Abstract

Claims for asylum entail many complex psychological interactions. The claimant presents his or her claim, interviews are conducted, appeals heard and decisions made. In other areas of law, civil or criminal law, for example, there is a wealth of studies exploring the interface with psychology and examining the processes at work in legal proceedings. However, to date, very little of this has been applied to refugee law. This article reviews areas of the psychological literature which have models or knowledge to offer that may be pertinent to the proceedings of refugee law. The review is tentative, in that cross-disciplinary research is needed to establish the extent to which these areas of psychology do apply. Studies similar to those seen in other areas of psychology and law are necessary to establish the degree to which similar conclusions may be drawn, and the degree to which there are distinct psychological issues at work in the process of refugee status decision making.

1. Introduction

The application of psychology within judicial processes (eye-witness testimony, the mental states of the various players), psycho-legal research into the behaviour of jurors, judges and defendants, and the psychology of moral development, including attitudes to law breaking and sanctions have long been an important field of study. However, striking by its absence is the investigation of the specific processes that pertain to asylum law and its application.

Noll argues that the role of the assessment of evidence, and hence the discretion of the assessor, is more important in asylum law than in other legal jurisdictions. If we cannot know the basis of the assessor's decisions, how can we be sure of consistent quality, or at least a common standard? Noll goes on to suggest that without generally accepted 'yardsticks', by which to examine asylum decisions, governments and adjudicators remain beyond criticism. Being beyond criticism might be a state to be desired, but without such yardsticks it is also more difficult to rebut confidently the arguments of those who retain doubts about the legitimacy of the decision making process.

In criminal law, psychologists have produced a great deal of empirical research (albeit sometimes controversial) on memory processing, eye witness testimony and interviewing. These are also relevant to the refugee status claim. It has been suggested that the main conduit for clinical input to the asylum process is by means of medical reports on individual claimants, and that, in contrast to country evidence, there is no 'breadth of evidence' to be called upon. It is hoped that, rather than limiting psychological and psychiatric input to reports on individuals, a fruitful collaboration can arise from sharing the empirical knowledge that already exists.

This article will outline some of the clinical experience and empirical findings from the clinical psychology and psychiatry literature that may be brought to bear on the process of claiming asylum. It will work chronologically through the administrative and legal procedures of the asylum process (the applicant, presenting a claim, the interview, the decision), providing a brief review of some of the literature relevant to each stage. It will focus not only on the psychology of the claimant, but also on that of the interviewers and decision makers, and on the interactions between them. The role of the broader social context and dominant social discourses will be acknowledged, but they are not the focus of this article. In some areas empirical findings are already available to illuminate the psychological processes at work; in other areas, more work is needed.
In this attempt to share knowledge across disciplines, it is important to acknowledge at the outset Greer's warning about psychologists who have

… failed to appreciate the intricacies and complexities of legal procedures ..., tended to oversee the legal implications of their work and seemed to expect their findings to be regarded as virtual saviours of the integrity of the legal profession².

It is beyond the scope of this article to delineate exactly how such a collaboration might develop. Similarly, the intention is not to provide trite solutions but rather to offer an overview of empirical literature that might be illuminating or informative.

The examples given in the article will be largely from the UK. As the UK is a signatory to the Convention Relating to the Status of Refugees (Refugee Convention),⁵ this should provide a representative sample of the asylum process for all signatories.

*I.J.R.L. 173 2. The applicant*

In order to qualify for protection in a receiving country, the individual must satisfy state authorities that he or she meets the definitions laid out in the Refugee Convention. This offers protection for individuals who are in ‘fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion’. Often this fear is substantiated, in part, by recounting one or more instances of actual persecution.

Thus people who qualify as refugees are, by definition, in a state of fear. Most have undergone traumatic experiences. The Diagnostic and Statistical Manual, one of the two main international manuals used for psychiatric diagnosis, defines a traumatic experience as one in which ‘the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others’.² Life-threatening situations are usually associated with extreme fear, although other emotions are also common. For example, some people may have a dominant feeling of horror at what they have been made to witness. Others may have been forced to do things that make them feel deeply ashamed or guilty, for example, betraying friends or family members.

Refugees, by definition, have left their own country. They may have engaged in struggles that they believed would improve justice or human rights in their country, only to find the battle lost, and other values, such as duty to protect their family, destroyed. They may have been forced to abandon strongly held commitments and to admit defeat. Some may be left with a deep sense of loss and despair, others may try to hold to their commitments in new environments and may find themselves uncontrollably angry at the slightest of injustices.

Refugees also come from a vast variety of social backgrounds. Some may be from mountain villages where they tended the sheep; others may have been directors of engineering companies. Most have mobilised their resources to change their situation. Some will have been sent away by families with connections in other countries; others will have been able to find the means and money to make their own way. All will have had to draw on a sense of hope and a commitment to their future. Social discourses in many receiving countries polarise our images of refugees into the ‘suffering and vulnerable’ ‘genuine asylum seeker’ and the ‘wily, determined and tough’ ‘economic migrant’. Most refugees fall somewhere between the two.⁸

*I.J.R.L. 174 3. Presenting a claim*

Upon arrival in a host country, the individual, whatever their background, and whatever their emotional and mental state, must present themselves to the correct authorities with the appropriate account of their experiences. It is possible to arrive in the host country and not have access to any advice, although contacts may be able to inform them of the correct procedures, or agencies at ports may offer them advice. In many countries, if the claim is not lodged sufficiently soon after arrival, the claimant may be refused financial assistance, putting the individual at further disadvantage. Later in the process, assessors of his or her credibility may also refer to this initial error of procedure by the asylum seeker.

Cohen³ has reviewed some of the conditions that may be present when the individual arrives in a host country, impacting on the recall and interpretation of personal experiences. She cites weight loss and malnutrition, minor brain injury, lack of sleep and chronic pain as having been shown to impair the
ability to recall memories.

The medical assessment of someone from a different culture with a history of serious educational difficulties can also be difficult, for example, due to problems in communication (including literacy) or to do with memory of trauma. Problems may also arise in instances of cognitive impairment following severe head injury. Moreover, most recognized tests of IQ have been standardised on English or American populations. Consequently, people with serious head injury or developmental problems may not be identified in the asylum process and thus are not offered the support they need to have an equal chance of presenting their asylum claim.

3.1 Trust

The individual who needs protection is ‘unable or, owing to … well-founded fear, … unwilling to avail himself of the protection of [his] country’. This is one of the core features of state persecution, that normal state protection is not available. However, availing oneself of the protection of any state requires trust. In many refugees, the normal expectations of trust not only in the state, but also in other individuals, have been damaged or destroyed.

Turner\(^{10}\) has argued that torture specifically targets the social bonds of trust. One key purpose of organized state violence is to prevent people trusting each other (and hence forming an effective political or military \(^{14}\)opposition). This works by the fear of enforced betrayal, for example under torture. If people know that anyone, in any position in their society, could be arrested and tortured, it does not make sense to trust anyone with knowledge that could harm them or others.

The UNCHR guidelines also recognize the impact of past experiences on trust in the host country, reminding decision makers in this field that,

A person who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive vis-à-vis any authority. He may therefore be afraid to speak freely and give a full and accurate account of his case.\(^{11}\)

The implications of these issues for the legal interview will be explored below.

This seeming loss of the ability or inclination to put trust in another is also seen in clinical work in host countries. Very often the early period of building a therapeutic relationship is focused solely on the development of trust. Indeed treatment programmes developed specifically for work with refugees and asylum seekers often recognize this by taking a phased approach with the early task being the establishment of a sense of safety and trust.\(^{12}\) An asylum process fair to all applicants would incorporate a thorough understanding of this issue.

3.2 Remembering and retelling

The initial stage of claiming asylum draws heavily on the applicant's ability to recall instances of ill-treatment and present them in a coherent and credible manner to an interviewing officer. Literatures on autobiographical memory, traumatic memory and eye-witness testimony inform this process. It is also important to understand what factors facilitate the disclosure of particularly distressing material.

Autobiographical memory can be defined as memory for a personal event. One of the defining features of an autobiographical memory is that it also evokes some of the sensory experience of the original event. Such memories ‘although communicated to others in narrative form, have a core imagistic [and/or olfactory, auditory and kinaesthetic] component’.\(^{13}\) Whilst this makes the reliving of a pleasant memory all the more enjoyable, it also means that the recall of unpleasant autobiographical events may evoke emotions similar to those experienced at the time. Some of the ways in which asylum interviewees may be coping with such emotions, through both conscious, deliberate strategies and automatic, unconscious strategies are explored below.

\(^{14}\)I.J.R.L. 176 The recall of autobiographical memory is known to be prone to biases. When depressed, for example, people are more likely to remember incidents which impacted negatively on them, or have negative implications for them (for example, failing a test, or betraying a friend). When people are anxious, their attention is automatically drawn to words, objects or events that they perceive as threatening.\(^{14}\) These effects may bias the information given in legal contexts, whether in interviews or in court. In a study of consistency of recall undertaken outside the asylum process in a group of programme refugees (discussed later), one participant described an experience in detention
as ‘we were badly beaten’, but on a subsequent occasion referred to the same event saying ‘we were slapped around’. Had they had to give evidence on their experience in the asylum process, this might have been interpreted as a factual discrepancy, and used to lend weight to a negative credibility finding. However, this body of empirical evidence on the impact of mood on recall would suggest that a more likely explanation would be that the claimant was in a different mood state at the different times he was interviewed.

3.2.1 Traumatic memory

In order to explore the legal aspects further, it is necessary to consider current theories of traumatic memory. These hold that memories for traumatic events are significantly different from normal memories. Autobiographical memories are held as verbal narratives. They have a beginning, a middle and an end, are recognized as being located in the past, and can be recalled at will. When someone is in a situation of extreme threat, however, they tend to retain a very different type of record of the event. At these times of high emotional charge, a primitive part of the brain takes the job of recording sensory ‘snapshots’, for example, a smell, a shout, the image of a face. These ‘traumatic’ memories have little verbal narrative to tie them together. They are not marked as being in the past, cannot be brought to mind by conscious attempts to recall, but instead are triggered by reminders that may be external (the sound of a firework) or internal (a feeling of shame). When such a trigger occurs, the individual may immediately re-live an aspect of the experience as if it were happening again. The traditional - and particularly vivid - example of such a ‘flashback’ is the Vietnam War veteran who drops to the ground upon hearing a car backfire. Responses to flashbacks are not always this dramatic.

We do not know how often asylum claimants experience such flashbacks during their interviews or court hearings, but it seems highly likely that, at least for some, the questioning about their experiences is likely to trigger these distinctive, distressing and highly vivid ‘traumatic memories’. It is a complicated process because, of course, different traumatic memories may be triggered on different occasions, and the triggering may be more or less complete. It is easy to see how there may be genuine differences in recall on different occasions.

3.2.2 Avoidance

Due to being subjected to these sudden, unbidden and painful memories, many individuals develop strategies for avoiding any triggers, or situations which will cause the memories to recur. For example, many refugees in a clinical setting report switching off war films on the television, or avoiding walking past a police station. Despite a claimant being perfectly well aware that they must fully disclose and explain their experiences in order to have the best chance of being recognized as a refugee, the need to avoid the ‘reliving’ of past experiences is also very compelling. Such avoidance can become a way of life, and indeed some of the strategies may not be conscious. Emotional numbing, for example, is a common reaction to traumatic experiences, when an account of the event can be recited, but the emotional connection to it is cut off. This can appear as indifference to the events being related, which might suggest, without an understanding of this psychological mechanism, that the claimant is not telling the truth.

3.2.3 Dissociation

One key unconscious avoidance strategy for avoiding painful, uncontrollable memories (flashbacks) is dissociation. Dissociation is described as the ‘disruption in the usually integrated functions of consciousness, memory, identity, or perception of the environment’. It may look as though a person in a dissociated state is day-dreaming, or even momentarily distracted. Calling their name may cause them to look slightly startled as they ‘come back’. It may not be total - an individual may apparently be conversing normally, but simultaneously seeing images and hearing sounds of the past. Although in clinical settings, techniques can be taught to help cope with dissociation when it occurs, it is usually not recognized and is not under the control of the individual.

Dissociation that happened at the time of the traumatic experience may interfere with the person’s registration of a memory of the event, since the person was, in a sense, ‘not there’. Dissociation is also common when asked to recall a traumatic event, especially in a high stress context. In a recent study of UK Home Office interviews by Bogner, Herlihy and Brewin a group of refugees and asylum seekers were asked to complete a standardised measure of dissociation (PDEQ) with reference to their asylum interview, as well as a measure of the difficulty they felt in
disclosing distressing personal experiences.

Twenty-four out of the twenty-eight participants reported dissociation - some scoring as high as 46 out of the maximum score of 50. The score on this scale was found to be the strongest predictor of their reported difficulties with disclosing to the interviewer what had happened to them.

This study has important implications for a decision process that is often based on what is disclosed in the initial interview with immigration officials. Subsequent disclosures, and discrepancies between this initial interview and later accounts, are often seen as evidence of a lack of credibility. However, these empirical findings suggest that one of the reasons why an account given at interview is neither coherent nor complete is dissociation during the initial interview itself.

3.2.4 Eye-witness testimony and memory

Asylum claimants recount autobiographical experiences, but with all the limitations of any other eye-witness evidence. Much has been written about the vagaries of eye-witness testimony in other areas of law. One of the key findings is that there is a distinction to be made between the types of information recalled about a particular event. There are ‘central’ details, that capture the main gist of what happened, whether in terms of the factual narrative, or the emotional impact of the event on the participant. ‘Peripheral’ details, on the other hand are elements which do not change the narrative nor add to the emotional impact of the event. It is important to note that it is sometimes only the participants themselves who can confirm which are central and which are peripheral details in an event he or she has experienced. For example, in a study of details recalled by refugees of a life-threatening event, participants were asked what clothes they were wearing at the time. For most, this was a peripheral detail in the story. For the individual who recounted a beating in prison, it was central, as fellow detainees had lent him extra jumpers to better protect him against the blows. The literature on eye-witness memory has found that, when an event is highly distressing to the participant, there is a tendency for central details to be remembered at the expense of peripheral details. However, a reliance on the accuracy and consistency of what are likely to be peripheral details is frequently seen in decisions made about accounts given by asylum seekers. For example, one Kurd was refused asylum partly on the basis of discrepancies in certain dates he had mentioned. These included that he had said that the military coup in Turkey occurred in 1979, rather than 1980.

The following example is taken from a refusal letter to an asylum seeker.

You then stated that you remained at a friend’s house until 30 October, 1995, when your parents telephoned to let you know that sentence had been passed on Ken Saro-Wiwa. [The Secretary of State] is aware that sentence was passed on Ken Saro-Wiwa … on 31 October, 1995. [He] is of the opinion that these discrepancies must cast doubt on the credibility of your claim. These discrepancies were taken to be indications that the claimant was fabricating a story. The evidence from eye-witness testimony would suggest that a reliance on such discrepancies, in what is probably peripheral material, is misleading.

4. The interview

4.1 The construction of an account of persecution

Recent memory theory suggests that memories are not stored units of information, as we used to think, but that the recall of events and information is a process of reconstruction. Each time we recall an event we are actually constructing an account of that event, within a social or conversational context. Eastmond, writing about narratives in forced migration research, draws on Bruner, who distinguished life as lived, the actual flow of events that happen to a person; life as experienced, the meanings and understanding ascribed by the person to the events; and life as told, the way that the experience is articulated in a particular context, for a particular audience and purpose. She summarises: ‘an experience is never directly represented but edited at different stages of the process from life to text’.

Galloway outlines an example of this interplay between the context of the asylum system and the resultant ‘life as told’ in the Canadian asylum procedure. He demonstrates how the instructions on the initial Personal Information Form - to ‘set out … all the significant events and reasons’ - and the
provision of just two pages for this purpose can lead claimants to give an impersonal, thinly described inventory of events, which can lead to adverse credibility judgments, by increasing the probability that one account will look very much like another, raising the suspicion of a formulaic reproduction rather than a personal account.

The same happens, although arguably in a less transparent way, at interview. The individual asylum claimant is under pressure to produce a coherent, plausible account of horrific experiences that may not, to him or her, feel at all coherent nor even plausible. His or her task is to construct a narrative (a ‘life as told’) that seems, in their judgment, to be an acceptable version for the requirements of the interview and the legal decision making system as a whole. Eastmond concludes ‘stories are never transparent renditions of reality, but partial and selective versions of it, arising out of social interaction’. Thus, the entire social context - involving the interviewer, the interviewee, and the context of the interview - has a part to play.

4.2 Interviewer, interviewee and context

In the field of experimental psychology there is the concept of ‘demand characteristics’. Researchers noticed that people in experiments will always, at some level, strive to understand what it is that the experimenters want. So if an experimenter asks a subject how stressed they feel, then plays them some soothing music, then asks again, they have a good idea of the answer that is expected. If the experimenter is someone that they like and want to help, or someone they perceive as powerful, they are more likely to give the answer that they believe is the expected one.

A scale has been developed (GSS2) that explores the related construct of ‘interrogative suggestibility’ in the context of forensic interviewing. This measure is widely accepted in criminal law. Respondents are told a story and then asked a number of questions about it. Some are leading questions (suggesting a response, either contrary to what was in the original, or introducing new items that were not present in the original). After a delay, respondents are then told that they made some mistakes and are asked to answer the questions again. Suggestibility is defined as the extent to which someone changes their responses due to either leading questions or negative feedback. There is also evidence that it is particularly relevant to people seeking asylum. Studies have shown that higher suggestibility is associated with suicidality (thoughts of killing oneself, and possible past attempts), low mood and low self-esteem. These are psychological difficulties often found in asylum applicants.

Although the GSS2 scale suggests that suggestibility is a feature of the individual interviewee, there have also been a number of studies looking at the impact of the behaviour of the interviewer. For example, one of the factors measured by the GSS2 is the effect of negative feedback. In the test, interviewees are told explicitly that they made some mistakes, but less overt messages can also be conveyed. Baxter et al. state that ‘simply repeating questions applies a form of Interrogative Pressure. Asking questions again can imply that an interviewee’s first answers were wrong, increasing interviewee uncertainty and levels of Interrogative Suggestibility’. Thus, in an asylum interview, innocent discrepancies might be introduced. Indeed this may be a greater risk in the asylum setting with such a large power imbalance between applicant and decision maker.

The same researchers have also investigated the effect upon the interviewee of the demeanour of the interviewer. They made the questions in their study as minimally leading as they could, in order to look only at the manner in which feedback was given to interviewees. They instructed their interviewers to be either ‘firm’ or ‘friendly’ when telling interviewees that they had made some mistakes in their responses. Interviewees with ‘firm’ interviewers were more likely to change their responses to the questions. They discuss this in terms of the ‘psychological distance’ between interviewee and interviewer. They discuss how the interviewee may shift back and forth between trying to provide accurate answers to questions and managing the interviewer, and/or [becoming] more preoccupied with their own emotional states'. Such work on the part of the interviewee, increased by any distancing by the interviewer, serves to increase the interviewee’s ‘cognitive load’, or the number of mental tasks they are dealing with at any one time, and exacerbate their anxiety and uncertainty, all of which stand to increase their suggestibility, their susceptibility to any leading questions and their tendency to change their answers.

Asylum interviews are conducted within a broader social and political context, which can also have an impact on the responses of an interviewee. A ‘culture of disbelief’ has been identified by a number of authors. The message that asylum seekers are not wanted, and their stories not believed, is given consistently in UK newspapers, as documented by the Information Centre about Asylum and
Refugees (ICAR). The effect of these messages is documented in a short film in which exiled journalists described their experiences in the UK. The ICAR report also quoted the story of a young musician, who described growing up in Britain like this:

I was determined not to be seen as a refugee… because I didn't want to be thought of as 'the scum of the earth'.

Another asylum seeker said,

if someone asks me where I am from I would be happy to tell them about who I am, and my country, because everyone likes their country. But here [in the UK] whenever you say ‘I'm an asylum seeker’, that's something I worry to say.

These messages may also be exerting an influence on the performance of asylum interviewees. Baxter, Boon & Marley state that ‘negative feedback may be any kind of disapproval or criticism of the interviewee, whether overt or implicit’.

### 4.3 The Cognitive Interview

Given the complexity of interviewing in forensic contexts, much attention has been given to the development of effective interviewing. In police interviewing of witnesses, for example, accurate recall has been much improved by the use of the ‘Cognitive Interview’. The Cognitive Interview draws on theories of interviewing and memory to provide techniques for eliciting the maximum possible detail about a witnessed event. Techniques include dividing the interview into different phases (free recall, questioning, and further recall); building rapport; encouraging the interviewee to recreate the scene in their mind; asking the interviewee to recall events from different points, working forwards and backwards through what they saw. Research has found that more details are elicited by these techniques, compared to standard police interviewing or other structured interviewing methods. However, this same research also shows that, although the technique does not produce significantly more confabulation than standard techniques (the invention of events or people that were not there), more errors are made, for example, saying that the colour of a jacket was blue rather than red.

The technique has its limitations with regard to interviewing for the purposes of a refugee claim. One of the theories of memory underpinning the Cognitive Interview is Schema Theory. This model describes how we develop and then draw on schemata, or generic mental models of common events. For example an individual may have a schema of going out to dinner in a restaurant - the waiter, the perusal of the menu, ordering food, eating, paying and leaving. If they are asked to remember a specific event involving dining out, they will expect there to have been a moment when they paid the bill, and, if pushed for more details of their memory, will ensure that this is something that they try to recall. This increases the chance that they will reconstruct a memory of something which ‘probably happened’. This is not a process of which they are aware. Refugee claimants who have experienced a series of similar events will also be particularly prone to filling in gaps in this way, under the pressure of a crucial interview.

Authors have also noted the dangers of using the Cognitive Interview to address traumatic events. The technique of encouraging a mental image of the scene would be particularly distressing in these cases, and be likely to induce the responses described above, such as a feeling of reliving the experience in all its horror, leading to efforts to avoid thinking about it or remembering it.

### 4.4 Facilitating disclosure

Bogner, Herlihy and Brewin reviewed the literature on the disclosure of difficult personal material in the asylum context, identifying a number of important factors making disclosure more difficult, including, culturally determined attitudes to taboo topics, culturally determined expectations regarding confidentiality, PTSD symptoms of avoidance, feelings of shame and corresponding assumptions about other people's judgments, dissociation, and lack of trust, particularly in torture survivors. Experience in clinical contexts also suggests that a history of abuse and experiences of a sexual nature are particularly difficult to disclose.

Importantly, this recent study of disclosure in UK Home Office interviews demonstrated the way in which, in this context, the probability of disclosure is determined by both the asylum seeker and their perception of the interviewer. This is an issue which has been explored in the context of police interviews of rape victims.
4.5 Interviewing after trauma: rape

Rape and other types of sexual assault are commonly reported by asylum seekers. This always requires particularly sensitive interviewing. For example, a pair of studies in the UK\textsuperscript{46} and New Zealand\textsuperscript{47} aimed to examine the impact of UK reforms in the mid-1980s on police interviewing of female rape victims in the general population. These reforms included training officers about the low likelihood of false complaints, the effects of the trauma of rape, and the importance of a sympathetic and respectful stance. By interviewing women who had reported cases of rape to the police the researchers identified a number of factors that continued to affect the ability of the victim to report rape effectively and without undue distress. These included whether they felt able to tell the story at their own pace, whether they felt that the interviewing officer was sympathetic and believed them, whether they had to keep disclosing intimate details to different interviewers, whether officers accepted and understood a delay between the rape and reporting it, the room in which they were interviewed, and being treated with a ‘caring professionalism’. Interestingly, given the UK ‘gender guidelines’\textsuperscript{48} on interviewing asylum applicants, ‘caring professionalism’ was reported as being more important than the gender of the interviewing officer. In Bogner \textit{et al.}’s study of *I.J.R.L. 185 asylum seekers in the UK,\textsuperscript{49} whilst eight people (out of twenty seven) reported that the gender of the interviewer was crucial to their ability to disclose a history of rape, five people reported that the attitude of the interviewer and the way in which they were treated was more important. However, these findings should not be taken as implying that the interviewer’s gender is immaterial; other studies have emphasised the importance of gender.\textsuperscript{50} A number of aspects of the interview are likely to be important.

Again, the behaviour and demeanour of the interviewer are emphasised. Interviewing individuals who have been subjected to sexual assault is not a neutral activity. Temkin\textsuperscript{51} discusses some of the pressures that have to be managed during a police interview of a rape victim. The interviewing officer has to strike a balance between the operational and administrative needs of the investigative process and the emotional support needs of the claimant, collecting evidence in such a way that it does not cause undue harm to the interviewee. Too much empathy for the victim, and the interviewer loses perspective and risks making emotionally based decisions; too little, and the interviewer causes distress and, as described in the work on interrogative pressure above (§ 4.2), probably fails to elicit the most accurate story. Similarly, the interviewer is under pressure to achieve convictions, whilst also remaining aware of the rights of the alleged perpetrator. To draw the parallel with the UK Home Office interviewer dealing with asylum applications, the pressure of upholding immigration control has to be balanced against causing undue harm to the individual claimant. Like the police interview, the asylum interview also takes place within the societal context of the host country and is influenced by dominant discourses that determine who are considered to be genuine victims and what is considered to be ‘real rape’.\textsuperscript{52}

The UK study of women who had reported rape also raised the issue of the power imbalance in the interview.\textsuperscript{53} One woman described how she continued to be questioned when she was exhausted and aware that she was no longer able to think clearly, because she didn’t realise that she could stop the interview. This resulted in significant inconsistencies and gaps in her account.\textsuperscript{54} Similar situations occur in asylum interviews. A report on the implementation of the gender guidelines in the UK quotes a legal *I.J.R.L. 186* representative describing a female client’s interview (by a male officer with a male interpreter):

\begin{quote}
She was a victim of rape, it was very clear that she was a victim of rape, she was visibly distressed throughout the interview, I had to stop the interview, I wanted her to go to the loo and sit down for five minutes and just freshen up. And she was not even allowed to do that, it was absolutely horrific.\textsuperscript{55}
\end{quote}

Campbell\textsuperscript{56} found that US rape survivors who had the help of an advocate reported more positive experiences in police, medical and legal settings. This study has not been replicated with asylum seekers, who come from very diverse cultural backgrounds, with diverse responses to and understandings of rape. Whether or not advocates can be provided for all claimants who may have been raped, it is still important to be aware at the decision making stage that the presence of an advocate may have had a significant impact on the quality of evidence gathered.

4.6 Vicarious traumatisation in interviewers

It is likely that the continued exposure of interviewers to horrific stories of human rights atrocities can also affect the interview process. However, there is very little empirical evidence in the asylum context.
to show that there is any acknowledgment either of this phenomenon or of the implications thereof for decision making. In their study of claimants' experience of asylum interviews in the UK, Bogner, Herlihy and Brewin found suggestive evidence. Participants reported interviews in which they tried to describe what had happened to them, but were stopped by the immigration officer. Of course it is often the case that interviewees are not aware of the information required of them, and it is the job of the interviewer to control the flow of information to some extent. However, when an applicant, who was told to 'keep it short' and to restrict themselves to 'yes/no answers', is later penalised for non-disclosure, it seems evident that something is going wrong with the procedure. One possible explanation for this is vicarious, or secondary, traumatisation in the interviewer. This is well known in the clinical field, and entails specific responses to traumatic material. People who repeatedly hear about traumatic events can, themselves, be affected by them. They may develop a similar pattern of avoidance behaviour - trying to minimise triggered distress. This may be manifest as diminishing empathy, a more cynical attitude and a trivialisation of horrific accounts. It is possible for interviewers, decision makers and legal representatives to experience nightmares and intrusive images related to the material that they have heard retold. In a study of Refugee Tribunal Board members in Canada, Rousseau and colleagues examined the case files of forty claims for refugee status. They found that in the majority of cases reviewed there was clear evidence of the decision makers avoiding hearing distressing material, showing a lack of empathy, expressing prejudice, and demonstrating cynicism. In over a third of the cases they identified 'signs of emotional distress [in the decision maker] related to secondary trauma'.

4.7 Repeated interviews

Asylum claimants will often be interviewed not once but several times during the course of their original claim, subsequent appeal hearings, and (if relevant) medical assessments. In one respect this is to be applauded as it gives the applicant a better chance to set out their case - or indeed for decision makers to explore an account that may, on close attention, be revealed as a fabrication. However, discrepancies between accounts continue to be a criterion for judging credibility, despite a great deal of empirical literature concerning the tendency for repeated interviews to introduce inconsistency, particularly in the more vulnerable applicant. Herlihy, Scragg and Turner interviewed a group of programme refugees (individuals, therefore, with no ostensible need to fabricate an account) on two occasions and found that up to 65 per cent of the details in their accounts of traumatic (life-threatening) experiences changed from one interview to the next. In accordance with the eye-witness testimony literature reviewed above (§ 3.2.4), discrepancies were more common for details rated as peripheral by the participants. Moreover, those with high levels of PTSD symptoms were more likely to be inconsistent the longer the delay between interviews. The UK Immigration and Nationality Guidelines (Asylum Policy Instructions) recommend that ‘Wherever possible, claimants should be given the opportunity to explain any apparent discrepancies and the reasons for any changes in their accounts’, but Smith presents evidence that these guidelines are not being followed by interviewers in the UK Home Office.

Cohen outlines several processes by which new memories (of experienced but previously forgotten events) and innocently confabulated memories (of things that never happened) can be introduced by repeatedly interviewing a claimant. Until these are thoroughly understood, claimants are increasingly vulnerable to the charge of inconsistency as they move through the system, undergoing further questioning and interviewing.

5. The decision

5.1 Decision making

Much psycho-legal research has focused on the attributes of the decision maker in both forming judgments and in sentencing. The reader is referred to Kapardis who reviews a broad variety of studies examining juries, sentencing and courtroom and police procedures. However, there is little mention in this literature of such studies focusing on the context of refugee law. A number of areas of psychology research might be seen to be relevant and these will be reviewed.

5.2 The story model

Haste describes a number of different models that have been postulated to explain juror decision
making. He concludes that the ‘most comprehensive’ is the ‘cognitive story model’, a detailed model of structures in the mind that work together to create a story that is built up from a *selective summary* of the evidence that tends to represent an *intuitively coherent* version of what happened in the events referred to in testimony (italics added). Hastie refers to principles of ‘plausible narrative structures’, as defined in psycholinguistic studies.

An example of this can be seen in a study of sentencing by Palys and Divorski. In this study they asked judges to recommend a sentence for a fictitious crime and to explain their thinking. The results showed that sentences depended on decision makers’ reliance on ‘stories’ about the defendant. These were either a story of ‘poor background, struggling to keep out of trouble, bad friends, needs help’ or ‘regular bad behaviour, been given chances before, will never be any good’ leading to different weighting of the factors of rehabilitation or punishment in their decision. They suggest that this is the way in which judges and jurors may think in coming to their decisions.

*Kapardis* draws out the extent to which, in this model, the process of paying attention to and interpreting evidence is dynamic and constructive, and, most importantly, consistent with the juror’s expectation of the outcome of the case. In other words, if the juror believes from the outset that the defendant is guilty, he or she is likely to construct a story consistent with that outcome. It seems likely that such models of juror decision making may be equally relevant to the immigration judge and other decision makers in the asylum process, but this needs to be studied.

### 5.3 Decision making heuristics

Within the psychology literature, a great deal of attention has been focused on how we make decisions across the whole range of areas of life and work. Some of these reports may shed light on how decisions are made in asylum determinations.

Early psychological studies on decision making were situated within the discourse of rational choice. According to this view, we decide between options by making calculations of the probability of each outcome, assess the utility to us of each outcome, and combine the two assessments to make a rational decision. However, since the 1970s, this understanding has been replaced by a model of heuristics. The main authors in this field, Kahnemann and Tversky, posit that we develop heuristics, or rules of thumb, to guide our decision making. There are two main heuristics, and these are the ones that are of most relevance to decision making as seen in refugee status determination. The first is the ‘Availability’ heuristic, where we call upon our own experiences, or hearsay of similar situations, to form a model of how to judge the current situation. So, for example, deciding to take a lift with a friend on a motorcycle will be informed by how many people we know, or have heard of, having fatal accidents on motorcycles (and probably not by the official statistics for traffic accidents). In the immigration appeal court, the judge has experience of her or his own previous hearings, and those of colleagues. The second is the ‘Representativeness’ heuristic, which is helpful when people are faced with a complex situation, hitherto unmet, and so they liken it to a known, simpler situation and apply judgments about one to the other. For example, they might hear someone describing a life threatening event and, not having experience of anything similar, they draw on a different type of unpleasant event that happened to them, in order to inform their responses.

The availability heuristic relies on memory and as such is prone to the biases of memory. We know that memory is better for personally and emotionally salient events, so that we would probably give more weight to the *memory of a close friend dying in a gruesome motorcycle accident, than hearing the fact, but not details, of a classmate’s death. Memory is also biased to mood congruent events, in exactly the same way as described above, concerning claimants’ memories. When feeling less positive about life, we are more likely to remember negative events.

According to current social psychology theories and empirical evidence, these are most likely to be the predominant mechanisms at work when we talk of ‘common sense’ judgments in the legal context.

In a recent study, written refugee status determinations in the UK Asylum and Immigration Tribunal were examined. A coding framework was defined, giving a close definition of assumptions, which were then extracted from a series of determinations and subjected to an inductive thematic analysis. Themes were identified showing that assumptions are made throughout the assessment of the claim, without reference to empirical evidence.

*Graycar* has criticised immigration judges for an over-reliance on their own experience in coming to ‘common sense’ judgments. She suggests that judges believe that they are looking out through a
window onto the world. However, given the important role played by personal experience in forming decision making heuristics, this window is rather, according to Graycar, a mirror, reflecting the judge’s own background, culture, upbringing and individual experience.

5.4 Mindset

It is said that judgments within immigration law (and no doubt the suggestion is made in other areas of law) can be a matter of the ‘mindset’ of the judge, or decision maker; a view expressed in private and explored in a recent study of judicial assessment of credibility. The role of the conscientious decision maker is, of course, to be aware of his or her own biases and prejudices, acknowledging that they are a necessary part of human understanding, but to be examined and, where necessary and possible, put aside. A study by Giner-Sorolla, Chaiken, & Lutz explored the assumptions that jurors bring to a litigation hearing. Using a fictitious sex-discrimination case, they distinguished two types of pre-trial thinking. Firstly, jurors had preconceptions about the validity of the case that predisposed them to form a positive or negative judgment, and, secondly, they brought with them their ideology, in this case a feminist or antifeminist stance. The research found that when jurors had more time for deliberation and reflection, they weighed the evidence carefully, and were indeed able to put aside their initial ideas on the validity of the claim. Ideology, on the other hand, was found to have a more stable influence on the decisions that they made, regardless of how much time they were given. It may be that similar processes are at work in the decision making of judges.

5.5 Stereotypes

As our understanding of cross-cultural issues develops, demeanour is looked upon less and less favourably as a source of evidence about an individual. However, when Jarvis asked forty-four immigration judges to rate the factors they used in coming to a decision on refugee status, on a scale of 1-10, the scores for ‘Demeanour’ ranged from 0 to 10, with an average score of 4.5. The most common score was 5. Demeanour is clearly still a factor in decision making. Furthermore, in her interviews with immigration judges (a subset of the forty-four surveyed), this factor was discussed frankly as a question of ‘attractiveness’.

Hinton reviews a long-established literature that shows that we hold, necessarily, visual stereotypes, for example, of the typical accountant, psychoanalyst, ‘criminal type’ or innocent victim, and that attractiveness, as well as gender, race and other aspects, are part of these. We need stereotypes to categorise and make sense of the world. It is also thought that we tend to believe (as it is in our interests, assuming we believe ourselves to be good people) in a ‘just world’, where good things happen to good people and bad things only to bad people. Until and unless we get to know someone well, we can only form an impression of whether someone is ‘good’ or ‘bad’ by how they appear to us and to what extent they fit into the stereotypes we have constructed through our previous experiences of the world.

Hinton’s conclusion, and indeed that of Jarvis, is that to deny these processes is to fail to acknowledge their inevitability. The more aware decision makers are of their own stereotypes, beliefs and biases, the more able they are to address and correct them. There does not seem to be empirical evidence available to suggest the extent to which this has been achieved to date.

A further solution - and perhaps a complementary one - is for decision makers to place more weight on empirical evidence about human behaviour and to draw on this in coming to their judgments.

6. Conclusions

This article has examined the process of claiming asylum, reviewing relevant selected areas of study from the psychology and psychiatry literature. It is by no means comprehensive, but aims to present some of the areas of research that might be brought to bear on the complex process of claiming, investigating and judging refugee status.

As has been shown, claimants, interviewers and decision makers at each stage all bring with them their own psychological processes. These then interact, under the overarching context of the social and political milieu. Each of the players brings their own assumptions to the process, and perhaps some are held more strongly than we realise. It seems that some assumptions are less correct than others, indeed some are not warranted at all when the empirical evidence is carefully examined.

An important counterbalance to the reliance on unsupported assumptions in the decision making is
the requirement of case workers and immigration judges to record and justify their decisions in writing. However, if decisions are understood within the heuristics model described above, which shows how decisions are open to biases and may be based on a lack of understanding of psychological processes, then this risks being an exercise in circularity. For example, the finding of discrepancies in a claimant’s account can, by law and by UK Home Office policy, be used to justify a negative judgment, but empirical evidence shows that this is not firm ground. This leaves the decision - and indeed the whole decision making process - open to criticism. This is not only disadvantaging genuine refugees, it may be keeping a door open to those who are not entitled to protection, but are extensively coached and able to present a coherent story. More empirically based decisions could provide a more effective and defendable process.

Although there has been extensive research in other areas of psychology and law of many of the processes outlined in this article, they need closer examination, from start to finish, in the context of actual asylum decisions. The processes at work in the minds of claimants, interviewers and decision makers need to be carefully and systematically identified and understood in this setting. Collaboration across disciplines could ensure that this work is comprehensive and cohesive so that we can be more confident that the best knowledge - empirical, clinical and judicial - is brought into play in what may be life or death decisions.

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20. Kapardis, above n. 3.

21. Herlihy, Scragg, & Turner, above n. 15.


23. Asylum Aid, Still no reason at all (London: Asylum Aid, 1999), 28.


26. Eastmond, ibid., at 249.


33. Baxter et al., above n. 31, 89.

34. Cohen, above n. 9.

35. Baxter et al., above n. 31.


37. Information Centre about Asylum and Refugees (ICAR), Reporting Asylum - The UK Press And The Effectiveness of PCC Guidelines (London: City University, 2007).


39. ICAR, above n. 437, at 108.

40. Herlihy, ‘Establishing the territory to stand on: working with traumatised asylum seekers’ (submitted).

41. Baxter et al., above n. 31.


44. Memon & Stevenage, ibid.

45. Bogner, Herlihy & Brewin, above n. 18.


49. Bogner, Herlihy & Brewin, above n. 18.

50. E.g., Ceneda, Women asylum seekers in the UK: A gender perspective - some facts and figures (London: Asylum Aid 2003), 147.

51. Temkin, above n. 46.

53. Jordan, above n. 47.

54. Jordan, ibid., at 701.


60. Immigration and Nationality Directorate, ‘Asylum Directorate Instructions: Assessing the Claim’, (2006). Retrieved 5th May 2006. As of 2008 this instruction reads: ‘Where there is reason to doubt the claim’s credibility, applicants should be told of this and given an opportunity to explain the reasons behind their actions’. There is no evidence as to whether this reworded instruction is being adhered to any more effectively.


63. Kapardis, above n. 3.


66. Kapardis, above n. 3.


72. Jarvis, above n. 69.

74. Jarvis, above n. 69.


76. Kapardis, above n. 3.