) would be seriously harmed if she was returned to Lebanon.'<sup>95</sup> (The Member did find that the applicant daughter held a well-founded fear of persecution in relation to being forced into a marriage against her will.) In the written decision, the Member rejected the credibility of two of the three instances of past harm that Ms Zeidan alleged had been directed against her, but did not make final determination about the mother's overall credibility, writing instead that '[w]hile the Tribunal has some concerns in relation to applicant mother's claims, it found the daughter applicant to be a credible and persuasive witness and is satisfied that she holds real fears.'<sup>96</sup> The decision makes no reference to Ms Zeidan's difficulty with remembering dates or sequences of events, but by implication, her evidence was found to be unpersuasive.

Research into the nature of autobiographical memory has been repeatedly brought to bear on credibility assessment in RSD and on methods of testing asylum-seeker

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particular gender): Immigration and Refugee Board of Canada, above n 57, 4.1. While the Canadian Guidelines do not contain detailed strategies for how the hearing might be run, they direct decision-makers to the RPD's highly detailed guide on questioning victims of trauma: Professional Development Branch Refugee Protection Division, 'Training Manual on Victims of Torture' (Immigration and Refugee Board of Canada, April 2004). Once again, while the Australian Credibility Guidelines direct decision-makers to be 'mindful' or aware of the fact that applicants may have difficulties recalling dates or numerical details, they do not set out how such mindfulness should structure the hearing or shape the testing of evidence: Administrative Appeals Tribunal Migration and Refugee Division, above n 60, [21], [22], [25].

<sup>94</sup> Significantly, often such questioning did not make it into the final decision, nor was it referred to in credibility findings—revealing the gap between the hearings as they occurred and what is recorded in the decisions.

<sup>95</sup> *Zeidan* [2014](Decision and Reasons) [43].

<sup>96</sup> *Zeidan* [2014](Decision and Reasons) [44].

testimony.<sup>97</sup> One of the major effects of trauma is the disturbing and disordering of one's sense of time and timing, and this has been reflected in both jurisdictions' guidelines on vulnerable persons and to a lesser extent, general credibility guidelines.<sup>98</sup> Yet the literature makes clear that despite psychological evidence that confusion regarding dates and times should not be interpreted as evidence of a lack of credibility, applicants' failure to correctly or consistently recall temporal details still forms the basis of credibility determinations.<sup>99</sup> The hearings I observed demonstrated that questions of time and sequence also persist as a means of testing an applicant's evidence during the hearing.

Beyond the significant problems posed by the reliability of memory and the effects of trauma, which render questions about time and sequencing especially difficult for certain applicants to address, the individual's relationship to time is also a cultural phenomenon.<sup>100</sup> Different calendars exist; some people have a sharper awareness of the year and month than others; and individuals' sense of what is a 'long' or 'short' amount of time is highly subjective. One extract from the *Adere* hearing exemplifies a critique commonly made of the questions of time in relation to credibility assessment:

Applicant: One of the things the Delegate raised was the dates; Ethiopia has a different calendar. It's very hard for me sometimes to switch to this calendar; honestly, if you call any Ethiopian and ask them what is the day today, people would say "I don't know." It is not only for me, but the Delegate took it as a point of not believing.

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<sup>97</sup> See especially Hilary Evans Cameron, 'Refugee Status Determinations and the Limits of Memory' (2010) 22 *International Journal of Refugee Law* 469; Hannah Rogers, Simone Fox and Jane Herlihy, 'The Importance of Looking Credible: The Impact of the Behavioural Sequelae of Post-Traumatic Stress Disorder on the Credibility of Asylum Seekers' (2015) 21 *Psychology, Crime & Law* 139; Diana Bögnér, Jane Herlihy and Chris R Brewin, 'Impact of Sexual Violence on Disclosure during Home Office Interviews' (2007) 191 *The British Journal of Psychiatry* 75; Jane Herlihy and Stuart W Turner, 'Asylum Claims and Memory of Trauma: Sharing Our Knowledge' (2007) 191 *The British Journal of Psychiatry* 3; and see generally Judith Lewis Herman, *Trauma and Recovery* (BasicBooks, 2nd ed, 1997).

<sup>98</sup> Ibid. See also above n 92, 93.

<sup>99</sup> The *Beyond Proof* report notes that:

Decision-makers should not assume that an inability to recall a date; or the number of times something occurred; or the frequency with which it occurred; or how long something lasted; or the exact order in which events occurred; is necessarily indicative of a lack of credibility. However, UNHCR's research found that some decision-makers may be disregarding existing scientific evidence about memory in their expectations of what applicants should remember.

UNHCR, 'Beyond Proof: Credibility Assessment in EU Asylum Systems: Full Report' (May 2013) 139.

<sup>100</sup> Walter Kälin, 'Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing' (1986) 20 *International Migration Review* 230, 236; Evans Cameron, above n 97.

Member: Well, that was I think in relation to when you were released from prison, was it? You've told me some other dates today, but the date you said you were released from prison, that was 11 May when you converted, wasn't it?

Applicant: Yes.

In the above excerpt, the applicant mentioned to the Member the cultural nature of one's relationship with time and the difficulty of translating dates across different national or religious calendars. To this, the Member responded by asking the applicant for confirmation of another specific date.

Questions of time and decision-makers' demands for specific times, dates and quantities highlight two points that are relevant to this thesis' overall contention. The first point is the extent to which demands for details about time and sequencing prevented the applicants from putting together coherent narratives by interrupting the evidence being given. The second point is the extent to which the questions revealed a demand for a linear, temporally coherent narrative. Even where an applicant's knowledge of dates and timing did not feature in the final decision, questions of timing continued to feature heavily in the hearings. Questions about time constitute a demand for temporality, such that evidence is expected to be plotted 'in time' and in a manner that posits a causative relationship between sequential events.

### *Jumping Between Topics*

During the observed hearings, decision-makers jumped from one topic to another, frequently without warning or explanation. It is difficult to overstate how extreme certain Members' unexplained shifts between topics were, and how challenging it therefore was to predict or to follow the direction of certain hearings. The applicant and advocates were in no better position than myself with respect to knowing what would happen next. In this section, I extract sections from the *Rostami* hearing before the IRB, which reveal how Ms Rostami was required to deal with the decision-maker's unexplained shifts from topic to topic. These 'topic jumps' appeared to limit the applicant's ability both to comprehend what the decision-maker was asking and to answer the question at hand; the topic jumps certainly did not result in the applicant presenting evidence in a chronological manner. The *Rostami* hearing before the IRB is particularly apposite to the discussion of topic-jumping, as at almost no point in the hearing was the applicant given a chance to discuss, without closed questions from

the Member, the elements of her claim that related to the Refugee Convention definition of a refugee, such as her persecution and causes, her inability to seek assistance from the State and her inability to relocate within Iran. Indeed, at the end of the hearing, the Member asked the applicant's advocate how much time the advocate might need for questioning the applicant. Her advocate responded by stating the Member 'has not asked [the applicant] much about her life'—and so the advocate requested more time than would usually be required.<sup>101</sup>

The *Rostami* hearing certainly did not start at the beginning of the 'narrative of becoming a refugee' discussed in Chapter Four. That is, the hearing did not begin by exploring the applicant's experience of persecution or harm. At the very outset of the *Rostami* hearing, the applicant's advocate informed the Member that the original version of a particular piece of documentary evidence (to do with the applicant's religious conversion from Islam to Christianity some time prior) was not on the file. A short discussion then took place to organise a copy of the original to be sent to the IRB after the hearing.<sup>102</sup> Following on from the discussion about the document that related to the applicant's religious conversion, the Member opened the hearing with a discussion of the applicant's religious conversion, which had taken place after her arrival in Canada:

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|--------------|---|
| Member:      | Since we are already talking about religion, I would like to ask you a question about that. In your PIF you indicated you were Muslim. Do you still consider Islam is [sic] your religion or one of them? |
| Applicant:   | No.   |
| Member:      | Okay. What is your religion now?  |
| Applicant:   | I am an Evangelical from the Protestant branch of new-born or born-again Christians.  |
| Member:      | Um, we'll get back to that later, but I will ask you some general questions now. When did you leave your country?   |
| Applicant:   | Ummm, in the Iranian calendar, it would be [XXX]. [ <i>Interpreter translates and there is a long exchange in Farsi between the applicant and the interpreter.</i> ]                                      |
| Member:      | What is the conversation?   |
| Interpreter: | It's about the year. She's telling me in the Farsi calendar, and I'm converting it, and we have a problem.  |

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<sup>101</sup> The Member replied to this by stating that he had clearly set out the 'issues' with her claim as he saw them, and proceeded to reiterate the 'issues' that needed to be addressed.

<sup>102</sup> After this, a number of other standard pre-hearing exchanges took place, including the applicant confirming the contents of her PIF.

Once the year that the applicant had left her country of origin was agreed upon, the Member asked an open question about the applicant's 'problems', but soon after her answer, the Member redirected her to discuss a different aspect of her claim:

- Member: Ms Rostami, when did your problems begin in your country?
- Applicant: About six months after we married, we had lots of fights, and really bad fights.
- Member: Wait, just to place this in context, when did you get married?
- Applicant: 2000.
- Member: Continue, go ahead.
- Applicant: Even when I divorced him, he would still harass me, and he kept calling me, following me, everywhere I went, and because he worked for the Government I had a feeling he was controlling everything I did, and sometimes I even felt he was controlling my phone. Due to this harassments [sic], I lost my job, and also a person I was in a relationship with because he worked for the Government, and I took part in election demonstrations in 2009, and I also thought ...  
[interrupted by the Member]
- Member: Wait, did you lose a relationship with someone you were going to marry?
- Applicant: Yes, it was this reason why we didn't marry [sic].
- Member: Yes, but was it your intention to marry this man [who was] scared away by your ex-husband?
- Applicant: Yes, my intention was to get married, but I was only with him six or seven, months and I wanted to get to know him more before I married, as I didn't want the same experience as in the last marriage, and I wanted to get to [pause] to know him, to do things together. ...
- Member: Umm, okay, we'll get back to that a little later. Who do you fear in your country?

This opening excerpt reveals the unpredictability of the conduct of the hearing for both the applicant and the applicant's advocate—and given the seemingly staccato and impulsive nature of the Member's topic shifts, perhaps for the Member also.<sup>103</sup>

The above dialogue took place in the first two minutes of the Member's questioning of the applicant, after the opening formalities were concluded. In that short time, the

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<sup>103</sup> This corresponds with the Canadian Council for Refugees (CCR) research, which found that, 'most claimants described a question-answer format at their hearings' that did not necessarily follow the sequence of their claims. The report found that 'for some claimants, this model was not ideal because it gave the Board Member control over their narrative, and sometimes prevented them from saying what was important to them.' Applicants in the CCR study also described how a focus on 'facts' such as dates or addresses, fragmented and depersonalised their accounts: Canadian Council for Refugees, 'The Experience of Refugee Claimants at Refugee Hearings at the Immigration and Refugee Board', above n 30, 38–9.

topics covered included the applicant's religion; the date she left the country; the 'problems' in her marriage; the actual date of her marriage and whether her ex-husband had prevented her from pursuing a subsequent relationship. Indeed, it appears that the hearing began with the issue of religion because some documents about the applicant's religion happened to be absent. When the applicant began to explain her religion in greater depth, the Member redirected her to 'some general questions' and asked the closed question, 'When did you leave your country?'

The above excerpt ended with the Member asking the applicant whom she feared in her country. In response to this, the applicant listed that she feared both the Government and her husband, and then attempted to explain why she feared her husband. The Member then asked her to stop talking about her husband and to explain her fear of the government:

- |            |   |
|------------|---|
| Member:    | What kinds of problems with the regime would you have?<br>Harassment from your husband is what I am hearing so far.   |
| Applicant: | During the election of 2009 and after, I used to take part in demonstrations, and he was against it, and we would have terrible fights, and after he would beat me up.  |
| Member:    | I didn't catch that.  |
| Applicant: | He would beat me up.  |
| Member:    | So that's your husband again. Can you tell me about problems you would have with the regime other than your husband?  |
| Applicant: | My husband works in the [XXX] in Iran and he would know when I left Iran, when I came back, and if he finds out that I changed religion, he would inform the Government, he would harass me again, call me and generally harass me. |

When the applicant continued to talk about her husband, the Member changed the topic altogether and asked her again when she decided to leave Iran and after that, what countries she had visited outside of Iran 'since her problems began.'

The zigzagging course of this hearing reveals that the applicant, while required to give evidence, did not have any power to direct how evidence was given or what would be addressed and when.<sup>104</sup> Ms Rostami did not discuss any evidence outside of

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<sup>104</sup> An 'x-ray' summary of the topic sequence of the Member's questions in the *Rostami* hearing, following on from the questions above, is as follows: the details of the applicant's post-divorce relationship; whom the applicant feared in Iran; what would happen if the applicant returned to Iran; why the Iranian regime would know of the applicant; the date the applicant decided to leave Iran; why



the topics raised by the Member. Even when Ms Rostami began to answer the question about her religion at length, the Member stopped her. In a similar vein, in response to the question about when the problems in her marriage had begun, the applicant described these problems in some detail and arguably attempted to place these events within some form of a chronology. The Member, however, chose not to let this narrative continue and redirected her to a new topic.<sup>105</sup>

Indeed, ‘topic jumping’ reveals decision-makers’ directive role in the hearings. In each Member’s capacity to move between topics, often without explanation, the effects of the previous three forms of fragmentation come together to confirm the unpredictability of both the course of the oral hearing, and the *nature* of decision-makers’ questioning. In several of the hearings I attended in person, the applicant’s advocate took a moment prior to entering the hearing in order to explain to the applicant (or to remind her or him) how the hearing would run. Sometimes this advice was given on the basis of the advocate’s experience of the particular member listed for the hearing; at other times, the explanations were more general. In the *Mbassi* hearing before the RRT, the applicant explained just before the hearing began that he was nervous about how the hearing would go. In response, his advocate gave him a brief account of RRT procedure, describing the order of questioning and the role of the Tribunal officer who opens and closes the hearing, and also explaining that the

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she left Iran; the date of the applicant’s marriage; countries she had visited since her ‘problems’ with her husband had started; details of each country visited; details of an earlier attempt to flee Iran; the applicant’s relationship with her smuggler/agent; why she chose Canada; details of her ex-husband’s job; details of her ex-husband’s employer; the relationship of her ex-husband’s employer with the Iranian regime; the ex-husband’s alleged stalking of the applicant; the applicant’s employment history; the ex-husband’s practice of making unwanted calls to the applicant; the applicant’s place of residence in Tehran; the places of residence, employment and marital status of her siblings; details of her family home and the applicant’s relationship to her parents; whether the applicant changed her telephone number or the family telephone number to avoid her ex-husband; the decision-maker’s summary of her claim as he sees it; the applicant’s seaside holiday post-divorce with her family; the location and content of the applicant’s passport; pages destroyed in her passport; details of applicant’s overseas travel prior to departing Iran (again); her ex-husband’s knowledge of this travel; her name on an airport blacklist in Iran; the date of the applicant’s divorce (again); her previous applications for a (non-protection-related) visa to Canada; how the applicant accessed her ex-husband’s employment documents; the applicant’s employment history; her allegations of harassment at a former place of employment; the inconsistent spelling of the applicant’s husband’s name in documents; the applicant’s current religion; her current religious practice; and her view about the afterlife, according to her Christian religious beliefs.

<sup>105</sup> One further, persistent instance of ‘topic jumping’ was the manner in which breaks were inserted by decision-makers into the hearing. There was at least one break in every hearing I observed. The break was often announced with little warning, and more significantly, when the hearing resumed, Members often began questioning applicants without a lead-in or introduction to the resumed hearing. There was no way of knowing what the topic of questioning would be once the applicant returned, and decision-makers often restarted the hearing on an entirely different topic to the topic which preceded the break.

applicant would have to swear an oath or an affirmation. The advocate further explained that the hearing would not be ‘like a court’ because it was an informal hearing. Ultimately though, the advocate did not explain the hearing in great detail. This was perhaps because the advocate herself could not know exactly how the hearing would run.

As it turned out, the *Mbassi* hearing was particularly long, and the Member’s questioning style was interrogative and hostile. The Member asked a large number of closed questions, and asked questions in a tone that was frequently disbelieving and impatient. Questions about several topics were repeated and even returned to despite the applicant’s inability to answer, and the applicant was given no opportunity to outline his claim without his answers being interrupted or fragmented. As soon as we left the hearing, the applicant said repeatedly ‘that was not what I was expecting.’ The applicant’s surprise at how the hearing ran lingered, and he repeatedly expressed his shock as we left the RRT building.

## **Conclusion**

The meaning imparted by any narrative depends upon the context in which it is told, or on what Ewick and Silbey term ‘norms of performance and content.’<sup>106</sup> The response of Mr Mbassi at the close of his hearing, described above, reveals the unpredictability of the hearing as a narrative occasion. Narrative theory’s attention to the spaces (or occasions) of narrative illuminates just how difficult it might be for a refugee applicant in an oral hearing to create an effective narrative if the terms of that narrative’s telling are unknown, or worse still, entirely unpredictable. At the outset of this chapter, I demonstrated that what decision-makers told applicants at the start of the hearing, about the terms of the hearing and the applicant’s role within it, did very little to accurately inform applicants about their role. I argued that this fact is particularly troubling in instances where applicants are led to believe they will have the opportunity to present their narratives on their own terms, but are never given this opportunity. While the RSD hearings are governed by a narrative demand—whereby applicants are expected to present their experiences in a coherent narrative form—in attending to how the RSD hearings actually run, we see that applicants are frequently impeded from presenting coherent narratives. Applicants’ evidence in the hearings I

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<sup>106</sup> Ewick and Silbey, above n 2, 197.

witnessed was fragmented and decision-maker-driven and outside of a scripted opening section, how the oral hearings ran in each jurisdiction was subject to decision-makers' discretion.

The structure, tone and focus of the hearings I observed varied significantly. My findings corroborate concerns expressed in the credibility literature about the adversarial (rather than inquisitorial) nature of RSD hearings. In the hearings I observed, repetitive, fragmented questioning; the tone and form of questions; decision-makers' focus on timing, dates and sequencing; and lurching between topics frequently gave rise to an interrogative or unreceptive atmosphere. This contrasted with decision-makers whose questions were generally open-ended, whose tone was receptive, who engaged in practices of affirming or acknowledging answers, and who signposted between questions and topics. Decision-makers' practices of fragmenting and impeding narrative-creation put applicants in the impossible position of being asked to prove their credibility by presenting their evidence in narrative form, but not being given an opportunity to articulate such narratives. Indeed, Chapter Three highlighted the fact that the oral hearing is key site for credibility testing within RSD. While the written application provides some opportunity to present a narrative, it is during the oral hearing that that narrative is ultimately tested.

My critique of the contradictory mandates placed upon refugee applicants gathers force in the following pages, the thesis's final chapter. In the final chapter, I argue that alongside the demand for evidence presented in narrative form, decision-makers evinced an expectation that applicants would be able to tell particular kinds of narratives and take on particular narratorial voices. Specifically, the chapter traces instances in the hearings when applicants were expected to recount their evidence as though they were omniscient narrators, providing plausible and rational accounts of their own *and others'* decisions and actions. In tracing this element of the hearings, I argue that the presentation and assessment of refugee testimony is best understood not only by reference to narrative theory and forms, but also by thinking about testimony through the concept of narrative genre. In so doing, I explore the narrative voice expected of refugee applicants, and I return again to the 'narrative of becoming a refugee' first discussed in Chapter Four. I argue that the genre of refugee testimony relates closely to the genre of human rights discourse, in which refugee applicants

must above all demonstrate that they possess the qualities of rational, autonomous and enlightened narrators who are worthy of refugee status and entry into the host state.

## CHAPTER SEVEN. BEYOND THE DEMAND FOR NARRATIVE: THE GENRE OF REFUGEE TESTIMONY

### Introduction

Over the past three chapters, I have attempted to give some sense of the ways in which narrative expectations frame the assessment of refugee testimony. By focusing on the oral hearings that formed the dataset of this thesis, I have shown how the narrative qualities of an applicant's evidence constituted one basis upon which testimony was heard and judged. Refugee applicants are not only required to conform to expectations of content in presenting testimony in support of a claim to protection, but also to speak in particular forms. In the most recent chapter, I explored instances where applicants were expected to create narrative and yet were thwarted in their attempts to do so. The impossible narrative position of the refugee arises from the specific conditions of speech within the administrative hearing, one of which is the power of the decision-maker to direct and control applicants' testimony.

As outlined in Chapter One, my methodology in this thesis incorporates a critique of the claim that law is 'separate' from literature and of conceptions of law as a stable and closed system of rules and institutions, that must seek out literature and literary forms, as a source of salvation, virtue and moral good.<sup>1</sup> In this chapter, I seek to build on my argument about law's relationship with literature, as neither uni-directional nor necessarily remedial, by thinking through the *genre* of testimony that is demanded of refugee applicant during the oral hearing. Specifically, I argue that attending to the generic elements of the narratives expected of refugee applicants provides a further means by which to understand how refugee speech is tested and judged during the oral hearing. In so doing, I seek to develop one of my core arguments that refugee applicants' narratives are contested, or in certain cases recast, when they do not accord with decision-makers' shifting and often invisible narrative standards.

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<sup>1</sup> As Mark Antaki puts it, '[t]he critical work of law and literature, it seems to me, consists not in romantically completing law with literature, ethics with aesthetics, but in confronting how we have been disciplined to separate them, to separate sense from sensibility': Mark Antaki, 'Genre, Critique, and Human Rights' (2013) 82 *University of Toronto Quarterly* 974, 978.

Chapter One also traced the attempts made within narrative theory to define the narrative form. In that chapter, I noted that once we have abandoned a taken-for-granted understanding of narrative, it is difficult to articulate a precise and durable definition of the concept. Indeed, one might say that any ‘intersubjective linguistic exchange’ located in time and place might be classed as narrative, yet this definition does little to distinguish narratives from other textual forms.<sup>2</sup> Part of my argument in this chapter is that, given the breadth of what constitutes a ‘narrative,’ the claim that the legal processes of RSD demand that refugee applicants present evidence in a ‘narrative form’ is, if left at that, almost axiomatic. So, this chapter seeks to provide a more precise account of the *kind* of narrative that is required of refugee applicants by employing the concept of genre. Alexandra Georgakopoulou, critiquing the tendency of narrative-based analyses to essentialise and homogenise all narratives as ‘one archetypal genre,’ observes that such analyses rely on a narrowly defined version of narrative as a well-structured story, with a beginning, middle and end, building up to a complicating event that is usually resolved in the end.<sup>3</sup> The analysis of narrative that Georgakopoulou critiques has been central to my exploration of refugee testimony in this thesis. In this chapter, though, I demonstrate that a more detailed investigation of narrative *genre* within refugee testimony and decision-making raises important questions about the origins of the conventions that govern how refugee applicants give testimony, and how these conventions relate to existing genres or styles of narration.

This exploration of genre in refugee testimony within the RSD oral hearing focuses on two aspects of the form of refugee speech. The first aspect is the narratorial voice with which refugee applicants are expected to speak, which I argue is that of an omniscient narrator. That is, as narrators of their own evidence, refugee applicants are not only required to recount events; they are also required to explain why they took certain courses of action and to explicate decisions that the decision-maker deems ‘implausible.’ As well as this demand for self-possession and interior knowledge,

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<sup>2</sup> Martin McQuillan (ed), *The Narrative Reader* (Psychology Press, 2000) 8–9.

<sup>3</sup> Alexandra Georgakopoulou, ‘Narrative Genre Analysis’ in Lisa M Given (ed), *The Sage Encyclopaedia of Qualitative Research Methods* (Sage Publications, 2008) 541; and see further Alexandra Georgakopoulou and Anna De Fina, ‘Analysing Narratives as Practices’ (2008) 8 *Qualitative Analysis* 379.

applicants are also required to account in their narratives for the decisions and interior worlds *of others*. My contention is that these demands call to mind the generic device commonly associated with certain realist novels, of reliance upon an ‘omniscient narrator able to adjudicate the development of the narrative from a beginning to a middle to an end,’ where subjects are ‘knowing, responsible and autonomous,’ in full possession of themselves and of their language.<sup>4</sup> As with the processes of ‘topic jumping’ and fragmentation I charted in the previous chapter, the demand to account for oneself and others was constant throughout the hearings, and constituted a further expectation about *how* applicants present and explain their evidence.

The second expectation of refugee narrative that I explore here is the style of plot that applicants’ evidence was expected to form. By returning to the ‘narrative of becoming a refugee’ described in Chapter Four, I argue that the genre demanded of refugee testimony is similar to what Joseph R Slaughter has described as ‘the genre of human rights discourse.’<sup>5</sup> Drawing on Slaughter’s work and other genre-based critiques of human rights discourse I explore the relevance of the genre of the realist novel, specifically of the *Bildungsroman*, to ‘the narrative of becoming a refugee’ addressed in Chapter Four.<sup>6</sup>

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<sup>4</sup> Maria Aristodemou, *Law and Literature: Journeys from Her to Eternity* (Oxford University Press, 2000) 6.

<sup>5</sup> See Joseph R Slaughter, *Human Rights, Inc.: The World Novel, Narrative Form, and International Law* (Fordham University Press, 2007); Joseph R Slaughter, ‘Enabling Fictions and Novel Subjects: The Bildungsroman and International Human Rights Law’ (2006) 121 *Publications of the Modern Language Association* 1405; and see also Robert Meister, *After Evil: A Politics of Human Rights* (Columbia University Press, 2013); Samuel Moyn, *The Last Utopia* (Harvard University Press, 2010); Karin Van Marle and Stewart Motha (eds), *Genres of Critique: Law, Aesthetics and Liminality* (Sun Press, 2014); Antaki, above n 1; Elizabeth Swanson Goldberg and Alexandra Schultheis Moore (eds), *Theoretical Perspectives on Human Rights and Literature* (Routledge, 2013). The term ‘human rights discourse’ is used by Robert Meister in *After Evil: A Politics of Human Rights* (ibid). I note here that much of this work fits into a broader field, which critiques human rights discourse more generally. I do not address that literature here, instead focusing on various assessments of the *genres* of contemporary human rights; however, see further Samuel Moyn, *Human Rights and the Uses of History* (Verso Books, 2014); Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press, 2013); Upendra Baxi, *Human Rights in a Posthuman World: Critical Essays* (Stranger Journalism, 2009); Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press, 2009); Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press, 2003); Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge, 2007); Ben Golder, ‘Beyond Redemption?: Problematising the Critique of Human Rights in Contemporary International Legal Thought’ (2014) 2 *London Review of International Law* 77.

<sup>6</sup> My argument in this chapter also draws on and echoes the work of Jenni Millbank, Laurie Berg, and

This final chapter explores the above questions about RSD genres and narrativity in three parts. Part One explains how the concept of genre informs this chapter. While genre is, like narrative, a difficult term to define, if we cultivate an awareness of the multiple genres at play within state law and its judgments, we gain another means by which to critique the RSD process and the oral hearing. And even though the realist novel is a genre that notoriously resists classification, in Part Two I argue that the narrative voice often (but not only) associated with the realist novel, which displays the literary quality of omniscience and provides access to the interiority of characters, was frequently demanded of refugee applicants.<sup>7</sup> Specifically, in that part, I engage in a close reading of the *Zahau* hearing before the RRT in order to demonstrate how the demand for omniscience manifested during the observed hearings.

Finally, in Part Three, I argue that literature addressing the ‘genre’ of human rights law and discourse also informs the genre expectations governing the testimony given in RSD processes. In particular, work on the ‘mutually enabling fictions’ of the *Bildungsroman* and the narratives of human rights law are productive in explaining

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Robert Barsky, all of whom have addressed these questions of interiority and demands for the presentation of a particular kind of refugee subject in the testimony of onshore refugee applicants. Using ‘law and literature’ (and in particular Ariel Dorfman’s brilliant text, *Death and the Maiden*), Barsky explore questions raised by the assessment of refugee testimony and argues that ‘the transformation of inner experience into narrative through relations with the other’ is an important facet of the process of narrative construction with which refugee applicants must engage. He notes that those who are ‘accused’ in law or involved in legal processes ‘must all learn to construct themselves adequately’: Robert F Barsky, *Arguing and Justifying: Assessing the Convention Refugees’ Choice of Moment, Motive and Host Country* (Ashgate, 2000) 294, 312. In examining the ‘particular issues that arise in eliciting and presenting a refugee narrative when the claim is based upon sexual orientation’, Berg and Millbank found that the narrative ‘being looked for [in sexuality claims] is heavily influenced by Western conceptions of the linear formation and ultimate fixity of sexual identity’ and that there is ‘little awareness of the psychological issues faced by lesbian, gay or bisexual individuals’, which can affect how applicants negotiate such identities and how narratives of self-identity are formed. In particular, they critique: ‘the psychological ‘stage model’ of sexual identity development and examine the pervasive impact it has had upon decision makers’ ‘pre-understanding’ of sexual identity development as a uniform and linear trajectory’: Laurie Berg and Jenni Millbank, ‘Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants’ (2009) 22 *Journal of Refugee Studies* 195, 195–197.

<sup>7</sup> Though cf with Mikhail Bakhtin’s account of the novel as the most accurate approximation of the complex relationship between representation, time, language and experience, through its heteroglossia (multiple voices), multiple temporalities and ‘chronotopes.’ The novel, he writes, ‘reflects more deeply, more essentially, more sensitively and rapidly, reality itself in the process of its unfolding’: Mikhail Bakhtin, ‘Epic and Novel’ in Michael Holquist (ed), Caryl Emerson and Michael Holquist (trans), *The Dialogic Imagination* (University of Texas Press, 1981) 3, 7; and following this approach, see Desmond Manderson, *Kangaroo Courts and the Rule of Law: The Legacy of Modernism* (Routledge, 2012); Robert F Barsky, ‘Narratology and the Convention Refugee Claim: Re-Ontologizing the Subject in Canadian Immigration Hearings Discourse’ (1988) 1 *Discours social/Social Discourse* 265.



the genre of the ‘narrative of becoming a refugee’ that was discussed in Chapter Four.<sup>8</sup> My argument here is that decision-makers are engaging with a culturally contingent genre that is problematic and shot through with implications of power. This imposition of genre is even more troubling when decision-makers do not engage with these forms with a level of awareness.

Finally, in the Conclusion, I return to questions about the relationships between law and literature to ask what *else* literary forms have to offer in the analysis of refugee testimony that is presented in the context of RSD. Not wanting to altogether abandon the hope that *certain* literary forms or indeed narratives can expand our understandings of legal questions, as well as legal forms of rhetoric and speech, I argue that certain literary texts can function to challenge the kinds of testimony that are demanded of refugee applicants. Turning to literature, and particularly to narrative style, is productive not only because aids in understanding the terms upon which refugee testimony is assessed in the specific legal, cultural and political setting of the hearing. Certain texts also offer ways of reading and interpreting the ‘subjects’ of law that do not conclude, or solve, or impart direct moral meaning, and that permit ambivalence, uncertainty and a lack of self-knowledge and self-realisation.

In undertaking this work, I am (still) aware of the admonition that scholarship in law and literature rarely engages in literary analysis at all, or where it does, it tends to instrumentalise simplistic interpretations of literary concepts or literary texts.<sup>9</sup> This is one of the pitfalls of ‘interdisciplinarity,’ which often consists of legal analysis punctuated with what Balkin and Levinson have perhaps too harshly termed ‘a few half-hearted borrowings from other disciplines.’<sup>10</sup> While I do draw upon literary theories of genre in the sections that follow, I make no claim to provide a genealogy or history of genre, or an account of the critical discussions that have accompanied this concept in both literary and cultural theory.<sup>11</sup> Equally, this chapter engages rather

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<sup>8</sup> Slaughter, ‘Enabling Fictions and Novel Subjects’, above n 5.

<sup>9</sup> Robert Weisberg, ‘The Law-Literature Enterprise’ (1989) 1 *Yale Journal of Law & the Humanities* 1, 2–3.

<sup>10</sup> See Jack Balkin and Sanford Levinson, ‘Law and the Humanities: An Uneasy Relationship’ (2006) 18 *Yale Journal of Law & the Humanities* 155, 180.

<sup>11</sup> But see generally Alastair Fowler, *Kinds of Literature: An Introduction to the Theory of Genres and Modes* (Clarendon Press, 1985); John Frow, *Genre: The New Critical Idiom* (Taylor & Francis, 2006);

instrumentally with the genre of the novel, which Virginia Woolf described as ‘this most pliable of forms.’<sup>12</sup> The novel genre has been the subject of vast critical reflection, debate and insight. Engaging closely with this literature is beyond the scope of this chapter, but I hope that the questions raised here act as a beginning not an end to explorations of how the voice and genre of the novel relate to the kinds of narrative expected of refugee applicants, and conceptions of applicants as self-narrating subjects.<sup>13</sup>

## Part One. Genre and the Law

Analyses of law and legal forms have, upon occasion, turned to genre to reveal forms of writing (and of reading) that are implicated in or explain practices of interpretation and/or ‘world-building’ within the law.<sup>14</sup> In this section, to frame my exploration of genre below, I look at the ways in which genre has been argued to be relevant to law and legal authority.<sup>15</sup>

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Wai Chee Dimock, ‘Introduction: Genres as Fields of Knowledge’ (2007) 122 *Publications of the Modern Language Association* 1377.

<sup>12</sup> In *A Room of One’s Own*, Woolf writes:

There is no reason to think that the form of the epic or of the poetic play suits women any more than the sentence suits her. But all the older forms of literature were hardened and set by the time she became a writer. The novel alone was young enough to be soft in her hands—another reason, perhaps, why she wrote novels. Yet who shall say that even now ‘the novel’ (I give it inverted commas to make my sense of the words’ inadequacy), who shall say that even *this most pliable of forms* is rightly shaped for her use?

Virginia Woolf, *A Room of One’s Own* (Granada, first published 1929, 1977 ed) 74 (emphasis added).

<sup>13</sup> I note here that Terry Eagleton writes that even the novel *as a genre* is a contested claim:

A novel is a piece of prose fiction of a reasonable length. Even a definition as toothless as this, however, is too restricted. Not all novels are written in prose. ... As for fiction, the distinction between fiction and fact is not always clear. And what counts as reasonable length? At what point does a novella or a long short story become a novel? ... The truth is that the novel is a genre which resists exact definition. This in itself is not particularly striking, since many things—‘game,’ for example, or ‘hairy’—resist exact definition. It is hard to say how ape-like you have to be to qualify as hairy. *The point about the novel, however, is not just that it eludes definitions, but that it actively undermines them. It is less a genre than an anti-genre. It cannibalizes other literary modes and mixes the bits and pieces promiscuously together.*

Terry Eagleton, *The English Novel: An Introduction* (Blackwell, 2005) 1 (emphasis added).

<sup>14</sup> See Slaughter, *Human Rights, Inc.*, above n 5; Moyn, above n 5; Van Marle and Motha, above n 5; and see also Lynn Hunt, *Inventing Human Rights: A History* (WW Norton & Company, 2008); Martha C Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (Beacon Press, 1995).

<sup>15</sup> On the importance of attending to form and style, Mark Antaki writes that ‘of course, Lon Fuller’s work reminds us that sensitivity to questions of “form,” including especially to the form of “rules,” is not new to so-called legal theory’: Antaki, above n 1.

The concept of genre does not have a settled definition.<sup>16</sup> Like narrative, genre is both part of our everyday vocabulary and also a term of art that is used across disciplines. As Mary Chamberlain and Paul Thompson write, '[g]enre is not an easy matter to discuss; on the one hand the term is relatively new for social scientists, while on the other it has a very long and at times confusing history in literature and the visual arts.'<sup>17</sup> The concept of genre goes back to the basic distinction made in Ancient Greece between the dramatic, epic and lyrical forms of literature, 'a distinction made partly in terms of mood and theme, and partly of mode of presentation and the relationship with the audience.'<sup>18</sup> Chamberlain and Thompson note that genre is most recently understood,

not as a rigid form of classification but more akin to language, with its fundamental flexibility, but at the same time [as creating] common assumptions between writer, speaker and audience of conventions, manner and tone, forms of delivery, timings, settings, shapes, motifs and characters.<sup>19</sup>

In their volume exploring the potential of critique at the intersection of law, aesthetics and politics, Stewart Motha and Karin Van Marle employ genre as means of assessing and thinking through different forms of critical legal theory. In so doing, they explain the way in which genre is a normative force, creating a commitment to certain forms and conventions even when those rules and conventions are undermined or broken:

To speak of genre is to draw a line, invoke a limit, mark a boundary. As Derrida pointed out, 'when a limit is established, norms and interdiction are not far behind.' A genre announces a line of demarcation, belonging, purity and also the anomaly that lies beyond that limit. Even 'mixing' genres reintegrates the line: a transgression that reinscribes the norm, reinforcing difference. This is an axiom of the law of genre.<sup>20</sup>

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<sup>16</sup> Indeed, much writing on genre begins by stating that genre has a vexed or 'spotty' history. See for example Mary Chamberlain and Paul Thompson, 'Introduction' in Mary Chamberlain and Paul Thompson (eds), *Narrative and Genre* (Routledge, 1998) 1.

<sup>17</sup> Ibid 1.

<sup>18</sup> Ibid. Though, as they note, genre became a term that could be applied to almost all written forms of literature, even though it originally referred to three spoken or theatrical forms: at 1.

<sup>19</sup> Ibid 4.

<sup>20</sup> Stewart Motha and Karin Van Marle, 'Introduction' in Karin Van Marle and Stewart Motha (eds), *Genres of Critique: Law, Aesthetics and Liminality* (Sun Press, 2014) 17, 19; citing Jacques Derrida, 'The Law of Genre' in Derek Attridge (ed), *Acts of Literature* (Routledge, 1992) 221, 224. Wai Chee Dimock agrees with Derrida that the law of genre is an impossible law, since it contains within itself a 'principle of contamination.' She suggests that genre is best invoked 'less as a law, a rigid taxonomic landscape, and more as a self-obsolating system, a provisional set of rules that will always be bent and pulled and stretched by its many subsets': Wai Chee Dimock, 'Genre as World System: Epic and Novel on Four Continents' (2006) 14 *Narrative* 85, 86. Dimock also cites Alan Fowler, who rather charmingly writes, '[g]enre is much less of a pigeonhole than a pigeon,' and that it is best understood not as 'permanent classes,' but as 'families subject to change': Fowler, above n 11, 37.

A focus on the role of genre in law provides a way of discussing which narratives are successful or persuasive in a particular cultural and social context. Like law and literature itself, such a focus can be seen as a subset of the turn to language and society in law, and of ‘law and rhetoric’ scholarship. In her piece arguing that we should read the law as an archive, Honni van Rijswijk writes that, ‘[l]aw’s archive is a source of authority, power, and control, and is an active and productive domain.’<sup>21</sup> She argues that by reading law as an archive, we can see that law and its authority exist within the context of other archives, as well as other genres.<sup>22</sup> Following van Rijswijk’s approach, my argument is that the demand for narrative in refugee testimony implicates certain genres and generic devices, particularly the omniscient narrator and the journey towards self-possession and sovereignty in the *Bildungsroman*, in how the law reasons and judges (in this case) refugee applicants. Recognising that state law draws upon particular practices of representation allows us to make visible ‘law’s genres and logics’ and to challenge representations of state law as a genre that necessarily grants access to the truth.<sup>23</sup> That is, we can challenge the extent to which legal authority governs in a realist register or as form of ‘aggressive realism,’ as van Rijswijk describes it.<sup>24</sup> In this chapter, I argue that the law plays a part in requiring particular subjects to speak in culturally specific, recognisable generic forms *in order* for such subjects to be heard and for their stories to be deemed plausible—or put in terms of work on the genre of human rights narratives, in order to receive ‘our’ sympathy.<sup>25</sup> This attention to literary genres is quite distinct from

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<sup>21</sup> Honni van Rijswijk, ‘Archiving the Northern Territory Intervention in Law and in the Literary Counter-Imaginary’ (2014) 40 *Australian Feminist Law Journal* 117, 119. In presenting the law as archive, Van Rijswijk draws on Foucault, who describes the archive not just as ‘that whole mass of texts that belong to a single discursive [in this case, legal] formation,’ but argues that the archive should be thought of as the ‘law of what can be said, the system that governs the appearance of statements’: Michel Foucault, ‘The Statement and the Archive’ in Sheridan Smith (tran), *The Archaeology of Knowledge and the Discourse on Language* (Pantheon Books, 1972) 129; van Rijswijk, 119.

<sup>22</sup> van Rijswijk, above n 21, 119.

<sup>23</sup> Ibid 120.

<sup>24</sup> Ibid 127. As van Rijswijk puts it: ‘Law’s archive as “commandment” suggests that the genre of law is a certain kind of aggressive realism. The legal archive is a domain in which social relations and inequalities are structured and adjudicated, and in which law asserts access to a reality that law alone can adjudicate and resolve’: at 122.

<sup>25</sup> For a critique of Lynn Hunt’s turn to the 19<sup>th</sup>-century epistolary novel as a further example of an ‘uncritical turn to genre,’ see Moyn, above n 5, 6–7; Antaki, above n 1, 978–82. Hunt connects the

turning to pieces of literature on the rather optimistic and even imperial basis that they allow us to empathise with particular subjects or to see the ‘other,’ which is at times how genre has been analysed (or utilised) within legal scholarship.<sup>26</sup>

In seeking out traces of genre-based expectations within RSD and refugee applicant testimony, I am aware of the contingency of genre and of the many different subgenres that fall under the broad, culturally imprecise and sometimes unhelpful banner of the realist novel. In Jacques Derrida’s essay on genre, he writes that there is no such thing as a pure or natural genre; instead, genre arises where ‘one has deemed natural structures or typical forms, whose history is hardly natural but, rather, quite to the contrary, complex and heterogeneous.’<sup>27</sup> At the same time, though, Derrida observes that ‘a text cannot belong to no genre, it cannot be without or less a genre,’ since ‘[e]very text participates in one or several genres, there is no genreless text; there is always a genre and genres, yet such participation never amounts to belonging.’<sup>28</sup>

## **Part Two. Accounting for Oneself and Others: Omniscience in the Oral Hearings**

This section explores the demand that refugee applicants display narratorial omniscience during oral hearings, that is, that they access and articulate the interior worlds of themselves and others across time. In the hearings I observed, there was a requirement that applicants account for and explain not only their own behaviour but

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epistolary novel with the rise of human rights because, as she argues, it ‘encouraged a highly charged identification with the characters and in doing so enabled readers to empathize across class, sex, and national lines’: Hunt, above n 14, 34.

<sup>26</sup> My approach here is helpfully understood in contrast to Martha Nussbaum’s argument in her book *Poetic Justice* that the content and genre of the Anglo-American realist novel is able to teach its readers empathy and social justice. In that text, Nussbaum argues that exposure to the lives of characters within the realist novel (Dickens’s *Hard Times* in particular) enlarges a lawyer’s sensibility and understanding of human life in a (positive, empathetic) manner, one that the study of law without these texts cannot achieve. Manderson is ardent in his critique of this approach, arguing that Nussbaum treats the realist novel as an ‘unproblematic vehicle for information about people’s lives, and for the truth of their particular perspective’: Desmond Manderson, ‘Mikhail Bakhtin and the Field of Law and Literature’ (2012) 8 *Law, Culture and the Humanities* 1, 7. I agree with Manderson but in Nussbaum’s defence, she is hardly the first scholar to treat fictional narratives as a source of teaching for the law, particularly where such voices or accounts are otherwise inaccessible to or not sanctioned by the law. Though, I think here, the critique is levelled at her invocation of genre (the realist novel), followed by the sidelining of form in favour of a literature-as-fact or evidence approach.

<sup>27</sup> Jacques Derrida, ‘The Law of Genre’ (1980) 7 *Critical Inquiry* 55, 60.

<sup>28</sup> Ibid 65. He goes on to note that this lack of belonging is not ‘because of an abundant overflowing or a free, anarchic, and unclassifiable productivity, but because of the trait of participation itself, because of the effect of the code and of the generic mark’: at 65.

also the behaviour of other people who featured in their evidence. This requirement to account for themselves and others formed part of a further expectation that applicants could and would explain their own and others' decisions and interior worlds in order to make them understandable, reasonable and therefore plausible to the decision-maker.<sup>29</sup> I refer to literature on the omniscient narrator and interiority within the eighteenth- and nineteenth-century realist novel as I demonstrate how the demand for applicant omniscience was exemplified in the *Zahau* hearing before the RRT.

#### *i. Omniscience and the Refugee-as-Narrator*

The demand that applicants act as omniscient narrators was a dominant theme in my analysis of the dataset for both the IRB and the RRT. In this section, I explore the oral hearing of Ms Zahau, which took place before the RRT, with reference to literary theory that explains and critiques the narratorial characteristic of omniscience and the omniscient narrator.<sup>30</sup> Paul Dawson notes that, despite orthodox accounts of the omniscient narrator that locate the phenomenon in the eighteenth- and nineteenth-century novel, the term has taken on various meanings and come to describe different features of narrative voice and focalisation depending on the period and context to which it is applied.<sup>31</sup> In tracking contemporary theoretical debates about omniscience and its inexactitudes, Dawson cites Jonathan Culler's list of four textual phenomena that are understood as constituting omniscience in narrative: the performative authority of reliable narrative declarations about the fictional world; the reporting of

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<sup>29</sup> See, on this point, Matthew Zagor, 'Recognition and Narrative Identities: Is Refugee Law Redeemable?' in Fiona Jenkins, Mark Nolan and Kim Rubenstein (eds), *Allegiance and Identity in a Globalised World* (Cambridge University Press, 2014) 311. Zagor draws on Judith Butler, in making his argument that the fact that failing to tell a story may result in a 'legally-sanctioned return to violence and possibly death' creates a 'crucial self-narrating imperative.' He writes that RSD 'forces a novel, creative form of 'self'-reflection – an accounting as Judith Butler calls it.' See also Barsky, *Arguing and Justifying*, above n 6, 312; Berg and Millbank, above n 6, 316–17; Judith Butler, *Giving an Account of Oneself* (Fordham University Press, 2005).

<sup>30</sup> Paul Dawson, 'The Return of Omniscience in Contemporary Fiction' (2009) 17 *Narrative* 143, 144; see also Paul Dawson, *The Return of the Omniscient Narrator: Authorship and Authority in Twenty-First Century Fiction* (Ohio State University Press, 2013).

<sup>31</sup> Dawson writes that despite these variations in meaning, literary theorists are nonetheless accustomed to 'an historical trajectory of the novel which holds that modernist and postmodernist fiction throughout the twentieth century can be characterised, in part, as a rejection of the moral and epistemological certainties of omniscient narration.' More generally, the article argues that there has been a 'prominent reappearance of the ostensibly outmoded omniscient narrator' in contemporary British and American fiction, and that as a result of omniscience's outmoded status, the omniscient narrative voice has not been analysed outside of its use in pre-20<sup>th</sup>-century fiction: Dawson, 'The Return of Omniscience in Contemporary Fiction', above n 30, 143.

characters' private thoughts 'such as are usually inaccessible to human observers'; overt, self-reflexive and authorial narration 'where the narrator flaunts her godlike ability to determine how things turn out'; and the synoptic overview of events as a means of producing a kind of universal wisdom.<sup>32</sup> While Culler's purpose in describing these multiple elements is to argue that the term 'omniscience' is ultimately unhelpful (because it cannot adequately cover each of these elements of narrative style),<sup>33</sup> these multiple meanings or implications of the term 'omniscient narrator' are still useful to my argument that a version, or indeed versions of omniscience, are required of refugee applicants.<sup>34</sup>

Two of Culler's elements of omniscience (cited above) that were demanded of refugee applicants during the hearings I observed were, first, the performative authority of reliable narrative declarations about the world, and second, the reporting of each character's private and internal thoughts.<sup>35</sup> This approach to omniscience follows Gérard Genette's formulation of omniscient narration, which defines it as a mode of focalisation where the 'narrator knows more than any character, or more exactly, *says* more than any of the characters know.'<sup>36</sup> Decision-makers conspicuously and repeatedly asked refugee applicants in the observed hearings to narrate their own *and* other characters' (or actors') private thoughts and motivations,

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<sup>32</sup> Jonathan D Culler, 'Omniscience' (2004) 12 *Narrative* 22, 26.

<sup>33</sup> Culler agrees in part with Nicholas Royle, who first employed the term 'telepathy' instead of the concept of omniscience, and who argues that telepathy 'calls for a quite different kind of critical storytelling than that promoted by the religious, panoptical delusion of omniscience': Nicholas Royle, *The Uncanny* (Manchester University Press, 2003) 261; Culler, above n 32, 29. The concept of telepathy, alongside the more familiar but perhaps less specific 'omniscience,' works well to explain the instances that I extract below—and it is a helpful idea to keep in mind when reading exchanges between decision-makers and applicants.

<sup>34</sup> Dawson notes that Culler also objects to the theism and to the analogy with God that omniscience implies. Dawson does not share Culler's anti-theism in relation to the term, since 'none of the existing alternatives quite manages to encompass the narrative freedom (in terms of panoramic scope and narratorial judgement) which the trope of a 'godlike' narrator suggests': Dawson, 'The Return of Omniscience in Contemporary Fiction', above n 30, 145.

<sup>35</sup> This is also described within narrative theory as 'focalisation.' Internal focalisation is where the story is mediated through the point of view of the focaliser, often with access to the internal world of that narrator. External focalisation occurs when the narrator presents information that is only externally observable. Gérard Genette first used the terminology of homodiegetic and heterodiegetic to distinguish between types of narrators: homodiegetic (a narrator who is also a character) and heterodiegetic (a narrator who is not a character and narrates all-knowingly from 'outside' the story). An autodiegetic narration takes place where the narrator is also the story's main protagonist: Gérard Genette, *Narrative Discourse: An Essay in Method* (Cornell University Press, 1983) 244–248.

<sup>36</sup> Ibid 189 (emphasis in original); see also Dawson, 'The Return of Omniscience in Contemporary Fiction', above n 30, 148.

as well as to account for why they and others made particular decisions. Applicants were asked to explain why and when certain events had occurred, and why other people behaved as they did. The applicants were required to make clear, reliable declarations about the story they presented and why it took a particular course.

The significance of this requirement for omniscience, in the context of RSD, is that the applicant is not a self-conscious author of literary fiction or non-fiction, styling a story to produce a particular literary effect or to convey a lesson. Rather, the applicant is recounting events that she or he understands to be, or has been told to be, relevant to a claim for refugee status. Inevitably, the applicant narrates the story as a narrator who participates in it. But then, in decision-maker questioning, the applicant is frequently asked to meet the expectation that her or his narratorial role be accompanied by a performance of narratorial omniscience, indicating that she or he has both ‘self-knowledge’ and access to the action and interiority of other actors in the story.

Before turning to an exploration of how demands for applicant omniscience featured in the *Zahau* hearing, I note that in the observed hearings, modes of questioning that required the applicant to account for her or himself and others were so common that it was challenging to choose one hearing and only a handful of instances to focus on here.<sup>37</sup> I witnessed egregious examples of the demand for omniscience. In certain hearings, when applicants failed to account for their own internal worlds, they were met with hostile and incredulous questioning. Decision-makers often grew impatient when applicants could not present fully realised versions of themselves, free of ambiguity, with full sovereignty over their decisions and their narratives. Often the decision-makers’ incredulity led them to question why applicants could not explain their own or others’ choices, rather than focusing on the evidence that applicants provided. Critically, only some applicants were able to describe and explain their own

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<sup>37</sup> The applicant was required to account for his or her own or others’ interiority and decision-making making processes in all of the Australian hearings. This requirement was less present in the *Jadoon* [2013](RRT) and the *Pillai* [2013](RRT) hearings, where it was only raised briefly in relation to two or three events. In the Canadian hearings, applicants were required to account for their own or others’ interior decision-making processes in multiple instances in all of the hearings except the *Flores* [2013](IRB) hearing.



internal motivations or to posit and speculate about the interiority of others. Many applicants could not meet this expectation.<sup>38</sup>

## *ii. The Zahau Hearing*

The *Zahau* hearing before the RRT involved a single female applicant from Burma. It was a long hearing, running for more than six hours over two days. For most of this time, Ms Zahau was required to give oral evidence.<sup>39</sup> Her application was on the basis of her persecution on the grounds of her religion, as a Christian in Burma, and on the basis of her political opinions. Her claims in relation to her political opinion were based on her membership of the Chin ethnic minority, as well as her anti-government views. She detailed her participation in pro-democracy activities in Burma as part of her general opposition to the Burmese government.

The *Zahau* hearing exemplified the ‘culture of disbelief’ described in the credibility literature cited earlier in this thesis. At certain points, the Member in this hearing could be described as either incredulous or as openly derisive. The excerpts below further illustrate the argument of the preceding chapter, insofar as they demonstrate the overwhelming directive and discretionary power of the decision-maker in regards to how the hearing is structured. The extracts here could equally be described as narrative contests, like those I detail in Chapter Five. In this chapter, though, I focus on how these excerpts exemplify decision-makers’ demands for omniscience in the applicant.

## *iii. Accounting for Others*

In Ms Zahau’s hearing, she was required to construct a narrative in which she was an omniscient narrator. In each of the excerpts in this section, Ms Zahau was called upon to explain the motivations, mindsets and inner worlds of the people who played a part

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<sup>38</sup> Specifically the applicants in the *Adere* [2012](RRT), *Zahau* [2012](RRT) and *Bhatti* [2013](IRB) displayed a truly exceptional ability to meet decision-makers’ expectations that they account for the decision-making processes of both themselves and others in their narratives. These applicants both attempted to explain internal motivations for particular actions or choices and sought to make these motivations or decision-making processes ‘comprehensible’ for decision-makers by highlighting how and why decision-making processes might differ from those expected or articulated by the Member, or might vary on the basis of the differing cultural contexts or experiences.

<sup>39</sup> The hearing also included the brief examination of a witness who appeared on Ms Zahau's behalf, as well as her lawyer’s closing submissions.

in her narrative, including those who were involved in and responsible for her persecution. I begin with a relatively subtle example to demonstrate how demands for omniscience functioned during the hearing. Though, the example may only appear subtle because the applicant, as the narrator, was able to provide a plausible motivation for the characters in her story, and she successfully, albeit hesitantly, took on the role of an all-knowing narrator.

Early in the hearing, Ms Zahau gave evidence of being politically active at her university. She claimed that she was involved in handing out leaflets that highlighted the lack of university funding from the Government and criticising the low standards of education, especially for poorer students who could not afford private education. Towards the end of her three years at university, she was called in by university authorities and forced to sign a declaration that she would not engage in further political activities. In the following exchange, the Member does not understand why the authorities would reprimand her just as she was about to finish her degree:

- Member: So, hmmm, so you [*pause*] you went to university only Saturday and Sunday, not even every Saturday and Sunday. Um, and it's just surprising that they [the university staff] warn you so close towards the end of your degree, three months before you finish your degree and, umm, you're not a student ... you don't even go there every week?
- Applicant: Um, yes, um, um I was um, at there for a few times, on Saturdays and Sundays, but it wasn't that much, and maybe they didn't know what we were doing at—at the start. Um, maybe they just find—found out recently or maybe they knew all along but they just wanted me to be more careful at that time.
- Member: [*Long pause.*] Um, what do you mean 'want you to be more careful'?
- Applicant: Um, the government system is really shaky in Burma, um, so when the politics get really complicated or dangerous, then there are times they um, close schools or postpone examinations and they want students to be more careful at those times, so it might have been something to do with that.
- Member: [*Long pause.*] I'm sorry. I—I don't understand. Um, what do you mean? The government wants students to be more careful in—in what way? What does that mean?
- Applicant: Um, what I'm trying to say is that because you asked, 'why warn me um—when I'm almost finished my degree?' and I'm trying to say that maybe the teachers aren't—didn't know what I was doing until that time, or maybe they knew, but they wanted [me] to be more careful because the political situation was getting worse, because um, governments

- always want teachers to control their students when that happens. So, um, the teachers wanted us to be more careful.
- Member: [Long pause.] But that means if they knew from an earlier time, before July 2006, what you're saying is that perhaps they didn't care that much?
- Interpreter: Um, I'm not sure when they knew, I'm just guessing that they might have known and not cared or they might have just found out, so I don't know.
- [Member changes topic.]

The above excerpt demonstrates that Ms Zahau was, as a matter of course, expected to account for the behaviour of others. She did provide an explanation for the thinking of university authorities—those allegedly responsible for her persecution—but in providing an explanation she also added that ‘it might have been something to do with that,’ demonstrating both a willingness to explain others’ motivations and a hesitance to postulate an answer with certainty.

In providing evidence of her political involvement, Ms Zahau was also required to explain the actions of other actors in her narrative. The following exchange comes quite late in the hearing, on day two, after the Member has asked the applicant to describe the various political activities she was involved in while in Burma. One part of her evidence related to helping her brother’s academic tutor, a political activist, to pass on sensitive or illegal information. Ms Zahau explained that the tutor was wanted for arrest by the authorities. Ms Zahau's involvement included picking up a letter and passing it on to another teacher on behalf of her brother’s tutor, whom the decision-maker characterised as a pro-democracy activist.<sup>40</sup> In the exchange below, the Member repeatedly asked, amongst other things, why Ms Zahau’s brother's tutor would ask her for this favour; why the tutor could not do it himself; and why the tutor could not have just called his friend by telephone to express the sensitive information. In response to each question, the applicant tried to explain the behaviour of the tutor, who on her own admission, she did not know personally. Ms Zahau offered compelling answers to these questions and established possible motivations for the

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<sup>40</sup> Zahau [2012](RRT Decisions and Reasons) [86].

tutor, but ultimately she admitted that she did not know why he made the choices he did.<sup>41</sup>

Applicant: Rather than going to protest without no [sic] real outcome, I thought I should do something that would lead to a better outcome, so I went to my brother's teacher who teaches English, and he was involved in the '88 revolution. My brother told us that his teacher was involved during the '88 revolution although he didn't know all the details and he was wanted for arrest. So, I knew this teacher through my brother, and although I didn't know what he did regarding politics, he told me that they wanted to arrest him.

Member: Sorry, was he tutoring your brother around that time?

Applicant: Yes, he was tutoring him, but not at their house. The university, which was really big, part of it was closed down during the '88 generation, and they built a boarding school instead, and so my brother went there for tutorings [sic]. So I knew him [the tutor] through that, and he said that he was wanted for arrest and he needed help. He couldn't go publically [sic] so he asked for my help, so I said I would help him.

Member: So you went and met him personally?

Applicant: I knew this teacher before the Saffron revolution began because my brother was unwell and his leg was not good, so with his tutorings [sic] either me, my sister or I [sic] had to take him, so I met this teacher occasionally, but it wasn't personally. So I knew him through that, and maybe because he knew me at that time, he asked me to get this letter to someone.

Member: How did you ... how did he tell you to get the letter?

Applicant: He called me on the phone and said he wanted to write a letter to his friend and he couldn't give it to him personally and, um, because my brother was quite young he couldn't do it, so he asked for my help instead. Because I was very interested in those things, I said I would help him, but even after saying that, I couldn't help him immediately. I only could meet him a couple of days after I said I would help him. The letter was short. There wasn't even much, but I didn't read it because I'm not supposed to. His friend was a teacher, so I delivered the letter to him. Even when I was delivering the letter, I couldn't meet that friend personally because he was hiding just like the other teacher, so I asked the secretary of the school to hand it to him.

Member: Do you know this person [the secretary]?

Applicant: No, I have never known him [sic].

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<sup>41</sup> In this hearing, the interpreter made frequent grammatical errors in her translations, which I have noted in the transcript but not amended.

- Member: How did you know that he could be trusted?
- Applicant: Before I went to deliver that letter, my brother's teacher told me I wouldn't be able to get through to his friend directly and that there might be police around the school, and I should pretend like I am one of the students and give it to the secretary and that he could be trusted.
- Member: He gave you the name?
- Applicant: He did tell me the name, but I am not sure if it was the name they only use to refer to each other or if it was his real name, but he told me his name but that I wouldn't be able to see him.

After asking the above questions, which implied doubt about the applicant's version of events, the Member then went on to pose his own version of what could (or to his mind, should) have happened, if the tutor in question had wanted to communicate with his friend in relation to politically sensitive topics:

- Member: [*Long pause.*] Why couldn't he just call his friend?<sup>42</sup>
- Applicant: Burma is very different from here, and making phone calls is very expensive, and all internet access and phone lines are controlled by the Burmese authorities, so they were probably afraid.
- Member: [*Sceptical.*] But he called you.
- Applicant: I was only his student's sister, and I could have been one of his students, so it might not [have] been dangerous for him to contact me, but he might have had other ways of contact with that other friend [sic].

Following this exchange, the Member explained at length why he found the applicant's version of the tutor's actions and motivations implausible. The Member's scepticism of the applicant's account primarily concerned her explanation of the tutor's internal decision-making processes. As difficult as the Member's musings are to comprehend when reading the passage below, his musings were even more difficult to follow when heard during the oral hearing:

- Member: I am just not sure that it makes that much sense for this person [XXX] to be calling the sister of one of his students, who he barely knows; he barely knows you and to ask you to do something very dangerous, pass on a letter to another person and you can't even get to the other person, so you pass it to a third person. Sorry. [*Gentle laugh.*] I will break

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<sup>42</sup> This followed on directly from the previous excerpt.

this up into separate pieces. So, there could be two ways to communicate about things. One is to pick up [the] phone and to speak to the person. The other way is to write a letter, to pass it on to the other person. And I understand that he may be afraid of using the telephone, but he picked up the telephone and rang you. Then, he doesn't know you very well, but he decided to trust you; you had to meet two days later, and then you couldn't even get to his friend, so you had to give the letter to a third person, the secretary. And all of this is for what you say is, you thought is a short letter. If communication technology is not very advanced in Burma, wouldn't it be safer just to ring up on the phone?

[*Forcefully.*] Or why couldn't the secretary go to [the tutor] and get the letter from him. Why did you have to go?

Applicant: The secretary didn't know who my brother's teacher was, and it was my brother's teacher wanting to pass the letter, not the friend wanting to pass the letter back to my brother's teacher, so it was the other way around. And, although he barely knew me, he knew me better than most people. And I don't know why he decided to trust me, but he did ask for my help. The reason the secretary didn't go to [the tutor] was because it wasn't them who needed to pass a letter to [the tutor].

Member: I understand, but if they meet then [the tutor] can pass the letter to the secretary. In the same way you didn't know the secretary but identified him, why couldn't [the tutor] meet him? They could ring each other up on the phone and [the tutor] would say, 'Let's meet tomorrow at such and such a place, I will be wearing red and something or other, and that's how you will recognise me and I will give you the letter.'

Applicant: I don't know why he decided to do that, but what I think is because most teachers are involved in political activities in Burma, it is more dangerous for them to use the school phone to call and talk to each other about political activities and meetings for them.

Member: So that was it, was that what you were involved in prior to arrest, or were there other things as well?

The above exchange is astounding. The Member posits a series of alternative decisions—in his view, better-reasoned ones—that the tutor could have presumably made in order to more 'safely' and easily send on anti-government or politically sensitive information. The decision-maker not only entered into a narrative contest with the applicant; he also proposed a completely alternative story, which included the Member making up dialogue as well as imagining that the applicant's brother's tutor could have worn a red jumper so that he might be recognised upon an imagined secret meeting with a secretary. The applicant was then required to explain her

brother's tutor's decisions and to account for why the tutor's approach was different to the imagined decision-making process proposed by the decision-maker—who seems to have taken the applicant's place as an omniscient narrator.

The Refugee Convention definition of a refugee requires that the applicant must fear persecution '*for reasons of race, religion, nationality, membership of a particular social group or political opinion*'—a definition that creates a causal requirement in relation to *why* persecution will take place<sup>43</sup>—and this has frequently given rise to the discomfiting demand that applicants be able to account for the actions and motivations of their persecutors.<sup>44</sup> Though, there is a substantive difference between presenting *evidence* of a particular persecutor's motivation, and be required to *know* why each actor in one's narrative behaved as they did. Notably, in the hearings I observed, applicants frequently met demands for omniscience with a display of agency and a willingness to challenge decision-makers,<sup>45</sup> just as in Chapter Five applicants resisted the counter-narratives that decision-makers presented to them in narrative contests. Indeed, in such challenging moments, applicants often refused to engage in speculation or answer questions that they identified as being outside of their knowledge. Still, in instances of narrative contest and demands for omniscience, applicants were being asked and indeed encouraged by decision-makers to testify in the form of arguably pure speculation.

Questions that demanded the applicant perform the role of an omniscient narrator were especially troubling when they were asked in regards to an applicant's alleged traumatic experiences. This occurred twice in the *Zahau* hearing. I do not address each occurrence in detail here,<sup>46</sup> but I will briefly summarise one exchange. On day two of the hearing, the applicant provided evidence in relation to her experience as a forced porter, after being stopped by the Burmese army whilst travelling. The

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<sup>43</sup> *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) art 1A(2).

<sup>44</sup> On this point, see Chapter Four of this thesis, at n 78; and see especially Michelle Foster, 'Causation in Context: Interpreting the Nexus Clause in the Refugee Convention' (2001) 23 *Michigan Journal of International Law* 265.

<sup>45</sup> See, especially, *Valdez* [2013](IRB); *Rostami* [2013](IRB); *Adere* [2012](RRT); *Zeidan* [2014](RRT).

<sup>46</sup> The other relevant example from the hearing occurred when the applicant provided evidence in relation to her being abducted and beaten by government authorities and the decision-maker wished to know why, after her abduction, her captors would choose to drive her home.

applicant described being forced, while she was held captive, to ‘massage’ and please the soldiers at night and to carry heavy goods during the day. The Member did not question her about the details of this alleged abuse. The applicant then described her attempt to escape, which she did by going to the toilet in the night and then running away with another person who was being held captive by the army.

After she had provided details about the sexual and physical abuse she had suffered before attempting the escape, the Member wanted the applicant to explain why the soldiers had not followed her to the toilet. The applicant responded, ‘I am not sure why, but maybe they couldn’t be bothered or maybe because the toilet was not far away.’ The Member then asked the applicant to explain her own decision to escape with a stranger via the toilet: ‘If the soldiers were about to go to bed and they couldn’t be bothered to follow you, couldn’t you just say “go” with the nod of your head or just say “run” [to the other escapee, rather than going to the toilet together].’ The Member questioned other details about her escape, including the order in which she and her co-escapee left for the toilet, and then changed the topic, to discuss the fate of the applicant's other political friends.

*iv. Inner Worlds: Accounting for Oneself*

As an omniscient narrator, Ms Zahau was also required to explain herself and her actions and to articulate her own decision-making process as if such decisions were always rational, knowing and clear-headed. In the following excerpt from the hearing, the Member asked the applicant to explain the circumstances of her arrest. In response to this, the applicant described the events that led up to her arrest, including her involvement in helping another politically active friend, who is referred to in the excerpt below. The excerpt once again features the applicant's brother. In the excerpt, the applicant’s friend asked her to get things from his house, as he was hiding from the authorities. The applicant sent her younger brother instead, as she believed this was the safer option. In response to this, the Member cannot fathom how, in the earlier incident (when delivering a letter for her brother’s tutor) she went *instead of* her brother because she thought this was the safer option and then, on a later occasion and in a different circumstance, she chose her brother to undertake a risky task. The Member requires the applicant to explain this perceived discrepancy in her reasoning,



and to present herself as an all-knowing, self-conscious narrator and as someone who makes decisions confidently, consistently and consciously:

- Member: So tell me about the arrest.
- Applicant: Before the arrest of [the friend], ahh, he was trying to escape, and he asked me to go to his house and pick up some money, clothes, and his passport, identification card from his house, but I was afraid to do that myself, so I asked my brother to do that. My brother decided to take a friend with him, but when they reached the house, the house was guarded and the guards told them that they couldn't go in and they said they were afraid to go in so they came back and didn't get any of his things.
- Member: Why did you send your brother?
- Applicant: Because I was afraid to go there by myself, and my brother was younger and he was like a student and it was normal for him to go there and it wasn't just [the applicant's friend] living at that house, it was like a shared house. So, he could go and ask the other people that lived there for that.

In the above extract, the applicant was required to clearly account for why she made a particular decision. Directly after, the Member then doubted the applicant's internal reasoning because it appeared inconsistent with her thinking and decision-making on a previous occasion, as if people can be expected to make perfectly consistent and well-reasoned decisions, across different times, events and places:

- Member: But, hang on a second. [*Long pause.*] But ... but ... with, with the letter you said the exact opposite, that your brother was too young at the time so that is why you didn't send your brother to pass on [the tutor's] letter to his friend. But then when it comes to doing something more dangerous, to pick up stuff from [your friend's] house, you send your brother. Isn't he too young?
- Applicant: The difference is that with delivering a letter he was young he might not have had tactics and if he was get caught with his letter [sic] then that would have been more dangerous. But as he is young and he is a student, going to his teacher's house is quite common. And, if he goes in there and asks the people that [the friend] lives with for those things, and picks it up then the authorities wouldn't know what he picks up [sic].
- Member: [*Interrupting the applicant.*] Surely if the authorities want to arrest [the friend] and they catch your brother with his ID and other things and personal belongings, that would be more dangerous than catching your brother with a letter?
- Applicant: What we thought at the time was that if they caught him with the letter and the letter was not delivered that would have been more dangerous. Because most of the time [the friend]

lived within the boarding school within the university. But this house that we are talking about is one he is sharing with his friends, so we thought maybe the authorities didn't know this house.

Member: But you didn't want to go because you were afraid.

Applicant: At that time, the police were everywhere on the roads, so because I was involved in political activities before, I was afraid to do that.

Member: But you understand what I am trying to say, that ... that ... I can't see why one logic would apply to the letter and another logic would apply for you for going to [the friend's] apartment to pick up his things. If your brother is younger and more vulnerable then he shouldn't do either of these things. If you are more vulnerable because you are involved in political activities, then you shouldn't do either of these things.

In the above line of questioning, the Member not only required the applicant to explain how and why she made a particular decision, but also to use the same 'logic,' as he calls it, in making all of her decisions.<sup>47</sup> In the above excerpt, the Member was insistent that if the applicant put herself in a dangerous situation in one circumstance, to keep her brother safe, then such 'logic' would apply to all future situations. The applicant then provided a very compelling reason as to why she might not apply the same 'logic' in all situations, and more or less told the Member that sometimes our reasoning processes are wrong, and that sometimes we often act on impulse or instinct:

Applicant: Sometimes our reasons and logics could be wrong [sic], but at that time, what I thought was that because my brother was his student and as a student it was common to go to a teacher's house, I just thought that the police wouldn't care if they saw him go in there.

Member: [Pause.] And your brother was not caught, he never went in?

Applicant: His apartment, he lived at the fifth floor, and the other people living in the apartment told them not to go there, so they were afraid and came back.

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<sup>47</sup> Similarly, in a review of UK asylum appeal decisions, Herlihy et al found that 'an assumption of consistency of behaviour also ran through a number of the determinations. If someone had not acted due to fear in one situation, it was not accepted that they might then act in a similarly fearful situation at another time': Jane Herlihy, Kate Gleeson and Stuart Turner, 'What Assumptions about Human Behaviour Underlie Asylum Judgments?' (2010) 22 *International Journal of Refugee Law* 351, 358.

The final excerpt that I wish to present in this section recalls Chapter Four, which addresses the story of becoming a refugee, and also dovetails with the following section addressing the genre of the ‘narrative of becoming a refugee.’ In the below excerpt, the Member requested that the applicant explain exactly why she chose to leave Burma on the day that she did. He also pressed her to explain why she would *voluntarily* go to the police to be questioned if she feared for her safety vis-à-vis government forces. Exasperated, the applicant explained that it might not have been the best decision, but that it was the one that she made at the time. In the excerpt, at first the applicant tries to explain her decision in retrospect, but then ultimately presents the decision to leave as something that struck her as the right thing to do in the circumstances:

Member: Now, the last thing is what happened or what you claim happened to you just before you left Burma. You were in [the town of XXX] and you wanted to leave Burma, in December and the beginning of January. Is that right?

Applicant: Yes.

Member: And then you go back [to your hometown] on the 5th January and your mother says the police want to talk to you. But you have already decided to leave the country, so why do you go to the police to talk to them?

Applicant: First of all, now thinking back it may seem stupid, but at that time I didn’t have any advisers around me, all the decisions I made I had to make by myself no matter what situation I was in. I had already decided I was going to leave the country, but I also wanted to see the police. Although both police and soldiers have authority in the country, umm, the citizens are just scared of the soldiers, but we aren’t that afraid of police. Some of them we are afraid of, but it is not like the soldiers. The reason I went was because I wanted to know how much they knew about me and I also had to think about my family, what could happen to them. I just wanted to know how much they knew about me, what exactly did they knew about me and how dangerous it was for me, and I also wanted to know how it could affect my family.

Member: Okay, so you go, you go to the interrogation, and they interrogate you for a full day, and they say come back on Monday?

Applicant: Yes.

Member: And when did you organise your ticket to leave the country?

Applicant: Buying tickets to Thailand is not that hard, so even if we wanted to leave this afternoon, we can get a ticket in the morning if there aren’t that many people, so it wasn’t that hard to buy.

Member: So when did you buy it?

Applicant: The agent did it for me, as I said, all my visas, including New Zealand and Thailand so that ticket was purchased by them too.

Then, for about five minutes, the Member and the applicant discussed the timing of the applicant's decision to procure tickets to leave Burma via Thailand, and who had bought these tickets. The Member read Ms Zahau's statement back to her, in which she had set out that the night after the interrogation, she and her mother planned to get her out of the country because the police had demanded she return for further interrogation. The applicant then explained that an agent gave her the ticket on the day she left. The Member then responded as follows:

Member: The whole story does not sound very plausible, that you would come home on the sixth of [XXX] without a ticket, that you would agree to go to the police the next day, then on the morning of the seventh you buy your ticket, then you fly out of the country, ready to leave with no ticket. So you go to police on the sixth of [XXX] then get the ticket on the seventh of [XXX] and then leave.

Applicant: As I said, I didn't know when the agent bought the ticket for me, although I was planning to leave the country. So, um, that ticket was only in my hand the day I was leaving.

Member: There was one other thing, if, if, assume for a second that nothing had happened on 6 January, so you go the police, they interrogate, they ask you a few questions, let's say for ten, 15, 20 minutes and then they say no problem, go home, and they let you go, if that had happened, when would you have left Burma?

Applicant: Because that actually never happened, I have never thought about it. I never even thought to think about it, I have just realised now that you are asking ... *[trails off]*.

At the close of the hearing, the Member 'summed up' his issues with Ms Zahau's case and gave her a chance to respond. After dealing at length with a number of issues the Member had raised, Ms Zahau closed her testimony by explaining that while she was required to narrate her reasoning for various actions, her actions were simply what she had done 'at the time.' She explained that it was not in her power to make these things less 'suspicious' to the Member or to make them better conform to the Member's sense of how the story (and her own internal reasoning) should have run:

Applicant: With my case, some of my decisions may not make sense or may be suspicious, but when you are in situations like this, you are in danger. There might be something that I can do better [sic], but that is what I did at that time.

The fundamental question within refugee law and refugee determination is whether the applicant has a well-founded fear of being persecuted if returned home.<sup>48</sup> As most refugee law texts emphasise, the test for determining whether the applicant has a well-founded fear of persecution is future-focused. That is, the question is whether there is a risk the applicant will face persecution in the future, upon potentially returning home.<sup>49</sup> It is decision-makers who must finally determine this question, via what Guy Goodwin-Gill and Jane McAdam call ‘essays in prediction’ and hypothesis.<sup>50</sup> But, at the same time, applicants are routinely given the opportunity to explain ‘what would happen’ if they returned to their country of origin and why this would place them in danger. Indeed, this question is at times the first question asked. Crucially, the applicant is then often called upon to state both ‘what’ would happen and then ‘why’ his or her persecutors would ‘still be interested’ in the applicant or why past persecution would continue. Consequently, one of the fundamental demands for the applicant to act as an omniscient narrator comes in relation to questions of what the future holds for the applicant, of how the story might end if the applicant returns home. However, there is once again a substantive difference between asking an applicant what she or he *believes* might happen if returned to her or his country of origin, and requiring the applicant, as narrator, to frame such speculation as a self-assured account of how the future will unfold and why, and to execute ‘a specific rhetorical performance of narrative authority.’<sup>51</sup>

Ms Zahau’s appeal to the RRT was successful. The RRT decision, though, rejected a number of her claims and in doing so meticulously recorded her inability to account for the behaviour of her brother’s tutor,<sup>52</sup> for herself in relation both to her departure

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<sup>48</sup> For a full description see my analysis of the Canadian and Australian tests for a well-founded fear of persecution in Chapter Six, in Part One ‘Legal Framing of the Oral Testimonial Encounter.’

<sup>49</sup> See generally James C Hathaway, ‘Michigan Guidelines on Well-Founded Fear’ (2005) 26 *Michigan Journal of International Law* 492; Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) 54–60.

<sup>50</sup> Goodwin-Gill and McAdam, above n 49, 58.

<sup>51</sup> Dawson, ‘The Return of Omniscience in Contemporary Fiction’, above n 30, 147.

<sup>52</sup> In the written decision, the Member paraphrases these exchanges at length:

The Tribunal asked why [the tutor] could not simply call his friend on the telephone ... The Tribunal pointed out that [the tutor] had used a telephone to contact [the applicant]... The Tribunal asked once again why [the tutor] would engage in such a complicated arrangement rather than just pick up the phone and tell his friend whatever he needs to tell, or get the secretary to pick up the letter. The

from Burma<sup>53</sup> and to her decision to send her brother to his tutor's house (instead of going herself).<sup>54</sup> The Tribunal rejected as implausible Ms Zahau's account of her departure and her experiences of being sexually assaulted as a forced porter but accepted that she had been politically active as a student and in assisting her brother's tutor.<sup>55</sup> The Member found she would be persecuted on the basis of her real or imputed political opinion. In regards to her overall credibility the Member wrote:

The Tribunal has considered whether it should draw negative credibility conclusions ... Despite the Tribunal's rejection of several of the applicant's claims ... the Tribunal accepts some key claims. The Tribunal is cognisant of the fact that it needs to assess the truth and merit of each of the applicant's claims. Just because the applicant may have exaggerated or even fabricated some of her claims, it does not necessarily follow that she has not been truthful in relation to other aspects of her claim.<sup>56</sup>

Patchen Markell, in his critique of the 'politics of recognition,' writes that the fantasy of knowing others or oneself is 'animated by a vision of sovereign agency, in which people are empowered by self-knowledge.'<sup>57</sup> Markell states that 'the attempt to become master of our own deeds and identity is not only doomed to fail,' but it also risks intensifying the ineliminable possibility of suffering unnecessarily, 'even demanding that we give our lives for what will turn out to have been an illusion of control.'<sup>58</sup> Markell highlights the difficulties that result when a literary conceit of

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applicant said that [the tutor] and the secretary did not know each other. The Tribunal pointed out that she and the secretary also did not know each other.

Later the Tribunal recorded that the applicant could not explain (in the Member's view) the 'illogicality' of the tutor's behaviour: *Zahau* [2012](RRT Decision and Reasons) [87]-[88], [139].

<sup>53</sup> The Member also records this exchange:

The Tribunal asked the applicant a series of questions related to the period leading up to her departure from Burma. First the Tribunal asked why she had gone to talk to the police on [XXX] if she had already decided to leave the country. She said she accepted, *with the benefit of hindsight* that it "sounded stupid" and at the time she did not have any advisors around her.

*Ibid* [111] (emphasis added).

<sup>54</sup> *Ibid* [89].

<sup>55</sup> *Ibid* [173], [178].

<sup>56</sup> *Ibid* [175]-[176].

<sup>57</sup> Patchen Markell, *Bound by Recognition* (Princeton University Press, 2009) 63. As Swanson Goldberg and Schultheis Moore note, literary and critical readings of human rights have brought 'diverse theories of subjectivity to bear on contemporary human rights discourses in response to the urgent need to grasp the characteristics that constitute the bearer of rights and how she is recognizable (to herself and others)': Elizabeth Swanson Goldberg and Alexandra Schultheis Moore, 'Introduction' in Alexandra Schultheis Moore and Elizabeth Swanson Goldberg (eds), *Theoretical Perspectives on Human Rights and Literature* (Routledge, 2013) 1.

<sup>58</sup> Markell, above n 57, 65; discussed in Mark Antaki, 'From the Bridge to the Book: An Examination of South Africa's Transformative Constitutionalism's Neglected Metaphor' in Karin Van Marle and Stewart Motha (eds), *Genres of Critique: Law, Aesthetics and Liminality* (Sun Press, 2014) 49, 65-66.

omniscience, of being sovereign and knowing oneself, comes to function as part of law's generic demands and expectations.

This impossibility of successful recognition of the self is particularly acute for refugee applicant in oral hearings, who must perform this sovereign version of self whilst narrating a difficult and unsettled autobiography for the purposes of 'protection,' and must do so in a fragmented, often adversarial and unstructured oral hearing. In relation to similar demands, for self-knowledge and self-reflexivity, being made of applicants making claims on the basis of sexuality, Berg and Millbank write:

In the Western tradition, the expectation of coherent narrative about life experience requires self-reflexivity. We expect a narrator to have objective distance about herself, to be able to describe different times in her life in relation to her self at present, such as, 'I was married to a man because I felt I had no choice at the time; I felt terribly ashamed of who I am at first, but I have been much happier since I came out as a lesbian last year'. The expectation of self-reflexivity deeply informs adjudication of the narrative yet reflective distance may not be a fair or realistic tool to determine the narrative's authenticity.<sup>59</sup>

Barsky gets to the heart of the challenge refugee applicants must face, in rendering *events* or evidence as narratives, or as narrative genres, when he writes that the demand for a full presentation of the self within the refugee oral hearing is a demand for the 'transformation of inner experience into narrative through relations with the other.'<sup>60</sup> He draws on Bakhtin, who describes the challenge of presenting oneself in narrative as a question of

precisely how to accomplish the task of translating myself from inner language into the language of outward expressedness and of weaving all of myself totally into the unitary and pictorial fabric of life as a human being among other human beings, as a hero among other heroes.<sup>61</sup>

As I have argued throughout the preceding chapters, the narrative form places a burden upon applicants that they are not necessarily equipped to meet. But an additional burden the applicant must encounter, in seeking to have her or his evidence sanctioned as plausible and credible, is the demand for particular genres of narrative,

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<sup>59</sup> Berg and Millbank, above n 6, 216 (citations omitted).

<sup>60</sup> Robert F Barsky, *Constructing a Productive Other: Discourse Theory and the Convention Refugee Hearing* (John Benjamins Publishing, 1994) 295.

<sup>61</sup> Ibid; citing Mikhail Bakhtin, 'Author and Hero in Aesthetic Activity' in Michael Holquist and Vadim Liapunov (eds), Vadim Liapunov (tran), *Art and Answerability: Early Philosophical Essays* (University of Texas Press, 1990) 31.

and indeed a particular narrative voice. Applicants are expected not only to fulfil the demand for a coherent narrative form, but also to speak in a coherent narrative voice that is characterised by an omniscience that is surely impossibly difficult, for any person in the context of an RSD oral hearing to achieve.

### **Part Three. The Story of Becoming a Refugee, Human Rights Discourse and the *Bildungsroman***

As I outlined in Chapter Two, the hearings included in my dataset were not all based on a common ground of persecution or a specific type of claim, nor did applicants come only from a particular region. In this sense, the *content* of the evidence that the applicants presented is difficult to categorise, and not necessarily ‘generic.’ And, as the preceding chapters have shown, when refugee applicants’ evidence is tested and assessed, the multiple narratives and topics that become the focal points of each hearing may be idiosyncratic, unexpected and variable from one hearing to the next depending on the style, impulse and narrative-based expectations of the decision-maker. However, as demonstrated in Chapter Four, stock stories of ‘genuine’ onshore refugees and the norms of refugee law and decision-making have formed the basis of a particular narrative frame for onshore refugee applicants’ testimony. That is, in the observed hearings, onshore refugee applicants in Australia and Canada were required to contend with a particular stock story, the ‘narrative of becoming a refugee.’ Here, I return to that particular story, in order to ask into what genre the narrative might fit, particularly when the story is read in combination with demands for a rational, self-possessed omniscient narrator. Applying genre in this way allows me to ask where the narrative of becoming a refugee might be placed in amongst a library of existing generic forms, even where the subject matter of hearings is often disparate and incongruent.

In thinking through the genre of refugee narratives within RSD in this chapter, I want finally to consider how work addressing the relationship between genre and human rights discourse—particularly work on the genre of human rights discourse—might be used to classify the genre of the narrative of becoming a refugee. In Makau Mutua’s influential work on archetypal figures within human rights narratives, he argues that human rights discourse is characterised by the need for ‘savages, saviours and



victims.’<sup>62</sup> In Chapter Four, where I first examined the narrative of becoming a refugee, I argued that the narrative is a stock story that features the tropes of refugee-as-victim, the State-as-saviour, and the attaining of refugee status as the ultimate closure. Indeed, I argued that the subject represented in the narrative of becoming a refugee conforms closely to Mutua’s description of narratives of the ideal victim, who is powerless, despairing, and lacks agency but for his or her resolve to undertake a primarily linear journey towards refugeehood. There I highlighted the paradoxical subject position that processes of RSD demand of refugees. They must be both vulnerable and dependent in order to be saved *and* they must act with certainty and resolve in response to persecution, exercising immense agency in the decision to seek refugee status. In the present chapter this paradox is once again apparent: the applicant must be the victim of certain events, in urgent need of protection, and yet also present him or herself as an omniscient narrator journeying towards self-possession.

The genre of the narrative of becoming a refugee, with its elements of confession, redemption and salvation, has much in common with Slaughter’s critique of the ‘genre’ of human rights discourse as tied to that of the *Bildungsroman*. Mark Antaki explains the genre of the *Bildungsroman* (literally meaning the ‘formation novel’ although the German word *Bildung* is notoriously difficult to translate)<sup>63</sup> as involving a linear narrative, which ‘allows the protagonist, often retrospectively, to take responsibility, as author, for his or her own development.’<sup>64</sup> Slaughter argues that international human rights law and the nineteenth-century genre of the *Bildungsroman* ‘are mutually enabling fictions’ because ‘each projects an image of

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<sup>62</sup> Specifically, Mutua writes that the human rights movement is ‘marked by a damning metaphor. The grand narrative of human rights contains a subtext that depicts an epochal contest pitting savages, on the one hand, against victims and saviors, on the other’: Makau Mutua, ‘Savages, Victims, and Saviors: The Metaphor of Human Rights’ (2001) 42 *Harvard International Law Journal* 201, 201; and see Mutua, above n 5. Although my focus here is on the intersections between critiques of human rights discourse and genre, rather than on the politics of rights *per se*, Ben Golder provides a pithy account of critiques of human rights discourse as including:

its false claims to universality, its investment in and reproduction of a narrow liberal ontology, its propensity to circumscribe the field and possibility of politics, its inability to break with global capitalist ordering, its indebtedness to and repetition of colonial history, and a host of other related criticisms (in short: the critique of human rights as a particular form of Western political liberalism that gets exported globally with great violence).

Golder, above n 5, 79.

<sup>63</sup> Antaki, above n 58, 68.

<sup>64</sup> Ibid, as part of Antaki’s reading of Slaughter; and see Slaughter, *Human Rights, Inc.*, above n 5.

the human personality that ratifies the other's vision of the ideal relations between individual and society.'<sup>65</sup> In so doing, Slaughter points to the complicity of literary and cultural forms in disseminating and naturalising human rights norms.

Slaughter builds this critique by revealing how both international human rights law and the early *Bildungsroman* elevated the 'bourgeois, white male citizen to universal subject.'<sup>66</sup> The *Bildungsroman*, writes Slaughter, is a reconciliatory genre<sup>67</sup> that 'conventionalized a narrative pattern for participation in the egalitarian imaginary of the new bourgeois nation-state, a plot for incorporation of previously marginalized people as democratic citizen-subjects.'<sup>68</sup> This genre is mirrored within international human rights law, which harbours a 'developmental narrative' and 'consists of two actors (the human person and the state), a probable conflict between them, a means of remediation in the human personality, and a temporal trajectory that emplots a transition narrative of the human person's sociopolitical incorporation.'<sup>69</sup> Slaughter writes that 'the development of human rights personality assumes a progressivist telos, a linearity,'<sup>70</sup> which Robert Scholes and Robert Kellogg considered the 'central technical innovation enabling the modern novel.'<sup>71</sup> Antaki writes that the novel's teleological, coming-of-age narrative, in which the protagonist becomes what he or she was always called to be, 'undergirds much human rights discourse both as grand narrative of world history ... and as the goal of human rights for each individual

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<sup>65</sup> Slaughter, 'Enabling Fictions and Novel Subjects', above n 5, 1407.

<sup>66</sup> Ibid.

<sup>67</sup> Slaughter also cites Wilhelm Dilthey's definition of the *Bildungsroman* plot, which he describes as obeying a kind of natural law where a 'law-like development is discerned in the individual's life ... on his way towards maturity and harmony': Wilhelm Dilthey, *Poetry and Experience: Volume 5 of Selected Works* (Princeton University Press, 1985) 336; Slaughter, 'Enabling Fictions and Novel Subjects', above n 5, 1410. Slaughter, however, writes that:

Although Dilthey emphasized the genre's individualism, the idealist sociological theory of *Bildung* was as invested in the emergence (and conservation) of a social order responsive to the human personality as it was in egoistic self-fulfillment, a fact reflected in the common names that *Bildungsroman* criticism usually gives to the 'lawlike' process of subjectivation: socialization, apprenticeship, assimilation, acculturation, and accommodation' and '[t]hese terms share a progressive temporality': Ibid 1410.

<sup>68</sup> Slaughter, 'Enabling Fictions and Novel Subjects', above n 5, 1410.

<sup>69</sup> Ibid 1409.

<sup>70</sup> Ibid.

<sup>71</sup> Slaughter, 'Enabling Fictions and Novel Subjects', above n 5; Robert Scholes and Robert Kellogg, *The Nature of Narrative* (Oxford University Press, 1966) 236. Slaughter's work on this topic involves a detailed genealogy of international human rights law and its relationship with German idealism, within which his argument about the *Bildungsroman* and its relationship to rights forms one part.

human being and nation: the opportunity to ‘develop’ his or her or its own distinctive capacities.’<sup>72</sup> Indeed some of the fantasies that Antaki has described as attaching to the genre or genres of the novel are those I have described as characterising the narrative of becoming a refugee: a linear, teleological progression towards a new status, closure of the past, access to the interiority of others, and sovereignty over the future.<sup>73</sup>

Laurie Berg and Jenni Millbank raise similar concerns in relation to applicants making claims on the basis of sexuality. In examining decision-makers’ expectations that applicants’ narratives will reflect a linear formation of sexual identity, Berg and Millbank note that ‘Western understandings of minority sexual identity development have been deeply influenced by *the idea of a linear process of self-knowledge* moving from denial or confusion to “coming out” as a self-actualized lesbian or gay man’, which derives from ‘the psychological and sociological disciplines in the 1970s and now permeates popular culture.’<sup>74</sup> They argue that it is important to problematise such an approach because it is ‘based upon a specific cultural and gendered experience of sexuality’ that cannot account for the diversity of human experiences of sexuality even in the cultural contexts upon which it is based.<sup>75</sup> And critically for my analysis here, they also express concern that ‘the stage model may be all too readily collapsed into an assumption that the “final” stage of identity synthesis will occur in conjunction with the adjudication process.’<sup>76</sup> That is, that at the time of the hearing, the applicant will have a fully-formed and certain sexual identity and will present her or his claim to protection as resolving in this newly-discovered sovereign (sexual) self.<sup>77</sup>

The narrative of becoming a refugee that I traced through the observed hearings in Chapter Four can easily be read as a coming-of-age or formation narrative. Human

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<sup>72</sup> Antaki, above n 58, 56.

<sup>73</sup> Antaki, above n 1, 988; see also Antaki, above n 58.

<sup>74</sup> Berg and Millbank, above n 6, 206 (emphasis added).

<sup>75</sup> Ibid.

<sup>76</sup> Ibid 207.

<sup>77</sup> As Berg and Millbank put it, this ‘assumes that the applicant, having earlier struggled with self-identity, has now come to terms with it and can (or in the refugee context, must) reflect back: they are now out and can tell their coming out story’: at 216.

rights narratives, of reformed ‘others’ waiting to be saved by the liberal state, are at play in the genre of narrative that is demanded of refugee applicants. As well as this, the narratorial voice that was often required of refugees is that of the enlightened and autonomous liberal subject—which implies a self-awareness and self-consciousness that goes well beyond the requirement that refugees have faced persecution, are outside their country of origin and are unable to attain the assistance or protection of their home state. Why must Ms Zahau know why she left her country of origin exactly when she did? Why must she account for how she responded to circumstances of danger and harm? And most of all, why must she be certain of all of the above—as if only those stories that involve characters of an impossibly firm resolve are capable of being believed?

The problems raised by the demand for narrative and genre in refugee testimony include the expectation that the refugee applicant present him or herself as a *particular* kind of subject or citizen-to-be. This analysis returns to Barsky’s foundational argument that the oral hearing is space where the refugee applicant must construct a ‘productive other,’ where ‘the measure of one’s success in *constructing a productive other* as refugee could be seen as a measure of one’s future ability to *construct a productive other* as integrated citizen,’ on terms wholly defined by the receiving state.<sup>78</sup> The demand for narrative is a demand for a particular *kind* of refugee, and Slaughter and Antaki’s critique of the genre of human rights discourse helps to illuminate the politics of the stock ‘narrative of becoming a refugee’ in particular.

For both Slaughter and Antaki the novel, and in particular the *Bildungsroman*, is implicated in the law’s exercise of power and authority in the realm of ‘human rights law.’ My suggestion here is that in the assessment of testimony within RSD, decision-makers’ engagement with oral evidence is also influenced by particular generic devices and narratorial styles, which are culturally contingent forms shot through with implications of power as well as raced and classed subjects. This suggestion is particularly troubling in light of my further contention that decision-makers do not

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<sup>78</sup> Barsky, *Constructing a Productive Other*, above n 60, 6 (emphasis in original).

engage with this genre and its conventional elements with an awareness of their own expectations or sensibilities.

In my application of Slaughter's critiques of the *Bildungsroman* to the refugee narrative, the methodological aims and argument of my thesis come together. Analysing the genre(s) of refugee testimony reveals that literature and literary forms may be complicit in law's authority and power, rather than a means of improving or challenging law. Patricia Tuitt openly rejects the position that aesthetics and literature are necessarily transformative of the law's determinative and positivist nature, and she argues that we should recognise where aesthetics are part of law's violent, biopolitical projects.<sup>79</sup> She writes that if we wish to recognise the place of aesthetics in law, this necessarily implicates aesthetics in the control of legal subjects.<sup>80</sup> Within RSD, applicants may be judged against 'stock stories' and multiple, intersecting 'standard' narratives, which apply to different cultural, racial and gendered identities that the applicant is perceived to inhabit. Applicants may also, however, be judged by virtue of the cultural forms of the stories that they tell. For the purposes of my argument in this thesis, the difficulties with generic requirements, with these literary *forms*, in the RSD context are similar to critiques of stock stories, which set out how certain subjects do or should behave. Genre, in the refugee context, adds a set of expectations not merely about how applicants behave, but how they narrate and interpret their own histories and stories.

## Conclusion

Genres, like narratives, are culturally and historically contingent. As Chamberlain and Thompson maintain, genres are context-specific, culturally conditioned forms, and '[e]ntering into another culture clearly requires knowledge of the forms and genres

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<sup>79</sup> Patricia Tuitt, 'Literature, Invention and Law in South Africa's Constitutional Transformation' in Karin Van Marle and Stewart Motha (eds), *Genres of Critique: Law, Aesthetics and Liminality* (Sun Press, 2014) 75, 78. Referring to Goodrich's *Law in the Courts of Love*, Tuitt argues Goodrich best captured the place of aesthetics in the biopolitical when he spoke of literature as a minor jurisprudence. She explains, '[a]ttention to the function of the aesthetic in the biopolitical age should be paid from a vantage point other than to assume the innocence of aesthetics in the forming and maintenance of the biopolitical sphere': at 78.

<sup>80</sup> Ibid. Tuitt, drawing on Edward Said, writes that:

[n]otwithstanding the many ruined people and cultures that have attended [imperialism's] search for 'new worlds' and new possibilities, the spirit of invention that is said to inhere in literature and other aesthetic forms continues to be applauded—and this by scholars who would not deny that literature produces action on the 'real world': at 75.

through which and in which memories are constructed and revealed.’<sup>81</sup> An individual’s sense of the past, and the ability to construct it, is structured by cultural norms and genres of history and remembering. In certain cultures, autobiography, and one’s sense of the past, of history—whether personal, familial or social—‘may assume different forms and different meanings’<sup>82</sup> since ‘[a]utobiography, self-expression, centring the ‘I’ as the agent in the narrative [may] not be part of the communicative code.’<sup>83</sup>

This chapter has sought to address the demands placed on refugee applicants to present their evidence in a manner that conforms to certain genre expectations, including the use of a specific narrative voice. I have argued that the assessment of refugee applicants’ testimony is marked by the demand for a narrative form and for the fulfilment of certain genre-based expectations. The genre of narrative that decision-makers expected of refugee applicants is an example of aesthetics or literature being implicated in law in a manner that does not improve law, but instead contributes to legal authorities’ power to justify and legitimise their judgment of others.

Even as I adopt a critical view of literature and narrative in law, as well as a deep scepticism of the valourisation of narrative, I wish to retain some hope for the potential of certain literary genres to challenge law and to aid legal theorists in their critiques and analyses of legal forms.<sup>84</sup> Antaki writes that while some literary genres call to be critiqued, others are acts of critique in themselves and can unsettle state

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<sup>81</sup> Chamberlain and Thompson, above n 16, 17. Or as Helen Buss puts it, when one is theorising the genre of memoirs and needs to understand the nature of particular genres, we must consider genre ... not only in the traditional way, as a set of writing practices, but also as a particular ideologically shaped discourse, in which we take into account the functional aspects of genre, the way in which a genre arises from particular social needs, empowers a particular class of people, and becomes a cultural practice.

Helen Buss, ‘Memoirs’ in Margaretta Jolly (ed), *The Encyclopedia of Life Writing* (Fitzroy Dearborn, 2001) 595, 595.

<sup>82</sup> Chamberlain and Thompson, above n 16, 17.

<sup>83</sup> Ibid.

<sup>84</sup> In Slaughter’s reading of the relationship between the realist novel and the human rights project, he is undeniably critical of human rights discourse. And yet, in his critique, he retains hope for the normative project, and indeed the genres, of human rights. Slaughter argues that instead of treating right discourse’s ‘imaginary egalitarianism’ and its paradoxes as a shameful limitation, we should attend to the productive possibilities of human rights discourse, whereby ‘such a project must consider not only the content of human rights discourse but also its logical and rhetorical forms, from which its content is in fact inseparable.’ Slaughter, ‘Enabling Fictions and Novel Subjects’, above n 5, 1413.

law's taken-for-granted assumptions and fantasies of closure and sovereignty,<sup>85</sup> and simultaneously challenge the 'romantic fantasy' that literature can complete the law.<sup>86</sup> While the *Bildungsroman*, in its fantasies of sovereignty over the future and access to one's own and others' interiority,<sup>87</sup> seems to be implicated in the law's power to define the terms on which refugee applicants may speak, other critical works such as the anti-novel 'call the fantasies into question and may therefore invite an experience of affective dissonance.'<sup>88</sup> In this sense, certain works of literature can be productively read to challenge law's demand for particular types of narrative. This point, of course, relates to the foundations of outsider storytelling scholarship and arguments that certain narratives disrupt and undermine legal authorities' stock stories about particular legal subjects. But, crucially, I stop short of arguing that these narratives or narrative forms will transform the law. My argument instead is a call for careful attention to the 'occasions' of narrative that the law creates, and to who has control over the narratives presented in pursuit of access to refugee status. Paying attention to these questions enables us to contemplate the possibilities of narrative forms that exist outside of the purposive, teleological and vertical setting of refugee decision-making.

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<sup>85</sup> Antaki, above n 1, 975–977; Manderson, above n 7, 17.

<sup>86</sup> Antaki, above n 1, 977.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid. see also Robin West, 'Communities, Texts, and Law: Reflections on the Law and Literature Movement' (1988) 1 *Yale Journal of Law & the Humanities* 129.

## CONCLUSION

The stories we find credible depend on a backdrop of narratives in constant circulation controlled by interests that are not neutral and would have us imagine our world in a certain way. This is not the best of all possible worlds. And imagination is the only faculty we have that lets us see beyond the horizon of convention.

—Laurence J Kirmayer, 'Failures of Imagination: The Refugee's Narrative in Psychiatry' (2003) 10 *Anthropology & Medicine* 167, 183

How the hell do I know what I find incredible? Credibility is an expanding field. ... Sheer disbelief hardly registers on the face before the head is nodding with all the wisdom of instant hindsight.

—Tom Stoppard, *Jumpers* (Grove Weidenfeld, 1972)

This thesis has presented an argument in favour of careful and critical engagement with terms upon which refugee applicants must speak during the RSD oral hearing in order to access protection. In the absence of other means to prove their claims, the refugee applicants who participated in this research needed to be able to present and explain their evidence such that it met the core elements of a compelling narrative form. A demand for evidence in a narrative form structured and shaped the manner in which decision-makers tested refugee applicants' evidence. This demand encompassed expectations that applicants present a particular kind of narrative, marked by linearity; direct and explicable causal connections; and some sense of both 'plot' and closure. The hearings woven through this thesis have traced how such demands were articulated in decision-maker questioning, how applicants contended with these frequently implicit expectations and the challenges of giving a compelling account of one's self in the fragmented and unpredictable space of the RSD oral hearing.

This thesis's focus on the form of refugee applicant's testimony places it squarely in the context of an interdisciplinary body of scholarship that has critiqued the tenuous straws at which RSD processes have grasped—principally coherence, consistency and plausibility—in order to finally determine the credibility of refugee applicants' testimony. The criteria governing credibility assessment are inaccurate measures of the credibility of *any* form of autobiographical testimony, and wholly inappropriate when applied to the often trauma-inflected, cross-cultural and bilingual environment



of the RSD hearing. The original contribution of this thesis has been to argue that the presentation and explanation of evidence in a narrative form is another expectation that governs what kinds of refugee testimony are heard as credible. It has also shown that the *form* of evidence that refugee applicants must present in part reveals *whom*, in the judgment of the receiving State, the onshore refugee should be and how they ought to behave. The expectations of refugee applicants-as-narrators exist over and above the requirement that an applicant's experiences meet the Refugee Convention definition of who will qualify for refugee protection.

I have explored these questions using the framework of narrative theory to analyse and assess the conduct of 14 RSD oral hearings. Alongside my argument about the place of the narrative form in the testing and presentation of refugee testimony, I have articulated an argument in favour of law's turn to literature and narrative as being one concerned with literary forms and means of persuasion. In addressing the role of 'narrative' in law, legal scholarship must remain critical of the social, political and cultural context of both 'literature' and the narrative form. This methodological claim led to a final chapter on genre and testimony, which argued in favour of exploring the forms of speech in refugee testimony through the consideration of the devices and conventions of different genres of narrative. In that chapter I suggested that *outside* of the RSD process, particular literary forms or genres of fiction may be productive tools when engaging with refugee oral testimony. Literary or fictional works can present us with a means of thinking through the narrative form within legal authority and decision-making. That is, certain texts attempt to make visible and question the narrative form, the conceits of a 'reliable' narrator, and particular means of persuasion and argument.<sup>1</sup> In this concluding chapter, I pick up that argument once more and turn to an excerpt from a refugee oral hearing. The excerpt, though, is not drawn from one of the 14 RSD oral hearings already analysed in this thesis, but rather from the 2011 French-Canadian film *Monsieur Lazhar*.<sup>2</sup>

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<sup>1</sup> As James Boyd White so cogently writes, literature teaches law a way of reading, 'of focusing our attention on the languages we use, on the relations we establish with them, and on the definition of self and other that is enacted in every expression. It teaches a way of reading that becomes a way of writing too': James Boyd White, 'Law and Literature: No Manifesto' (1987) 39 *Mercer Law Review* 739, 745–6.

<sup>2</sup> Philippe Falardeau, *Monsieur Lazhar* (Music Box Films, 2011).

*Monsieur Lazhar*, set in Montréal and directed by Philippe Falardeau, is based on Évelyne de la Chenelière's one-character play, *Bashir Lazhar*.<sup>3</sup> Both texts centre on Monsieur Bashir Lazhar, a recent arrival to Canada from Algeria who has applied for refugee status. As works of fiction, and of narrative, these texts critique the law's relations of power and processes of judgment within RSD, though they do not answer or resolve the questions raised by 'judging' refugee applicants. I draw on the film because it deploys narrative to critique the demand for a narrative form in RSD. However, I also choose to discuss this fictional refugee story in order to contrast the film's power to control the story it tells with the demand for narrative made of non-fictional refugee applicants. Unlike most all refugee applicants' narratives in RSD processes, the narrative form in fiction self-consciously deploys literary conventions and methods to persuade; its content is controlled and carefully edited; and the story's end is conceived of, if not foreshadowed, from the outset.<sup>4</sup> Fictional and celluloid texts employ the syntax of beginning, middles and ends, even if they do so in an unconventional manner. Attending to 'refugee stories' as they are presented within works of literature or fiction reinforces how misplaced the demand for linear stories—marked by explicable causative links, obvious moments of closure and where the beginning 'fits' with the end—is in relation to refugee testimony presented in adjudicative settings.<sup>5</sup> While narratives are an intimate part of and implicated in law, the demand for narrative in law must, as Dershowitz argues, be critiqued as an

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<sup>3</sup> Évelyne de La Chenelière, *Bashir Lazhar* (Leméac, 2011).

<sup>4</sup> Alan M Dershowitz, 'Life Is Not a Dramatic Narrative' in Peter Brooks and Paul D Gerwitz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (Yale University Press, 1996) 99, 101. Frank Kermode argues that the illusion of control within fictional stories does not marry with lived experience. He writes:

How good would it be ... if one could find in life the simplicity inherent in narrative order. 'This is the simple order that consists in being able to say: "When that had happened, then this happened." What puts our minds at rest is the simple sequence, the overwhelming variegations of life now represented in, as a mathematician would say, a unidimensional order.' We like the illusions of this sequence, its acceptable appearance of causality: it has the look of necessity. But the look is illusory.

Frank Kermode, *The Sense of an Ending: Studies in the Theory of Fiction* (Oxford University Press, 1967) 127; citing Robert Musil, *The Man Without Qualities* (Pan Macmillan, 2011) (first published in volumes from 1932-43).

<sup>5</sup> Reading fictional narratives against law and legal decision-making also reinforces Robin West and Robert Cover's insistence that while law is constituted by narratives and interpretation, law's acts are backed by force, and so narrative and interpretation in law can not be treated as the equivalent of interpretative acts in literature. As West states, 'Adjudication is in form interpretive, but in substance it is *an exercise of power* in a way which truly interpretive acts, such as literary interpretation, are not': Robin West, 'Adjudication Is Not Interpretation: Some Reservations about the Law-as-Literature Movement' (1986) 54 *Tennessee Law Review* 203, 207; see also Robert M Cover, 'Violence and the Word' (1986) 95 *The Yale Law Journal* 1601.

expectation that is relentlessly conditioned by our exposure to dramatic and fictional texts.<sup>6</sup>

*Monsieur Lazhar* is not a typical ‘refugee film’ in terms of its genre or content; although M. Lazhar is seeking refugee status, the central action of the film is not M. Lazhar’s attempt to access the protection of the Canadian government. Instead, the film’s central complication is the suicide by hanging of a teacher in a small Québécois primary school. At the start of a new school day, the body of the teacher, Martine Lachance, is found in the classroom by one of the young students, still suspended above the miniature desks and chairs.<sup>7</sup> M. Lazhar enters the story as the replacement teacher. Ultimately the film is about how the children and adults alike face the death of Martine Lachance, their teacher and colleague. It addresses questions of trauma and suffering, and the difficult processes of working through and acting out both of these states.<sup>8</sup> For his part, whilst also seeking to remain in Canada as a refugee, M. Lazhar seeks to engage with the young students’ confusion and grief. Against M. Lazhar’s approach, the school administration seeks to ‘move on’ and to shield the children from ‘adult’ concerns.

M. Lazhar’s attempt to secure recognition as a refugee runs parallel to classroom scenes featuring M. Lazhar instructing his new students. Through the character of M. Lazhar, the film explores the profound difficulty of judging refugee testimony. M. Lazhar is presented to us as an educated, sensitive and deeply sympathetic character. Although we see his success as a devoted albeit unconventional teacher, we are also exposed, from early on in the film, to a series of barefaced lies that M. Lazhar tells the school about his immigration status and his qualifications as a teacher—of which he in fact has none—in order to secure the primary school teaching position. We, as the viewers, come to know that M. Lazhar is not a qualified and experienced schoolteacher. In order to apply for the job, he has forged his credentials and told the harried, no-nonsense school principal that he has taught for 19 years in an Algerian

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<sup>6</sup> Dershowitz, above n 4, 101.

<sup>7</sup> For those who care about industry accolades, the film was nominated for and won a multitude of awards both in Québec and internationally, including a nomination for the best foreign film Oscar: Stephen Holden, “‘Monsieur Lazhar,’ Oscar Nominee From Philippe Falardeau”, 12 April 2012 <<http://www.nytimes.com/2012/04/13/movies/monsieur-lazhar-oscar-nominee-from-philippe-falardeau.html>>.

<sup>8</sup> On these concepts, see Dominick LaCapra, *Writing History, Writing Trauma* (John Hopkins University Press, 2nd ed, 2014) 141–3.

public school—while he was in fact a public servant and the owner of a restaurant-café. In *Monsieur Lazhar*, viewers must temporarily occupy the deeply discomfiting role of judging M. Lazhar and the content of his claim to refugee protection.

Armed with this knowledge about M. Lazhar, we are taken into his closed refugee hearing. The film recreates a fictional hearing before the Canadian IRB, complete with the actual IRB crest, although the courtroom-style setting looks nothing like an IRB hearing room. For most of the film, the audience is not positioned to ‘know’ whether M. Lazhar’s claim to status is ‘genuine,’ although we are exposed to flashes of sleeplessness and bereavement, and we do know his wife and children have died. In the scene from his IRB hearing, M. Lazhar must convince the decision-maker that his wife and children have died as the result of a politically motivated arson attack, not as the consequence of an accidental fire in their apartment building. It is in the IRB hearing scene that the viewer is first exposed to the details of M. Lazhar’s claim; in it, M. Lazhar not only presents his claim but also explicitly confronts his expected role as a crafter of narrative. He does so by taking umbrage with the decision-maker’s demand that his evidence be ‘convincing.’ An angry, het-up M. Lazhar asks what being ‘convincing’ has to do with the threats he has faced or with his claim for refugee status:

- |            |   |
|------------|---|
| Counsel:   | The threats were directed at your wife, is that correct? <sup>9</sup>   |
| M. Lazhar: | Yes, then at the whole family.  |
| Counsel:   | Describe the threats.   |
| M. Lazhar: | They spoke of traitors, execution, death, constant death threats.       |
| Member:    | Counsellor, I see your client has studied his vocabulary.               |
| Advocate:  | My client received death threats; I advised him to use that term.       |
| M. Lazhar: | I assure you the threats were very real.                                |
| Counsel:   | <b>You were a teacher... No, your wife was a teacher. You were a...</b> |
| M. Lazhar: | <b>Civil servant until 1994, then I ran a café-restaurant.</b>          |
| Counsel:   | Why was [your wife’s] book so problematic?                              |
| Member:    | Yes, the 90s are over. Algeria is back to normal.                       |
| M. Lazhar: | Algeria is never completely normal.                                     |

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<sup>9</sup> The person asking the questions appears to be acting for the Government or assisting the decision-maker. While the precise details of her role are unclear, it is clear that she is not acting for M. Lazhar.

Member: Well, the attacks have stopped.

Advocate: If I may, last month there were five attacks...

Member: [*To M. Lazhar's advocate.*] Yes, I have those clippings. [*To M. Lazhar.*] So, your wife's book?

M. Lazhar: It criticised the policy of national reconciliation. Many criminals were pardoned. Religious extremists, but also police and soldiers who had committed murders. When a women speaks out, it angers people ...

Counsel: You stated your family was in danger, yet you came alone?

Member: **Indeed, why did you abandon your family?**

M. Lazhar: [*Confused.*] **Abandon? I didn't abandon them; I came here to prepare the way. My wife's visa arrived after mine. She wanted to finish the school year.**

Member: **She was threatened, but *you* left.**

M. Lazhar: **We were all threatened.**

Member: **But not so convincingly that she left.**

M. Lazhar: [*Pause.*] **What does that change?**

Advocate: [*Reproachful.*] **Monsieur Lazhar...**

M. Lazhar: [*Forceful.*] **Convincing or not, what does that change?**

Member: **It is not convincing...**

M. Lazhar: She died; they all died.

Member: I don't deny that, but the entire building burned. With many flats. They may not have targeted your wife.

M. Lazhar: [*Defeated*] Yes. There were many flats.

Member: Look, just tell us the facts.<sup>10</sup>

During this scene, M. Lazhar must account for his story's capacity (or lack thereof) to convince the decision-maker. He must also explain why the form of his story does not conform to the 'narrative of becoming of refugee' described in Chapter Four. Why didn't he and his wife leave immediately if she was in danger? Why would she and his children stay behind when he left for Canada? However, rather than acquiesce to the requirement to convince, M. Lazhar takes on the role of the questioner, redirecting the hearing away from the details of his own claim and towards a critique of the process. He asks, 'Convincing or not, what does that change?' The film, though, does more than critique the demand that refugee testimony 'persuade' the decision-maker. It also presents the viewer with the challenge of judging that testimony. The scene

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<sup>10</sup> Falardeau, above n 2 (emphasis added).

above presents us with the details of M. Lazhar's claim, as it simultaneously reminds us that he has lied about his qualifications and his history as a teacher in order to get the teaching position he has held throughout the film. When viewing this IRB hearing scene, we are not positioned to straightforwardly empathise with M. Lazhar and the circumstances of harm and loss that he describes. Rather, we are positioned to hear these things in the context of understanding M. Lazhar's capacity to lie and deceive, and therefore to question whether the story he tells is credible or fabricated. As we are presented with M. Lazhar's testimony, we are implicitly invited to judge it. Some parts of his story do seem 'convincing,' and we do know that his family is dead. But at this point, there is no way of knowing whether his claim to protection is 'genuine' and whether his family was killed for political reasons as M. Lazhar claims.

Before film's end, in a second scene in the 'IRB' hearing room, we see M. Lazhar's claim succeed. For much of the film, his claim to refugee status has hung in the background, unresolved. He is granted refugee status only after a new piece of 'hard' evidence arrives and is submitted to the decision-maker: an Algerian police report that confirms his wife's death was found to be the result of a targeted act of arson. Based on this evidence, his claim is accepted. In some ways, the film's proffering of this new piece of evidence gives the viewers, as judges of M. Lazhar's testimony, an easy way out. We no longer have to decide, in absence of any corroborating evidence, whether to believe him. However, the unlikely substantiation of his claim, with a State-produced police report no less, comes towards the end of the film after we have already been positioned to see both his grief and his dishonesty.

The documentary evidence that turns up in *Monsieur Lazhar* is of course often not available to those seeking protection within RSD settings. That is, rarely do applicants access 'hard' evidence to corroborate their narratives. Instead, they are burdened to speak on their own behalves and tell a convincing tale—a practice against which M. Lazhar dares to remonstrate. Prior to this point (and perhaps even beyond it) viewers of the film experience the 'radical uncertainty' of refugee decision-making,<sup>11</sup> the vast power imbalance between decision-maker and applicant, and perhaps sense the inevitably flawed nature of settling upon some criteria by which to judge the story's

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<sup>11</sup> Trish Luker, 'Decision-Making Conditioned by Radical Uncertainty: Credibility Assessment at the Australian Refugee Review Tribunal' (2013) 25 *International Journal of Refugee Law* 502.

credibility. In the hearings at the centre of this thesis, the applicant's ability to demonstrate a particular kind of narrative competence was critical to making the claim heard and to explaining the claim to the decision-maker. The film critiques this process and refuses to present M. Lazhar as a helpless refugee applicant or to resolve the film in the determination of his claim.

...

My focus in this thesis on the RSD oral hearing was motivated by the minimal attention, scholarly or otherwise, that has been paid to *how* the oral hearing is conducted in Australia and Canada. My research design, described in Chapter Two, sought to explore how the events of the hearing affect refugee applicants' ability to present themselves and their evidence as credible. This led to a set of findings that revealed existing critiques of credibility assessment apply to the *testing* of evidence during the hearing. In particular, the hearings confirmed the vast power and subjectivity of decision-makers to determine the terms upon which evidence (and credibility) is tested. But, as well as this, they revealed that questions of narrative and the narrative qualities of each applicant's testimony were central to how evidence was both presented and examined.

Each of the arguments concerning refugee testimony in the oral hearing was framed by Chapter Three's account of the history of the oral hearing. In that chapter, I argued that the hearing in both Australia and Canada was introduced as a site for credibility-testing. In Australia, this occurred during a period when the State was seeking to limit both onshore refugee arrivals and judicial review of migration decisions, as well as to use RSD processes to distinguish 'genuine' onshore applicants from 'bogus' applicants. In Canada, the hearing was introduced in a less cynical mode, but as State policy moved into a period of 'deterrence' and of limiting onshore arrivals. In both jurisdictions, though, 'orality' and oral evidence were at the centre of RSD and the determination of refugee claims. Chapters Four and Five addressed how narratives and the narrative form were used to test refugee applicants' testimony. Chapter Four argued that a 'stock story' of becoming a refugee formed the basis for judging the form and content of refugee applicants' evidence. Then, Chapter Five traced the ways in which decision-makers tested evidence during hearing. Specifically, decision-makers engaged in a form of narrative contest, presenting counter-narratives to applicants as to how their histories *might* have taken place and expecting applicants to

contend with these alternative narratives. These counter-narratives exposed decision-makers' deeply subjective, shifting, narrative-based understandings both of their own and of the applicants' social context and worlds. The counter-narratives frequently related to small details in the applicant's evidence, such as an injured arm, a phone number, or the items that an applicant had packed prior to leaving. These normative expectations held by decision-makers were often implicit, idiosyncratic and difficult to discern.

Decision-makers primarily drove and directed the hearings I observed. Chapter Six in particular considered the conduct of the oral hearing as a narrative occasion. That chapter revealed that the events and issues addressed in the hearings were ordered according to each decision-maker's unique and frequently fragmented approach to the evidence. It argued that even though applicants were expected to take on the role of narrator and were held accountable for the form and content of their evidence, decision-makers actively impeded applicants from presenting their evidence in a narrative form. Finally, in Chapter Seven I articulated with greater precision the kinds of narratives that applicants were expected to present, focusing on the requirements of refugee testimony as they related to particular genres. The requirement for 'credible' refugee testimony calls for a particular kind of narrator and subject, one who has a knowledge of self and others, who is autonomous and who displays omniscience and sovereignty over her or his path to refugee status. This chapter asked how refugee testimony within RSD and the terms upon which it is assessed might relate to particular genres, including that of the realist novel and the 'genre' of human rights discourse. It revealed that the working definition of narrative I have adopted here begins rather than ends a process that considers different elements of narrativity and genre in refugee testimony.

### **Repairing the Oral Hearing?**

The aim of this thesis has not been to establish a set of normative standards for the conduct of the RSD oral hearing and the judgment of testimony.<sup>12</sup> However, my

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<sup>12</sup> Some of the literature on credibility assessment within RSD processes is reparative. That is, it has closely observed the processes of credibility assessment and made productive suggestions for improving these processes. See especially UNHCR, 'Beyond Proof: Credibility Assessment in EU Asylum Systems: Full Report' (May 2013); Helen Baillot, Sharon Cowan and Vanessa E Munro, "'Hearing the Right Gaps': Enabling and Responding to Disclosures of Sexual Violence within the UK



arguments and observations raise constructive questions about the hearing, as well as suggest possible means to ameliorate the burdens of speech and narrative placed on refugee applicants. Primary among these suggestions is that applicants ought not be required to shape their evidence into a ‘good story’ that is straightforwardly causal, neatly located within a time sequence, and able to be ‘resolved’ through the seeking and possible acquisition of refugee status. My argument that refugee applicants are expected to act as omniscient narrators who know themselves and others, and who can confidently account for the events in their narratives demonstrates that the narrative form is implicated in the politics of refugeehood. That is, the ‘other’ whom the state is willing to accept *can* account for him or herself—despite a history of harm and persecution—and will become an autonomous, self-possessed citizen in the receiving state.<sup>13</sup> While it is true that the RSD process unavoidably constitutes an ‘essay in prediction’<sup>14</sup> about what the future *may* hold, this ought not entail an expectation that refugee applicants confidently narrate and know the details of what is yet to come. Critically, applicants should not be required to speculate about what could have but did not happen in their evidence, based on a decision-maker’s sense of plausibility and what ought to have happened, which is not supported by or even addressed in the available evidence.

The hearings included in my thesis also support a suggestion that oral hearings in each jurisdiction should be more predictably structured. If applicants’ evidence is tested against standards of plausibility, coherence and consistency, the hearing should

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Asylum Process’ (2012) 21 *Social & Legal Studies* 269; Diana Bögner, Chris Brewin and Jane Herlihy, ‘Refugees’ Experiences of Home Office Interviews: A Qualitative Study on the Disclosure of Sensitive Personal Information’ (2010) 36 *Journal of Ethnic and Migration Studies* 519; Jenni Millbank, “‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations’ (2009) 21 *International Journal of Refugee Law* 1; Jane Herlihy and Stuart Turner, ‘Should Discrepant Accounts given by Asylum Seekers Be Taken as Proof of Deceit?’ (2006) 16 *Torture: Quarterly Journal on Rehabilitation of Torture Victims and Prevention of Torture* 81; Gregor Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martin Nijhoff Publishers, 2005); Michael Kagan, ‘Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination’ (2002) 17 *Georgetown Immigration Law Journal* 367.

<sup>13</sup> As Barsky puts it, ‘The process of making a claim in this sense is one of creating a “productive other,” a satisfactory stand-in for the purposes of the hearing ... The word “productive” here suggests not simply a process of communication, but one of self-representation for a clearly-defined end’: Robert F Barsky, *Constructing a Productive Other: Discourse Theory and the Convention Refugee Hearing* (John Benjamins Publishing, 1994) 14.

<sup>14</sup> As discussed in Chapter 7 on the Genre of Refugee Testimony, the RSD process is described by Guy Goodwin-Gill and Jane McAdam as ‘a system of protection founded upon essays in prediction’: Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) 58.

provide applicants with the opportunity to meet these standards. If the refugee oral hearing must be a narrative occasion, it should be a less surprising one. The applicants in the hearings I observed *did not* control the narrative that was presented. In spite of the intensely informal and unstructured nature of the hearing and the testing of evidence, applicants must be given a chance to speak and articulate their claims. The opportunity to present a claim, however, should not lead to a reinforcement of the assumptions in credibility assessment that refugee applicant evidence will be consistent across retellings, internally consistent and coherent. Simply put, the opportunity to present one's evidence orally in a *hearing* that is consistently and predictably conducted should be afforded to refugee applicants—even where the decision-maker has already read a written version of the evidence, or where merits review is being conducted.

My thesis was in part motivated by the silence and lack of information that surrounds how RSD oral hearings are conducted. The closed nature of the refugee oral hearing contributes to the core problems of narrative, credibility testing and decision-maker subjectivity that I have addressed in this thesis. The silence that surrounds these hearings entrenches the power of the decision-maker over the terms of credibility testing. While considerations of privacy must be balanced against the 'audibility' or transparency of these processes, I think this balance has tipped too heavily in favour of privacy.<sup>15</sup> The closed nature of these hearings in Australia especially should be read in the context of increasingly severe attempts to restrict access to information about so-called 'undocumented migrants' and asylum seekers.<sup>16</sup> Indeed, in jurisdictions where the hearings are designated as closed, challenges in accessing refugee hearings appear to be inevitable; a problem that I experienced most acutely in regards to the RRT. The dataset in this thesis is too small to make representative conclusions about the conduct of the oral hearing; however, it is one of a small but growing handful of studies that have successfully accessed the oral hearing and assessed its conduct. Such work is critical if the terms of credibility and evidentiary

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<sup>15</sup> See also Goodwin-Gill and McAdam who argue that in relation to RSD, the balance between public interest in the principle of open court and confidentiality is yet to be achieved: *ibid* 534.

<sup>16</sup> See Alex Reilly and Rebecca La Forgia, 'Secret "Enhanced Screening" of Asylum Seekers: A Democratic Analysis Centring on the Humanity of the Commonwealth Officer' (2013) 38 *Alternative Law Journal* 143.

assessment within RSD are to, at the very least, be accountable and meet existing standards governing the conduct of the hearings.

Each of the four analysis chapters at the centre of my thesis have shown that in the oral hearing's current form, the decision-maker's own sense of narrative is critical to how evidence is tested and articulated. Decision-makers' profoundly subjective interventions into the hearing, and their articulations of alternative narratives, shape and co-narrate the content of the evidence that is produced. Decision-makers' understandings of credibility and plausibility not only feature in their final decisions; they also influence the factual matrix—and the story—upon which the applicant's claim is ultimately based. In particular, Chapter Five addressed the narratives that decision-makers present in the hearing, narratives about how the events that the applicant recounts, or mentions in passing, as evidence could or 'should' have transpired. Chapter Seven revealed the decision-maker's own willingness to account for and explain the behaviour of others in the applicant's narrative, where the applicant failed or refused to perform the role of omniscient narrator. The *Zahau* hearing was not exceptional as an example of this practice. In that hearing, the decision-maker's demands that Ms Zahau constantly account for *why* everything happened in her testimony (why did she go to the toilet before escaping an alleged situation of sexual assault?) reveals the demand for an all-knowing narrator and explicable causation in refugee testimony. The decision-maker's readiness to fill in these gaps when Ms Zahau could not reveals the decision-makers role in recasting the applicant's testimony. The testimony produced in the oral hearing is created by the applicant and the decision-maker—and where relevant, by an interpreter and an advocate—and yet only the applicant bears the ultimate responsibility for the testimony, and the consequences of how that testimony is judged.<sup>17</sup>

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<sup>17</sup>In an overview of a number of domestic RSD evidentiary assessment procedures in 2005, Gregor Noll concluded that 'the design of migration and asylum law distorts the production and availability of proof, and could, in extreme cases, produce rejections by design.' Where decision-makers intervene into the oral hearing and participate in reformulating applicants' evidence according to subjective and unaccounted for assumptions, the extent to which such 'remade' evidence then forms the basis of credibility assessments may also result in rejections by (oral hearing) design. Gregor Noll, 'Introduction: Re-Mapping Evidentiary Assessment in Asylum Procedures' in Gregor Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martin Nijhoff Publishers, 2005) 1, 5.

## The Impossibilities of Repairing the Oral Hearing

Reforming the conduct of the oral hearing, and even attempting to undo expectations that those seeking asylum can and should present evidence in a particular, generic narrative form, will neither partially nor fully redress the demands of speech placed on those seeking asylum. Procedural reforms, including the ones I have suggested, cannot adequately address the critique of the hearing as a site that assesses the capacity of the applicant to ‘construct a productive other’ and to successfully *present* and justify a claim to refugee status on terms set by the receiving State.<sup>18</sup> Dauvergne observes that refugee applicants who cannot establish their identity or claims credibly must contend with the fact that ‘[o]ne’s account of self is not sufficient – a truth that most of us are spared from confronting.’<sup>19</sup> In the oral hearings I observed, refugee applicants had to deal with this fact—that their accounts of self were insufficient—directly and in person, and whilst contending with demand for evidence in a particular form in a necessarily stressful adjudicative setting.

Taken as a whole, my thesis points to the impossibility of constructing a process by which refugee applicants can be heard outside of discursive power imbalances of the hearing and the mandates of credibility assessment and narrative within RSD.<sup>20</sup> Even if the very ‘best’ practice were to be followed in relation to credibility assessment, the uneven, raced and cultural context of RSD; the inevitable demand for speech; *and the content of existing credibility standards*, would preclude the creation of a process that adequately answers the concerns I have raised here.

As part of the 2013 *Beyond Proof* report into credibility assessment practices in EU asylum systems, the UNHCR translated ‘the legal and theoretical concepts’ discussed in the report into ‘practical flowcharts and checklists to assist decision-makers and to support a fair assessment of credibility in the asylum procedure.’<sup>21</sup> These decision-maker tools thoughtfully incorporate an immense amount of critical, evidence-based research and literature on best practice in credibility assessment. They are intelligently

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<sup>18</sup> Barsky, above n 13.

<sup>19</sup> Catherine Dauvergne, *Humanitarianism, Identity, and Nation: Migration Laws of Australia and Canada* (UBC Press, 2005) 104.

<sup>20</sup> Gregor Noll, ‘Asylum Claims and the Translation of Culture into Politics’ (2006) 41 *Texas International Law Journal* 491, 499.

<sup>21</sup> UNHCR, above n 12, 16.

designed, with a flowchart-style interface for working through credibility determinations. Decision-makers following the checklists must be able to account for the bases of their credibility judgments and tie these judgments to the applicant's evidence in a manner that takes into account particular challenges that certain classes of applicants face in presenting testimony. In these *Beyond Proof* checklists, alongside factors that affect the applicant in the presentation of testimony (memories for facts, dates and objects; the impact of trauma; fear and lack of trust, cultural background, and gender, amongst others), factors affecting the decision-maker are addressed. These factors include the decision-maker's thinking processes; 'individual and contextual circumstances'; 'state of mind'; 'political, societal and institutional context'; and 'credibility fatigue, stress and vicarious trauma,' amongst others.<sup>22</sup> The inclusion of these factors is heartening. They acknowledge the central and decisive role that individual decision-makers play in how a hearing unfolds. As well, the checklists recognise that the conduct of the hearing, and of the decision maker will affect the ability of the applicant to present testimony.<sup>23</sup>

In many ways, the checklists address some of the directly normative and reparative suggestions I have made above, to improve the bases on which refugee applicants' evidence is tested. Indeed, they also address *how* evidence is tested during the hearing.<sup>24</sup> However, even in these checklists, the burden of narrative remains on the applicant as acutely as ever—especially during the oral hearing. The checklists, and my own suggestions, cannot escape the key bases of credibility assessment, and as such they carefully reiterate and explain the requirements of plausibility; sufficiency of detail and specificity; internal consistency; and external consistency, against which the applicant's oral and written testimony will be judged.

In my critique of even 'best practice,' though, it is hard to imagine a context in which removing the hearing will improve access to asylum. I believe it is important to

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<sup>22</sup> Ibid 258–9.

<sup>23</sup> Ibid.

<sup>24</sup> Amongst other things, the *Beyond Proof* checklists direct that the decision-maker 'uses appropriate questions, remains impartial and objective during the interview both in his or her verbal and non-verbal communication'; 'takes age, gender, cultural and ethnic background, education, social status, sexual orientation and/or gender identity into account in the way questions are put to the Applicant, responses are analysed, assessed and interpreted, and follow-up questions are phrased'; and 'provides the Applicant with an opportunity to clarify any apparent lack of details, omissions, inconsistencies, and implausibilities': at 254.

clearly state I am not advocating for such a reform; nor have the questions and methods of this thesis provided sufficient basis to mount a robust ‘reform’ suggestion. Though, in considering the implications of my arguments, it is essential to note that most contemporary reforms of RSD continue to be motivated by crude discourses of ‘efficiency’ and gate-keeping—that is, of limiting access to full status determination processes on the assumption that many applicants are not genuine and do not require such access. Abolishing the oral hearing as part of these frameworks would provide refugees with less of an opportunity to present their claims; with reduced access to much-needed advocacy; and with less of an ability to understand the terms of processes to which they are subject. However, the hearing is also increasingly used to legitimise extremely limited or truncated RSD processes.<sup>25</sup> The faster that ‘fast-track’ processes become, the use of *any* kind of hearing or ‘screening process’ to legitimise refugee determinations strikes me as a dangerous, possible direction of current procedural reforms.<sup>26</sup> Finally, though, in the considering the possibility/impossibility of ‘repairing’ the oral hearing, the *Beyond Proof* and my own suggestions directed towards making the hearing a predictable and receptive narrative occasion will surely have little purchase in the political context of asylum-seeking described here. Following the *Beyond Proof* checklists, for example, will not hasten the oral hearing or the ability of decision-makers to determine credibility.<sup>27</sup> Suggestions to ‘improve’ hearings must almost certainly be required to meet first and foremost the exigencies of ‘efficient’ determination processes.<sup>28</sup>

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<sup>25</sup> See Thomas Spijkerboer, ‘Stereotyping and Acceleration: Gender, Procedural Acceleration and Marginalised Judicial Review in the Dutch Asylum System’ in Gregor Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martin Nijhoff Publishers, 2005). The acceleration of RSD cuts against so much of the literature that has argued that thoughtful (and time-consuming) responses to the challenges of this adjudicative setting, as well as decision-maker accountability, are critical to improving credibility assessment and RSD more generally.

<sup>26</sup> See, for example, Australia’s practice of ‘enhanced screening’ at sea of Sri Lankan asylum seekers arriving by boat, at times using satellite phone to interview applicants: Savitri Taylor, ‘Sri Lankan Boat Arrivals: Enhanced Screening, Diminished Protection’ *The Conversation*, 1 November 2013 <<http://theconversation.com/sri-lankan-boat-arrivals-enhanced-screening-diminished-protection-19601>>; Human Rights Law Centre, ‘Can’t Flee, Can’t Stay: Australia’s Interception and Return of Sri Lankan Asylum Seekers’ (March 2014) <[http://www.hrlc.org.au/wp-content/uploads/2014/03/HRLC\\_SriLanka\\_Report\\_11March2014.pdf](http://www.hrlc.org.au/wp-content/uploads/2014/03/HRLC_SriLanka_Report_11March2014.pdf)>.

<sup>27</sup> Though, structuring the hearing and limiting decision-makers’ subjective and unpredictable interventions into applicant evidence *may* improve efficiency and prevent credibility assessment from ‘blowing out’ during the hearing, as observed by Kneebone in relation to the RRT’s early operation: Susan Kneebone, ‘The Refugee Review Tribunal and the Assessment of Credibility: An Inquisitorial Role’ (1998) 5 *Australian Journal of Administrative Law* 78, 84.

<sup>28</sup> Far from repairing the oral hearing, acceleration reforms have the opposite effect. The acceleration of asylum procedures and limiting the possibilities for review of asylum decisions mean that ‘the

## Refusing Conclusions and Closure

My thesis has critiqued the demand for narrative within RSD processes. It has argued that the narrative form is implicated in how law exercises power and authority, rather than outside of law or ‘better’ than ‘legal’ forms of language and persuasion. However, it has also argued that certain genres of narrative do not demand chronology, linear causation, closure, a rational interior self or a rejection of uncertainty. While such genres do not redress who may speak and on what terms, they do present us with a way of imagining narrative and testimony outside of the strictures currently placed on refugee applicants seeking protection. In the film *Monsieur Lazhar*, M. Lazhar's claim to refugee status is ultimately resolved. He is granted refugee status when a new piece of documentary evidence is filed with the IRB. But the discomfit of judging him, of not knowing how to determine the plausibility of his story, and of being unable to determine his credibility for much of the film, is not resolved. Here, the play and the film—both narratives for sure—do not offer simple closure. They leave an unanswered question in relation to the process of presenting and judging refugees and their stories. Part of that question surely is, who are we to judge? But another part of the question is, why should those in need of refugee status be required to present a convincing narrative, particularly one that ‘resolves’ with the granting of refugee status?

As a fictional text, it of course *Monsieur Lazhar* ends – but significantly, not with the resolution of M. Lazhar's claim: the film carries on and presents a series of further, simultaneous narratives. Of the 14 refugee applications included in this research, none of the stories presented ended with the oral hearing, and surely not with the resolution of each applicant's claim. The determination of each refugee claim might mark a beginning or an end, a complication, or indeed none of these things. The story is of course more ‘compelling’ if the resolution of the claim represents some form of culmination, whereby the ‘other’ is received into the State or indeed refused entry. However, the particular histories and experiences of refugee applicants presented in the adjudicative settings I observed do not necessarily order themselves into neat narratives. And yet, the ability to fit this story into a narrative and then to articulate

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opportunities to explore the evidentiary dimensions of a claim are severely reduced’ and that the ‘margins of subjectivity and irrationality’ are widened: Noll, ‘Introduction: Re-Mapping Evidentiary Assessment in Asylum Procedures’, above n 17, 6. See also Chapter Three.

and rearticulate this narrative, and to explain it in the oral hearing, was a central precondition to accessing RSD.

In many ways it is appropriate to end this thesis where it began, with a reflection on the place of the oral hearing in the broader context of onshore asylum seeking and the politics of deterrence. Onshore RSD processes are being progressively vanished or limited, just as the figure of the ‘legitimate’ onshore refugee is disappearing.<sup>29</sup> However, for those refugee applicants who do access RSD in refugee-receiving states, the conduct of the oral hearing, its relationship to the assessment of credibility, and the manner in which testimony is tested are critical factors in determining the quality of each applicant’s access to protection. This thesis has demonstrated that we cannot understand the terms of credibility assessment within RSD without an account of narrative and attention to the forms of evidence that refugee applicants present. Indeed, the burden of narrative, and of narrative construction, both encompasses and exceeds existing and urgent critiques of the terms of credibility assessment in RSD. The expectation, that applicants master particular narrative forms, should neither influence nor determine the credibility of refugee applicants’ evidence. Alongside analytic attention to narrative, the assessment of refugee claims cannot be understood without access to the events of the oral hearing, and an account of how testimony, attributed to the refugee applicant, is produced in these closed spaces of refugee testimony.

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<sup>29</sup> Audrey Macklin, ‘Disappearing Refugees: Reflections on the Canada-US Safe Third Country Agreement’ (2005) 36 *Columbia Human Rights Law Review* 365.



## APPENDIX

Applicant Name	Place of Hearing	Date	Country of Origin	Gender	Basis of claim	Details	Credibility	Outcome	Type of Data
1. <i>Bhatti</i>	Canada (Montréal)	2013	Pakistan	M	Religion, PSG	- Religious persecution due to conversion from Islam to Christianity - Persecution on basis of imputed homosexuality - Persecution by religious and government authorities	- Positive credibility assessment	Positive	In person hearing observation
2. <i>Flores</i>	Canada (Montréal)	2013	Cuba	F	Political opinion	- Expression of anti-government sentiment through art and poetry - Persecution by government authorities	- Positive credibility assessment	Negative	In person hearing observation
3. <i>Jabbar</i>	Canada (Montréal)	2013	Afghanistan	M	PSG, political opinion	- Membership of PSG: people working for foreign NGOs - Applicant perceived to be anti-Taliban - Persecution by Taliban forces	- Positive credibility assessment	Positive	In person hearing observation
4. <i>Perera</i>	Canada (Vancouver)	2013	Sri Lanka	M	Political opinion	- Imputed political opinion, perceived member of the Liberation Tigers of Tamil Eelam - Persecution by Sri Lankan authorities	- Negative credibility assessment	Negative	In person hearing observation
5. <i>Rostami</i>	Canada (Montréal)	2013	Iran	F	PSG, political opinion, religion	- Membership of PSG: women subject to spousal violence - Participation in anti-government protests, perceived anti-regime opinion; alleged immorality - Conversion from Islam to Christianity - Persecution by government and former spouse	- Positive credibility assessment	Positive	In person hearing observation

<b>Applicant Name</b>	<b>Place of Hearing</b>	<b>Date</b>	<b>Country of Origin</b>	<b>Gender</b>	<b>Basis of claim</b>	<b>Details</b>	<b>Credibility</b>	<b>Outcome</b>	<b>Type of Data</b>
6. <i>Valdez</i>	Canada (Vancouver)	2013	Mexico	M	PSG	-Persecution due to gang-related politics and violence - Persecution by local gangs	- Negative credibility assessment	Negative (applicant excluded under section 1F(b) of the Refugee Convention)	In person hearing observation
7. <i>Adere</i>	Australia (Melbourne)	2012	Ethiopia	M & F Husband & wife	Political opinion, PSG	- Persecution due to perceived anti-government and pro-democracy opinions and work with 'Western' NGOs - Persecution by government authorities	- Negative credibility assessment	Negative	In person hearing observation
8. <i>Jadoon</i>	Australia (Melbourne)	2014	Pakistan	M	Political opinion, PSG	- Persecution due to membership of a local Peace Committee and anti-Taliban political opinions - Persecution by Taliban forces and members of the army loyal to the Taliban	- Positive credibility assessment	Positive	Audio recording of the hearing in full and transcript
9. <i>Malik</i>	Australia (Melbourne)	2013	Pakistan	M	Political opinion, PSG	- Persecution due to imputed anti-Taliban political opinion; membership of a village defence committee; refusal to give land to the Taliban - Persecution by Taliban forces		Positive	Audio recording of the hearing in full and transcript
10. <i>Mbassi</i>	Australia (Melbourne)	2012	Small African state (details omitted for reasons of anonymity)	M	Political opinion	- Persecution on the basis of opposition to government corruption; whistleblower status and anti-government political opinion - Persecution by government and government-sponsored secret police	- Negative credibility assessment	Negative	In person hearing observation

Applicant Name	Place of Hearing	Date	Country of Origin	Gender	Basis of claim	Details	Credibility	Outcome	Type of Data
11. <i>Mena</i>	Australia (Melbourne)	2014	Egypt	F	PSG, religion	- Persecution due to status as Christian woman - Persecution due to status as an unmarried Christian woman - Persecution by Islamicist forces, in particular Muslim Brotherhood members	- Negative credibility assessment	Negative	Audio recording of the hearing in full and transcript
12. <i>Pillai</i>	Australia (Melbourne)	2013	Sri Lanka	M	Race, imputed political opinion	- Persecution due to activity perceived as anti-Tamil; refusal to support Tamil organisations - Persecution by Tamil paramilitary groups	- Positive credibility assessment	Positive	Audio recording of the hearing in full and transcript
13. <i>Zahau</i>	Australia (Melbourne)	2012	Burma	F	Political opinion, race, religion	- Persecution on the basis of Chin ethnicity and political activities in support of Chin people; Christian religion and pro-democracy political activism - Persecution by government authorities, army forces and pro-government groups	- Negative credibility assessment of certain claims; acceptance of some key claims	Positive	Audio recording of the hearing in full and transcript
14. <i>Zeidan</i>	Australia (Sydney)	2014	Syria & Lebanon	F & F Mother & daughter	PSG	- Persecution on basis of the ownership of a beauty salon and perceived 'anti-Islamic' behaviour (mother) - Persecution of the daughter as a young, unmarried, female child - Persecution by family members (threat of forced marriage) - Persecution by Islamic militias	- Negative credibility assessment of claims made by the mother  - Positive credibility assessment of the daughter	Positive	Audio recording of the hearing in full and transcript

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