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Asylum Narratives and Credibility Assessments: An
Ethnographic Study of the Asylum Appeal Process in
Scotland

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Degree of Doctor of Philosophy

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Abstract

Asylum claimants regularly arrive in the UK without corroborating evidence to support their request for refugee protection. Consequently, an assessment of the credibility of the applicant's account of persecution tends to become the focal point of asylum decision-making. In order for an applicant's asylum claim to be assessed as factual, and therefore, credible it must be prepared in a way that conforms to the narrative models in legal discourse and meets the evidential requirements for showing past persecution and a future well-founded fear of persecution. It is for this reason, in part, that the role of legal practitioners becomes crucial. This thesis explores the ways that asylum solicitors deal with the issue of credibility in their daily working practices. It also examines the structural and procedural constraints which affect the working practices of solicitors when representing asylum clients in this way in asylum appeals.

Based on ethnographic research conducted in Glasgow over an eighteen-month period, this thesis considers the ways that asylum solicitors approach credibility when representing asylum clients. This thesis explores the different forms of paid and unpaid labour undertaken by asylum solicitors and analyses how external factors such as legal aid funding arrangements affect the morale and working practices of solicitors who represent asylum claimants. It seeks to argue that a criminalising discourse exists in the asylum and immigration processes in Glasgow. Moreover, it demonstrates that such discourses extend to a cohort of asylum solicitors working in Glasgow and that the culture of disbelief which exists amongst these solicitors results in them regularly disbelieving their asylum clients' accounts. Finally, by considering proposed changes to funding arrangements in Scotland, which would bring them in line with those in place in England and Wales, this thesis contends that were these arrangements to be introduced this would result in the underrepresentation of, and limited access to justice for, asylum applicants in Scotland.

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Key to transcription conventions used

All interviews were transcribed verbatim using the following conventions. Where passages from interviews are included, the format of these has been edited to make them easier for the reader to understand. Pauses that I deemed not to be significant are not included in these passages. Neither are the responses of the researcher where these serve to validate what the interviewee was saying; in this way the following kinds of responses have been edited out in the move from transcript to thesis: (*Mhmm*), (*Uh-uh*), (*Right*), (*Okay*) etc. The conventions used are presented here to assist the reader in their interpretation:

(xxx)	Indicates speech that is difficult to make out.
/ Before text	Indicates one speaker interrupting the other
(.)	Pause in speech
(.5)	Indicates a significant pause, in this example of 5 seconds, pauses deemed 'significant' (longer than 6 seconds) were timed by the researcher
(<i>Okay</i>)	Researcher's comments during interview responses
(Bolt text)	Non-verbal actions of interviewer and interviewee
...	Speech trailing off
<i>So difficult</i>	Italicised text indicate speaker emphasis

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Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature _____

Printed name _____

1. Introduction

In September 2009 the Glasgow Immigration Practitioners' Group along with the Murray Stable of Advocates organised a seminar to be given by Professor James C. Hathaway a leading authority on refugee and asylum law. By securing the appearance of Professor Hathaway the Advocates and Practitioners' Group were regarded as having achieved something of a 'coup' and there was a lot of excitement within asylum and immigration law circles about the upcoming seminar by the 'world-renowned' academic. The event was held in the Royal Faculty of Procurators' Library in the centre of Glasgow. The Royal Faculty of Procurators is a body which serves the needs of affiliated members of the legal profession and the law library offers access to useful resources and serves as a venue for legal events. I had been present, during initial fieldwork in the summer before the seminar, at meetings where Professor Hathaway's visit was discussed and it was felt by the organisers that the Procurators' Library would have the required sense of gravitas and esteem befitting such an occasion. As one enters the Royal Faculty of Procurators, it has a particularly grand feel to it. The Library itself has an Italianate '*palazzo*' interior. Tall arches supported by marble columns line either side of the room and behind these arches on one side there are wide floor-to-ceiling windows. The room is decorated with white marble busts of eminent figures in legal history and the polished mahogany floors and furniture add to the sense of grandeur. The Library had been set out for the event with rows of chairs on either side of the library facing a table at the front of the room for the speaker, Professor Hathaway. Several rows at the front of the room had been 'reserved' for members of the Glasgow Immigration Practitioners Group.

Following his keynote presentation, the Professor agreed to take questions from the floor. During this question-and-answer session, a solicitor asked Professor Hathaway what advice he could give to him and his colleagues stating that there was 'a real problem with credibility at the Tribunal in Glasgow'. This particular legal representative was the principal solicitor at the Immigration Advisory Service (IAS) in Glasgow, which would later close down when IAS went into administration in July 2011. His question was quite a bold one to ask given the presence of Immigration Judges from the Tribunal at the seminar,

including the Senior Immigration Judge, Mungo Deans, who had overall responsibility for asylum appeal proceedings in Glasgow.

Shortly after the question-and-answer session, lunch was served for participants. The food was set out in one of two conjoining rooms on the ground floor of the Royal Faculty of Procurators. After serving themselves, most participants at the seminar gathered in the second room, while others stayed in the Library or went outside to smoke. As this was going on, I joined a discussion between two of the other delegates at the event and we spoke about the seminar thus far. It transpired that both were Immigration Judges who heard appeals in Glasgow and the North of England; they had chosen not to wear the name badges which were prepared for attendees because they did not want to be easily identifiable. They remarked to me that they would rather not draw attention to the fact that they were judges. Conversation turned to my research and I explained that it focused on issues of credibility in asylum decision-making. At this point the female judge commented that she wished '[I] would tell [them] once [I had] figured it out because credibility [was] an exercise in the black arts at times!' More participants joined our group and the conversation took a natural turn on to other matters.

This brief account of an event occurring at the beginning of my fieldwork in Glasgow highlights a number of key issues I will address in the chapters which follow. The first of these is the issue of credibility in asylum decision-making. The comments by the solicitor from the IAS during the question-and-answer session emphasize the challenges legal representatives face when trying to demonstrate the credibility of their clients' asylum claims at appeals. These comments also draw attention to a fundamental concern of this thesis, namely, how solicitors approach the issue of credibility when representing clients in the asylum appeal process. The reception of an applicant's account as factual, and therefore credible, may be dependent upon their account of persecution being structured in a similar way to the 'narrative model of fact construction' (Jackson, 1988: 61) that operates within legal processes. It is for this reason, in part, that the role of legal practitioners becomes crucial in the construction of the account of persecution which forms a large part of the asylum claim. Against this background, the central question explored in the present thesis can be stated as follows:

How do lawyers address the issue of credibility in their daily working practices when representing clients in asylum appeals?

A second issue, which was highlighted by the fact that the solicitor who posed the question about credibility worked at the IAS, concerns the nature and impact of legal aid funding in asylum law. The Immigration Advisory Service ceased trading in July 2011 due to problems securing payment for its legal aid work from the Legal Services Commission in England. As this thesis will go on to discuss, the legal aid funding arrangements differ between Scotland and the rest of the United Kingdom (UK). In spite of this, restrictions in Scottish legal aid funding will be shown to contribute to the challenges and frustrations solicitors experience when carrying out asylum casework. As has been noted elsewhere, the procedural and structural constraints which apply to appellants and their representatives as they prepare for an appeal also contribute to a gap in expectations between solicitors and clients as to the solicitors' role (Craig et. al, 2008: 83). In light of these considerations, a further question examined in the present thesis is:

What are the structural and procedural constraints which affect the working practices of solicitors when representing asylum appellants?

A third point which emerged clearly in my exchanges with the Immigration Judges was the difficulty they experience when making decisions about credibility in asylum appeals. Investigations into asylum processes in the United States (US) and the UK have argued that credibility assessments are the most important determinant of asylum cases (Einhorn, 2009: 188; see also Ramji-Nogales et. al, 2009; Anker, 1992). It has been claimed that the majority of asylum appeals succeed or fail on the basis of a decision-maker's assessment of the appellant's credibility (Thomas, 2011: 134). In the UK, scholars have noted that a lack of consistency exists in decision-making in asylum adjudication and attribute this to different Immigration Judges' approaches to credibility assessments (Thomas, 2009: 169). This has resulted in some likening the UK asylum appeals process to a 'lottery' (Jarvis, 2000: 19 in Good, 2007: 197). The research aims of the present thesis, however, represent an attempt to shift the focus on credibility from one which prioritises Immigration Judges' credibility assessments at appeal hearings to one that also recognises the role that pre-hearing processes, especially those undertaken by legal representatives, play in the production of asylum claims deemed 'credible' on appeal.

1.1 Methods

The thesis is based on ethnographic research conducted over an eighteen-month period (June 2010-December 2011), involving participant observation, semi-structured interviews and document analysis of case files, legal decisions and asylum and immigration legislation and policy. An ethnographic approach provided the opportunity to study the contexts and processes within which asylum narratives are produced between solicitors and their clients when preparing appeal cases and which are then challenged by representatives of the Home Office and by Immigration Judges during asylum appeal hearings. Participant observation was carried out at the First Tier Tribunal (Immigration and Asylum Chamber) (FTTIAC) in Glasgow. Although Immigration Judges are required to keep their own record of proceedings at asylum and immigration appeal hearings, this record is intended for their own use, to assist them in preparing their written judgement, and in the event of an onward appeal. The proceedings are not officially recorded or transcribed. Observation was therefore crucial to explore how the credibility of an applicant's narrative is, explicitly or implicitly, challenged by the various participants during the appeal hearings. In addition, I observed meetings between solicitors and their clients during the preparation of asylum appeal cases and, where possible, attended the hearings of these appeal cases. I also attended conferences, seminars and CPD training events in the areas of asylum and immigration in and around Glasgow. This gave me greater insights into the professionalisation of solicitors and advocates involved in asylum casework. It also enabled me to make connections and build rapport with research participants and, generally, to position myself as a researcher within the field of asylum law practitioners in Glasgow. Semi-structured interviews with legal practitioners allowed me to investigate the themes which had emerged during participant observation fieldwork and provided the opportunity to clarify my observations and triangulate my data. Case files, Immigration Judges' determinations and asylum and immigration law and policy gave a textual representation of the ways that asylum appellant's accounts emerge and are developed by solicitors during the course of the asylum appeals process. Access to appeal case files provided insights into the pre-hearing processes which operate in asylum appeals that would not have been available through participant observation of the appeal hearings at the FTTIAC alone.

1.2 Intended Contribution of Thesis

This thesis aims to contribute to theoretical, methodological and empirical research into the ways that solicitors deal with the issue of credibility in their working practices when representing asylum appellants specifically, and knowledge about asylum appeal processes, more generally. Firstly, much of the literature on the UK asylum appeal process focuses on the situation in England; this thesis, therefore, intends to make an empirical contribution to existing literature by providing a study of the asylum appeal process in Scotland.

Secondly, although legal aid funding is organised and administered differently in Scotland and England, this thesis contributes to discussions (Sommerlad, 2001; 2004; 2008; James and Killick, 2009; 2010; 2012) regarding the difficulties faced by legal representatives in both jurisdictions when carrying out publicly funded legal casework. The data show the negative effects of strict funding rules on the morale of many asylum solicitors and the implications that such restrictive funding arrangements have on their working practices.

Thirdly, the literature on credibility highlights the paucity of research on the role of solicitors in the production of asylum narratives (Good, 2007). Although there have been recent contributions to this aspect of the field (Good, 2011), the most established and substantial studies of UK asylum adjudication (Good, 2007; Thomas, 2011) have mainly been carried out in English asylum courts and focused on Immigration Judges. This thesis therefore seeks to fill this gap in the existing literature by providing insights into the working practices of solicitors as they prepare asylum appeal cases.

Fourthly, by strengthening arguments about the forms of emotional labour undertaken by solicitors during asylum casework (Westaby, 2010; James and Killick, 2010; 2012), this thesis makes a theoretical contribution to the academic literature on the nature of legal work. In addition, the data used to support the claims made in this thesis add credence to theoretical arguments that call for a move beyond focusing on courtroom interactions when examining legal discourse and which highlight the importance of analysing pre-hearing exchanges (Scheffer, 2003; 2004).

Finally, this thesis makes a methodological contribution to socio-legal scholarship on asylum processes. By adopting an ethnographic approach to investigate aspects of

credibility assessments within the asylum process, the methodology used in this thesis distinguishes it from other studies which adopt a purely doctrinal approach to similar areas of enquiry (e.g. Kagan, 2003; Byrne, 2005; 2007; Millbank, 2009;). Instead, it should be considered to support existing socio-legal and anthro-legal scholarship which endorses a qualitative, 'law-in-action' approach to the study of law and legal institutions (e.g. Scheffer, 2002; 2003; Kelly, 2006; 2012; Baillot et. al 2009; 2011; Good, 2007; 2011; Thomas, 2011;).

1.3 Plan of the Thesis

The present chapter has introduced the topic of the thesis and outlined its aims and main arguments. In addition, it has suggested the intended contribution of the present thesis to existing academic knowledge and has briefly set out the methods that were used in the course of this research.

Chapter 2 provides an overview of the main legislation and policy governing asylum claims and appeals in the UK. In addition, it outlines some of the key measures which have been implemented during attempts to establish a Common European Asylum System and it examines the organisation of the main institutions and procedures involved in the asylum appeal process in Scotland. This chapter also highlights the difficult task Immigration Judges face when carrying out credibility assessments and making decisions in asylum appeals. By explaining that credibility assessments are treated as matters of fact in asylum adjudication, the chapter demonstrates that judicial decisions which are based on credibility findings do not ordinarily benefit from a right of appeal; this emphasises the significance of judicial assessments of credibility at first instance asylum appeals.

This focus on issues associated with credibility assessments in refugee status determination procedures is developed in Chapter 3. Here the definition of 'credibility' in international and domestic law and policy is examined and arguments from the literature (Kagan, 2003; Sweeney, 2009) are used to assert that the UK Home Office operates with a broad definition of credibility which can often work to the detriment of asylum claimants. The chapter continues with an examination of the ways that credibility is assessed in asylum decision-making processes in the UK and highlights problems associated with such assessments. By exploring the literature on credibility and witness statements, this chapter

argues that there is a need for research into the ways that solicitors confront the issue of credibility when preparing asylum appeals, particularly when preparing clients' witness statements which play a pivotal role in an Immigration Judge's assessment of an appellant's case. In so doing, it also sets out the empirical contribution that the present thesis makes to existing literature and suggests that it be positioned in relation to this emerging area of study.

Chapter 4 outlines the theoretical framework that is adopted in this thesis. It assesses the contribution that conversation analysis has made to studies of legal discourse and suggests that such approaches can be supplemented with insights from narrative studies. On the basis of an engagement with works that consider the relationship between narrative models and adjudicatory processes (Jackson, 1988; 1994), this chapter suggests areas of congruency between the claims advanced in that literature and what may be observed in the context of asylum appeal processes, particularly in relation to asylum appeal hearings and the work of solicitors in the preparation of aspects of the appeal case. The chapter goes on to argue that in order to examine how asylum appellants' narrative accounts of persecution develop during the asylum appeal process it is essential to consider the pre-hearing stages, particularly at the point in the process where asylum solicitors work to prepare the witness statement as part of their client's appeal. Similar studies in other areas of law are examined and it is argued that they provide a useful conceptual framework through which to trace the ways that solicitors and their clients develop narratives of persecution, usually the main piece of evidence in an appeal, during the course of preparing the asylum appeal case. In discussing the importance of pre-trial interactions, therefore, the chapter emphasises the significance of the lawyer-client relationship in asylum law settings and outlines the ways that this is addressed in the discussions of the empirical findings of this research.

Chapter 5 elaborates on the methodology and methods employed to explore the research aims of this thesis. It makes the case that the research aims require an ethnographic approach and assesses the opportunities and challenges presented by the use of ethnography in legal scholarship. In particular, this chapter highlights the issues around access which I experienced when trying to conduct participant observation with solicitors and their clients. The chapter also explores my changing position as researcher within the field and reflects on how my previous education in law as an undergraduate affected my ability to build rapport with potential research participants; the latter gives rise in the

chapter to a discussion of the need for reflexivity when conducting ethnographic research. Finally, the chapter outlines the ethical considerations which were borne in mind before, during, and following my time spent conducting fieldwork research.

The subsequent five chapters provide an empirical discussion of the research findings. Chapter 6 considers the role that legal funding arrangements play in the daily working practices of asylum solicitors in Scotland. The chapter begins by examining how processes of New Public Management which are motivated by a commitment to value for money for the taxpayer and economic efficiency have begun to pervade public administration. In particular it considers how such processes permeate the discourse and ethos of the Scottish Legal Aid Board (SLAB). The chapter examines the potential effects that new funding arrangements proposed by SLAB would have on the morale and casework practices of asylum solicitors. These arrangements are already in place in England and Wales and this chapter claims that the introduction of such measures in Scotland would severely restrict access to justice in the asylum process through the underrepresentation of asylum applicants and the limited provision of quality legal services in this area.

Chapter 7 builds upon the focus on solicitors' working practices and considers the different forms of labour which asylum solicitors provide when representing a client. The chapter suggests that asylum solicitors undertake emotional labour when representing a client, evidenced by them having to suppress emotional responses during their casework. This chapter demonstrates how solicitors in my research have varying strategies for dealing with affecting or distressing aspects of their work. For many, the process of cultivating an emotional distance from casework is part of a professionalisation process that is learned 'on the job' and over a prolonged period of time. This chapter contends that learning to suppress emotions and maintain objectivity are, in fact, skills which solicitors begin to learn during their time as students at law school. By drawing on similar research with divorce lawyers and their clients (Sarat and Felstiner, 2005), this chapter goes on to highlight the ways that barriers are constructed between legal practitioners and asylum applicants in lawyer-client interactions. Solicitors are shown, in this chapter, to regard the creation of barriers between themselves and clients as necessary in order to combat their over-identification with asylum clients. In addition to maintaining personal and emotional distance from clients, these barriers can also be seen to facilitate the expectation management of clients.

Chapter 8 continues the examination of the nature of the relationship between solicitors and their clients and explores issues around trust and belief in that relationship. It also considers how a criminalising discourse permeates asylum and immigration procedures in Scotland. Examples from fieldwork research are used to suggest that this discourse operates in the language of Home Office presenting officers during their representations and submissions at asylum and immigration hearings. This chapter also reveals how the discourse around 'genuine' and 'bogus' asylum applicants extends to a section of the asylum solicitor community in Glasgow. It claims that solicitors' judgements about whether an asylum client is 'genuine' or not creates a situation in which they fail to appreciate their pivotal role in the eventual assessment of their client's credibility at appeal. It shows how solicitors in my study often fail to recognise their role in the construction of asylum narratives as an instrumental one and that this leads, at times, to them attributing an unrealistic level of agency to asylum applicants when discussing the production of witness statements. It argues that such judgements, about whether a client is genuine or not, may prove problematic were proposed funding arrangements (which were subject to an ongoing consultation process at the time of writing) to be introduced in Scotland; these arrangements would make solicitors responsible for assessing whether a client's case is likely to be successful and, thus, deserving of public legal funds.

Chapters 9 and 10 elaborate on the role of solicitors in the construction and treatment of witness statements in the asylum appeal process. Chapter 9 examines asylum appeal hearing processes and highlights the structural barriers that asylum appellants face when trying to present their asylum claim in appeal hearing settings. It argues that institutional demands that a pre-prepared written witness statement be adopted by the asylum appellant as their evidence-in-chief at the outset of the appeal hearing denies them the opportunity to provide full oral testimony, with their account being teased out in a sympathetic manner by their legal representative.

Chapter 10 revealed the problems associated with the over-reliance on the witness statement created by the procedural rules discussed in the previous chapter. It examines the pre-hearing interactions that take place in the asylum appeal process and reveals their impact on the account of persecution provided at appeal vis-à-vis the production of the witness statement. It explores the working practices of the solicitors who took part in my research to show how the asylum claim presented in the refusal letter and the appellant's responses during interviews with the Home Office shape the account that is produced in

the witness statement. This chapter argues that where solicitors take the refusal letter and the asylum interview transcript as their starting point in the production of the witness statement, the narrative that develops during the construction of the statement does so in the form of a response to the account forwarded by the Home Office in the refusal letter; appellants therefore become bound by their answers at the asylum and screening interviews and also by the subsequent accounts which are drawn from these interviews and presented in the refusal letter. In line with studies (Maryns, 2006) which have shown that asylum applicants are often prevented from providing full details of their claim at the asylum interview, this chapter highlights the problematic consequences of the solicitors who took part in my research taking the asylum interview transcript and the resultant refusal letter as a starting point in this way.

Finally, Chapter 11 brings together the main conclusions that have been identified during the course of this thesis. In addition to recapitulating the main arguments of the thesis and the contribution that it makes to existing academic knowledge, this chapter suggests the need for sustained academic engagement with asylum appeal processes in Scotland. In particular, the chapter restates the claim made in this thesis that the proposed introduction of new funding arrangements in Scotland, that would bring them in line with those currently in place in England and Wales, would limit the provision of quality legal services to asylum claimants and pose a serious risk to access to justice for asylum applicants in Scotland. Were such changes to be implemented, this chapter contends that it would be vital to research their impact on access to justice for those subject to the asylum appeal process in Scotland.

2. Asylum Appeals Processes in the United Kingdom

In this chapter I consider current asylum policy and legislation in the UK, with a particular emphasis on the institutions and procedures involved in the asylum appeals process. I outline the arrangements the Home Office put in place for determining asylum claims under the New Asylum Model (NAM); I also sketch out the main features of the First Tier Tribunal of the Immigration and Asylum Chamber (FTTIAC), where asylum appeals take place in Glasgow.

2.1 The Refugee Convention and UK Asylum Legislation

The 1951 United Nations Convention relating to the Status of Refugees ('the 1951 Convention') is the primary legal instrument relating to refugee claims. It sets out the internationally agreed definition of a refugee and also outlines standards for the treatment of refugees (Clayton, 2008: 407). Although it was originally drawn up to deal with people displaced as a consequence of the Second World War, whose fear of persecution arose from events occurring in Europe before 1 January 1951, time restrictions under the 1951 Convention were removed by virtue of the 1967 United Nations Protocol Relating to the Status of Refugees ('the 1967 Protocol'). In addition, geographical restrictions contained in the 1951 Convention have also been gradually removed. The definition of a 'refugee', however, has remained unchanged. According to the 1951 Convention, *art 1 A*, a refugee is someone who:

[O]wing to a 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 (sic) nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country.

The UK has been a signatory to the 1951 Convention since 1954 and to the 1967 Protocol since 1968. A statutory right to appeal against the refusal of an asylum claim has existed in domestic law since the incorporation of the Asylum and Immigration Appeals Act 1993 (ICAR, 2007: 2). Prior to this, the refusal of an asylum claim could be challenged by judicial review, on general public law grounds. The 1993 Act provided that where a person made a claim for asylum 'it would be contrary to the UK's obligations under the 1951

Convention for the claimant to be removed from the UK' (Clayton: 2008: 411). This was in accordance with the principle of *non-refoulement* contained in Article 33 of the 1951 Convention. The principle of *non-refoulement* dictates that:

No contracting state shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The whole scheme of refugee protection is based upon this principle (Clayton, 2008: 498). Following the 1993 Act, successive governments have extensively modified the UK asylum process through legislation. The New Labour government introduced no fewer than six substantive Acts of Parliament during its period in office from 1997 until 2010. The most recent change was made by the introduction of the Borders, Citizenship and Immigration Act 2009. The main Act which governs the process of dealing with asylum claims, however, is the Asylum & Immigration (Treatment of Claimants, etc.) Act 2004.

Good has argued that the implementation of each new piece of legislation has led to the introduction of increasingly draconian measures (2007: 5). The policies introduced to coincide with these new rules have been widely criticised. In particular, the UKBA's use of detention, the government's unofficial policy of enforced destitution and the increasingly restrictive border controls introduced have been the subject of sustained criticism by those working in the areas of asylum and immigration (for example, Refugee Council, 2007a; BID, 2010; 2011). The introduction of stricter border controls has been identified as a further measure in the move towards more securitised asylum and immigration policies, both in the UK and internationally (see Mountz, 2010; Gammeltoft-Hansen, 2011). The UK operates border controls in conjunction with other European Union Member States. Such measures that European states take in conjunction with one another have been considered by the European Courts in order to determine whether they are in line with the Member States' obligations under the 1950 European Convention on Human Rights (ECHR).

2.2 Europe and the UK Asylum System

Since the incorporation of the ECHR into national law, with the enactment of the Human Rights Act 1998, decision-makers in the UK asylum process must also take into account an applicant's rights under the ECHR. The interpretation of European and International Conventions is one of the factors that sets asylum law apart from other areas of domestic law. Owing to the fact that there is no supranational asylum court charged with the interpretation of the 1951 Convention, its signatories are largely able to interpret it in different ways. However, in order for an effective system of refugee protection, it is important that signatories to the 1951 Convention maintain a consistent interpretation of it (Clayton, 2008: 407). In order to address this, the European Union (EU) has attempted in recent years to 'harmonise' asylum procedures, as well as interpretations of the meaning of the term 'refugee', within its Member States.

2.2.1 The Common European Asylum System

EU Member States wanted a Common European Asylum System (CEAS) to deal with a number of specific problems stemming from the large differences in asylum systems and practices among them. The aim of the CEAS is apparently to 'harmonise asylum procedures in the European Union, increase cooperation between EU states on managing their external borders and develop high standards of protection for asylum seekers' (Public Policy Exchange, 2012). It was the intention of the Member States that the CEAS would be introduced in phases and completed by 2012. To date, there have been four Directives and four Regulations passed as a result of 'harmonising' attempts under the formation of a CEAS¹. Two of the most controversial measures introduced as part of the CEAS were the attempts at an agreement between EU Member States of a list of 'safe countries of origin' and the introduction of a unified finger-printing database across the EU, known as EURODAC.

The 'Safe Country of Origin' concept has been adopted in many EU Member States. A safe country of origin is one in which there is deemed to be no general risk of persecution

¹ A full discussion of these is outwith the scope of the brief overview I wish to provide in this section, for a more comprehensive examination of the instruments introduced under the CEAS, see Clayton, 2010: 156-9.

and there is a presumption that it is safe to return asylum applicants to that country without breaking the *non-refoulement* principle. Although an agreed list of Safe Countries of Origin has never been officially agreed in the EU, it remains a controversial principle because it cuts across the idea that an applicant is entitled to an individual assessment of their asylum claim.

EURODAC provides a unified finger-printing system amongst the EU so that Member States can compare the finger prints of asylum applicants who have travelled through other parts of the EU. This system had the purported intention of helping to fight ‘insecurity and terrorism’ within the EU. In practice, however, it serves to help Member States identify other EU countries through which an asylum applicant has travelled. This then means that they can return applicants to those countries and transfer the responsibility for their asylum claim to those Member States’ governments. The Regulation that governs this arrangement between Member States is known as the Dublin Regulation and it is regularly invoked by the Home Office in the UK to try and limit the number of asylum applications that it has to deal with. As I will show in the course of my research, for example, one applicant was returned to France several times before the UK would agree to consider his claim (in Chapter 10). It is to a consideration of the process for claiming asylum in the UK that the present chapter now turns.

2.3 Claiming Asylum in the UK

The UK government department responsible for asylum and immigration is the Home Office. In 2008 the UK Border Agency (UKBA) was established as an executive agency of the Home Office, the UKBA’s remit included the work previously undertaken by the Border and Immigration Agency, UKvisas, and the border-related work of HM Revenue and Customs. The integration of these agencies under the auspices of the new unified UKBA was reportedly aimed at achieving an agency ‘with the resources and remit to improve the UK’s security through strong border controls, while welcoming and encouraging the flows of people and trade on which the UK’s future as a global hub depends’ (Cabinet Office, 2007: 3). In spite of the restructuring process, general responsibility for asylum and immigration has remained with the Home Office; and it is common practice for participants in the asylum process to refer to both the UKBA and the

Home Office interchangeably. Consequently, reference will be made throughout this thesis to both the UKBA and the Home Office.

2.3.1 Making the Claim and the Initial Decision: The New Asylum Model (NAM)

In February 2005 the Home Office announced its five-year strategy, *'Controlling our borders: making migration work for Britain'* (Home Office, 2005). As part of its stated aims to 'introduce a new fast track managed asylum process...and swiftly remove failed asylum seekers' (Home Office, 2005: 19), the government proposed the development of a New Asylum Model (NAM)². The aim of the new model was to 'introduce a faster, more tightly managed asylum process with an emphasis on rapid integration or removal' (Refugee Council, 2007b: 1). The focus on speeding up asylum processes, as Clayton points out, actually pre-dated the NAM with initiatives in fast-track decision-making being increasingly introduced from 2000 onwards (Clayton, 2008: 420). However, the NAM represented the most comprehensive attempt to streamline and speed-up the asylum process. The NAM's primary objective was to conclude a large proportion of asylum cases within six months. Mechanisms put in place under the NAM to achieve this included 'case ownership', 'segmentation', and 'fast-track processing'.

The NAM introduced a system of case ownership whereby a single case owner, a Home Office official, was to be responsible for overseeing a person's asylum claim from start to finish. The case owner would make the initial decision about an applicant's claim, handle and appear at any appeal of their decision, and deal with issues surrounding asylum support, reporting and contact arrangements. It was also envisaged that the case owner would eventually assist in the 'integration' or 'removal' of an applicant once their asylum claim and appeal had been concluded. In spite of these aims of the NAM, as I will discuss later in this thesis (in Chapter 9), those working within the asylum process in Glasgow do not think that it was successful in achieving such a system of case-ownership.

Segmentation meant that under the NAM, cases were to be categorised as falling into one of five segments depending on characteristics of a claim. The five possible segments are: 'third country', 'minors', 'potential non-suspensive appeal' (NSA), 'detained fast-track',

² Figure 1. below provides a general overview of the process under the NAM

and 'general casework'. Unaccompanied asylum-seeking children (UASC) and children who arrive with their families but apply for asylum in their own right are those who are deemed to fall within the 'minors' segment. UASCs may require an age assessment to clarify what sorts of services they will need to access. These are generally conducted by social services, though the reliability of such assessments has been called into question by the Immigration Law Practitioners' Association (ILPA, 2007). The danger that flawed age assessments may result in children being processed as adults for the purposes of their claim and support is one that should not be dealt with lightly. Unaccompanied children who are wrongly assessed as adults will not receive specialist support, in the form of welfare services and from specially trained case owners who are equipped to handle asylum claims made by children. In addition, they may be accommodated in an adult environment or even detained while their claim is processed.

Claims which are classed as 'third country' claims relate to those made by people who come from one of the countries that the UK has deemed to be a 'safe country of origin', as discussed above. Where an applicant's country of origin is considered to be 'safe', their claim will be certified by the Home Office as 'clearly unfounded'. If a person's claim is deemed to fall within this category, they will be referred to what is known as the Third Country Unit (TCU) which will make arrangements to return the person to that 'safe' country. The only mechanism for challenging return to a safe third country is judicial review. Often, applicants who fall into this category are detained while their claim is processed.

Similarly, those who are classified as making claims which may be 'fast-tracked' are liable to be detained while their claim is processed. A claim may be fast-tracked where the Home Office is of the opinion that it may be dealt with quickly. There are certain exclusions to the types of people that may be put into the Detained Fast-track process (DFT). However, other than these exclusions, as the UKBA policy instruction states:

- 2.2 It is UK Border Agency policy that any asylum claim, whatever the nationality or country of origin of the claimant, may be considered suitable for DF processes where it appears, after screening (and absent of suitability exclusion factors), to be one where a quick decision may be made (Home Office, *Detained Fast Track*: 4).

Critics of the Home Office's use of detention and fast-track procedures have argued that often people will be detained who are then later found to have been victims of trafficking or torture (see Hales and Gelsthorpe, 2012). In addition, they have shown that applicants who are subject to DFT procedures are regularly denied the opportunity to access legal advice and representation. Cases will be classed as 'general casework' cases where they do not fall under any of the other categories above. Some applicants in the general casework segment, however, may also be detained while their claim is decided.

Since March 2007, all asylum claims have been dealt with by the Home Office under the NAM. Claims made prior to 5 March 2007, often referred to as 'legacy cases', are dealt with under the Case Resolution Directorate (CRD). The CRD comprises roughly forty teams dealing with older, unresolved cases. Unresolved cases are treated in the same way as new applications by the case resolution teams. A report published by the Independent Chief Inspector of the UKBA in 2009 revealed that the CRD's targets for dealing with legacy cases was unachievable showing that a significant proportion of these cases were still awaiting a decision (ICI, 2009).

An application for asylum may be made either at a claimant's port of entry to the UK or following entry by presenting in person at an Asylum Screening Unit (ASU). The ASU in the UK is situated in Croydon, London. After an asylum applicant has made a claim, the UKBA arranges an initial interview, known as a 'screening interview', with them. The purpose of the 'screening interview' is meant to be to establish an applicant's identity and nationality and to determine in which 'segment' a person's claim will be processed. I will go on in this thesis to suggest that this is not always the way that the screening interview is used by the Home Office during asylum decision-making (in Chapter 9). In this section, though, I will outline the process as it ought to be carried out according to UKBA guidance and UK asylum law as detailed in the general overview provided in Figure 1. below.

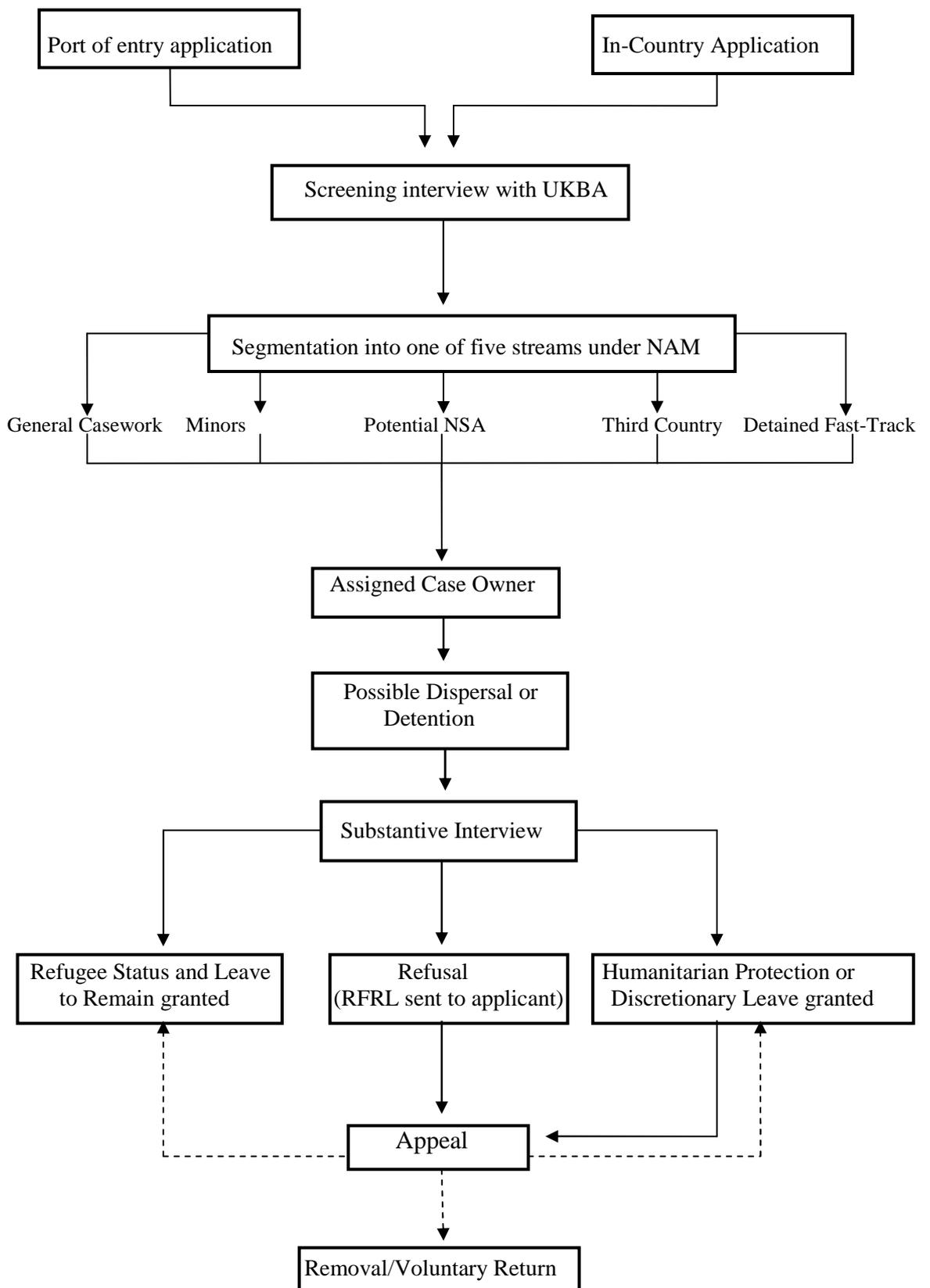


Figure 1. Asylum determination process under the NAM

At the screening stage the applicant will be expected to produce documentation in support of their claim and any passports or travel documents that verify their identity and nationality. In fact, by virtue of section 2 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004, any failure to do so at this stage may adversely affect the outcome of an applicant's claim. An applicant's fingerprints and a photograph of the applicant are also taken at this stage to reduce the possibility of multiple claims by the same person. The information taken at screening will then be contained on the Application Registration Card (ARC) that is issued to the applicant. The ARC functions like an identity card for asylum applicants and is required when reporting at Home Office centres and for accessing asylum support and welfare services.

The biometric details contained on the ARC are also checked against information held in a shared database between European Union Member States in order to verify whether the applicant has been previously present in any other EU Member States. As mentioned above, where an applicant has been present in another Member State where s/he has, or could have, claimed asylum before entering the UK, s/he will be forced to return to that state to claim asylum there.

Where an applicant is granted temporary admission to the UK while his/her claim is being processed, s/he will then undergo a process of 'segmentation' where it is decided under which 'segment' his/her claim should be dealt with. The segment into which an applicant's claim is streamed will then dictate the route that the applicant's claim takes through the process (as detailed under the individual segments above). The applicant will then be assigned a case owner and may be 'dispersed' to another area of the UK where there is an asylum team to deal with his/her claim. Following 'dispersal' an applicant will then have an asylum or substantive interview with a UKBA representative, usually their case owner and usually no more than twelve (different arrangements are made for minors) days after initially lodging an application for asylum.

The substantive interview forms the main basis for the decision that is made about an applicant's claim. Under the previous application procedure, applicants were required to complete a Statement of Evidence Form (SEF) prior to the asylum interview and normally within ten working days of making a claim. The SEF was then used to form the main basis of the interview and applicants could be questioned on the detail that they had given in it.

However, with the introduction of the NAM, the SEF element has been removed from the process. For many applicants, therefore, the asylum interview is their first opportunity to disclose details of their claim in full to the Home Office. The Home Office provides an interpreter for the interview and where an applicant's legal representative is not able to attend the interview, s/he may request that the interview be taped. Interviews at the Home Office are extremely structured. Case owners will ask applicants detailed and at times repetitive questions in order to try and extract as much detail as they can about their claim. The questions and the applicant's responses are recorded in writing by the case owner, and should provide a verbatim account of the interview.

Following the substantive interview, the case owner will make a decision about the applicant's claim. There are three possible outcomes: refugee status is granted to the applicant and she is given five years limited leave to remain; the applicant may not be recognised as a refugee but may be granted a subsidiary form of humanitarian protection or discretionary leave to remain; or, as happens in the majority of asylum claims the application is refused (Home Office, 2011).

By being granted refugee status a person is able to work and apply for social welfare benefits and also educational grants (ICAR, 2007a: 6). It also means that they can apply to bring over family members from their country of origin. Prior to August 2005, applicants whose asylum claims were approved and who were granted refugee status were awarded Indefinite Leave to Remain (ILR). The current arrangements, which involve what is termed the 'Active Review' of cases, mean that individuals granted refugee status are awarded five years leave to remain 'subject to review at the expiry of or during those five years where there is a 'significant' and non-temporary change in the country of origin making return possible' (ibid). The Refugee Council (2011) have conducted research into the detrimental effects that 'Active Review' can have on a person's ability to settle and move on once they have been granted leave to remain.

Before August 2005, Humanitarian Protection (HP) could be granted for up to three years. Since that date, HP can be awarded for up to five years and is subject to the same 'Active Review' as refugee status. Once an individual has lived with HP status for five years, s/he is able to apply for ILR. Humanitarian Protection is usually granted to individuals who are refused refugee status but where there are 'compelling reasons why they cannot be returned to their home state' (Clayton, 2008: 438), such as: the death penalty, unlawful

killing, torture, inhuman or degrading treatment or punishment (ICAR, 2007a: 4). The enforced return of people to places where they face such treatment would run contrary to the UK's obligations under the ECHR. In particular, it would violate Article 3 of the ECHR which prohibits torture or inhuman or degrading treatment or punishment (Thomas, 2005: 462).

Discretionary Leave (DL) is granted to individuals who are not considered to satisfy the criteria to be awarded refugee status or HP. The Information Centre about Asylum and Refugees (ICAR) has summarised the kinds of conditions under which DL may be granted. These include where the applicant:

- has an Article 8 claim under the ECHR;
- has an Article 3 claim under ECHR only on medical grounds or severe humanitarian cases;
- is an unaccompanied asylum seeking child for whom adequate reception arrangements in their country are not available;
- would qualify for asylum or humanitarian protection but has been excluded; or
- is able to demonstrate particularly compelling reasons why removal would not be appropriate (ICAR, 2007a: 4).

Discretionary Leave will be granted initially for a period of up to three years and may be renewed following review for a further three years. After this six-year period of discretionary leave expires, an individual may apply for ILR. Where an individual is refused asylum, or awarded HP or DL she may be entitled to appeal the initial decision of the UKBA.

2.4 Appealing a Refused Asylum Claim

In the UK asylum appeals process, the person making an appeal is known as the 'appellant' and the person challenging the appeal, usually the Secretary of State, is known as the 'respondent'. Both sides are 'parties' to the appeal (ICAR, 2007: 6). In most asylum cases, a refusal of asylum is accompanied by an immigration decision; this is a decision that the applicant has no legal right to be in the UK and in such cases the applicant is able to lodge an appeal. As Clayton points out, the right to appeal is actually the right to appeal the associated immigration decision that accompanies a refusal of asylum, namely, the decision to remove the applicant from the UK (2008: 411). Where an application attracts a

right of appeal, an applicant may apply to the First Tier Tribunal of the Immigration and Asylum Chamber (FTTIAC) for a reconsideration of the initial Home Office decision to remove him/her from the UK.

Changes to the legal landscape of asylum and immigration law over the last two decades have resulted in appeal rights being increasingly curtailed. As a result of this, an in-country right of appeal will be prohibited where a claim has been certified as ‘clearly unfounded’; an applicant’s country of origin is designated as ‘safe’; an applicant’s exclusion from the UK is deemed to be in the interests of national security; or where an applicant has enjoyed an earlier right to appeal. In such circumstances, it may be necessary for the applicant to make an out-of-country appeal. An out-of-country appeal means that an applicant cannot appeal against the refusal of his/her claim prior to removal. His/her only in-country remedy would be judicial review. As previously mentioned, where an applicant has an in-country right to appeal an initial Home Office decision about their asylum claim, they can appeal to the FTTIAC. This must be done within ten working days of the applicant receiving a Reasons for Refusal Letter (RFRL or ‘refusal letter’) from the Home Office. Where applicants are subject to detention, the more stringent timescale of five working days applies to appeals to the FTTIAC and those individuals whose claims are being dealt with under ‘detained fast-track’ procedures have merely two working days to lodge an appeal with the FTTIAC.

2.4.1 The First Tier Tribunal of the Immigration and Asylum Chamber (FTTIAC)

Until recently, asylum and immigration appeals were dealt with under a single-tier system by the Asylum and Immigration Tribunal (AIT). The AIT was created by virtue of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 and was established as a single-tier appeal system in April 2005. It was governed by the Asylum and Immigration Tribunal (Procedure) Rules 2005. With the exception of national security-related cases which are heard by the Special Immigration Appeals Commission (SIAC) all appeals against decisions made by the Home Office on asylum, immigration and nationality matters were heard by the Tribunal (Home Office, 2007 in ICAR 2007: 6). The AIT replaced the former two-tier model of the Immigration Appellate Authority (IAA). Under the previous IAA system, appeals of initial Home Office decisions were heard by an

adjudicator with any subsequent appeal of that decision made to the Immigration Appeal Tribunal (IAT). AIT appeals were heard by one or more Immigration Judges (IJs) who were sometimes accompanied by non-legal members of the Tribunal. IJs and non-legal members are appointed by the Lord Chancellor and form an independent judicial body. Adjudicators and legally qualified members of the former IAT transferred immediately to the role and title of Immigration Judge, while non-legally qualified members of the IAT became non-legally qualified members of the AIT (Clayton, 2008: 255).

Following the 2002 Nationality, Immigration and Asylum Act, appeals to the IAT were restricted to those with grounds of ‘error of law’³ only. This restriction was also enforced in relation to appeals of Immigration Judge’s decisions at the AIT. It was, therefore, only possible to challenge an Immigration Judge’s determination of an initial appeal where it could be shown that the judge had made an error of law in coming to that decision. Under the single-tier AIT system, such onward challenges of initial appeal decisions were made to the upper courts, that is, the High Court in England and Wales, the Court of Session in Scotland, and the High Court in Northern Ireland. However, in order to reduce the number of applications that these courts would have to deal with, an AIT ‘filter’ was introduced. The ‘filter’ involved initial applications for a reconsideration of an Immigration Judge’s decision being determined by a Senior Immigration Judge at the AIT. If this application was refused, asylum appellants could then renew their reconsideration application by ‘opting-in’ to the upper courts, in the case of Scotland, to the Court of Session (Craig et. al, 2008: 22). The ‘opt-in’ meant that the Court of Session would consider the written application without a hearing and could make an order for the AIT to reconsider the

³ An error of law has been defined by the upper courts, specifically the Court of Appeal, in *R (Iran)* ([2005] EWCA Civ 982) to include:

1. making perverse or irrational findings;
2. failing to give reasons or adequate reasons for findings on material matters
3. failing to take into account and/or resolve conflicts of fact or opinion on material matters;
4. giving weight to immaterial matters;
5. making a material misdirection of law on any matter;
6. committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or fairness of the proceedings; and
7. making a mistake as to a material fact which could be established by objective and uncontested evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made.

As is clear from the above categories outlined in the case law, an error of law must be ‘material’ in order to constitute the basis of an onward appeal. An error of law is said to be material where ‘correction of the error would have made a material difference to the outcome of the case, or to the fairness of proceedings’ (*R (Iran)* para. 90, cited in Craig et. al, 2008: 32). Therefore for the courts to decide that an Immigration Judge has made a material error in law in coming to their decision, they must be of the opinion that the initial Immigration Judge made an error of law which ‘...affected the Tribunal’s decision upon the appeal’³.

application where it thought that the Tribunal may have erred in law (ibid). The Court of Session could only decide that the AIT should reconsider an application once in relation to an appeal, and so, after this stage there was no further avenue for review or appeal open to asylum claimants (ibid).

This process for onward challenges was changed significantly with the implementation of a two-tier tribunal system in 2010. In order to reduce the burden of a heavy immigration and asylum caseload on the higher courts, the AIT was transferred into the First-tier and Upper Tribunals (Immigration and Asylum Chamber) in February 2010. Initial appeals of Home Office refusals are considered by Immigration Judges at the First-tier Tribunal (Immigration and Asylum Chamber) (FTTIAC). These initial appeals at the FTTIAC are ostensibly carried out in the same way as appeals were under the AIT system. Onward challenges of these appeal decisions are now made to the FTTIAC for permission to appeal the initial decision to the Upper Tribunal. Where permission to appeal is refused by the First-Tier Tribunal, a further application for permission to appeal the initial decision can be made to the Upper Tribunal. If it decides that there may be an error of law in the original appeal decision, the appeal will be reconsidered within the Upper Tribunal. Challenges of Upper Tribunal decisions are to the higher courts. Recent case law has addressed the issue of whether the Tribunal is still answerable to the higher courts and although this case law confirms that it is, it suggests that judicial review of Tribunal decisions may be only possible under limited circumstances⁴ (see *Eba v Advocate General for Scotland ; R (Cart) v Upper Tribunal*).

The changes described above were implemented during the course of the field research that informs the present thesis. In spite of the changes, there were no real differences in appeal proceedings under the new FTTIAC. This brief consideration of these changes remains useful, however, in that it highlights the changing nature of the asylum appeals process in the UK. Indeed, as Thomas notes:

The asylum appeals process has itself been subject to regular legislative restructuring, more than any other tribunal system, to reduce delays, increase efficiency, and promote finality (2011: 20).

⁴ For a fuller discussion of the cases, the Supreme Court judgements and what this may mean in practice for asylum appeals, see Craig (2012).

The emphasis on timely and efficient decision-making at the FTTIAC is due to the fact that Tribunals tend to operate in a way that prioritises these considerations. In this regard, they tend to differ from other Courts that do not explicitly promote efficiency as a priority. Despite this, many asylum applicant and legal representatives refer to the Tribunal as ‘the court’.

2.4.2 Court-Like Nature of FTTIAC

The FTTIAC is housed in a corporate-looking building, called the Eagle Building, in a business district of Glasgow. Once inside, however, its layout and procedures seem very court-like to lay users. In fact, many of the asylum applicants that took part in Craig and her colleagues’ study of onward challenges to Tribunal decisions explained that they found it to be court-like in nature and, indeed, both appellants and legal representatives in their study referred to the Tribunal as ‘the court’ (Craig et. al, 2008: 83-105).

The spatial layout of a courtroom at the FTTIAC, however, is quite unlike most other courtrooms; it is significantly smaller. There are two tables situated in front of the judge, one table is for the appellant’s solicitor and the other is designated for the Home Office representative. The tables are positioned on opposing sides of the room and face one another. There is a third table, which forms the apex of a triangle that it makes with the other two; this is for the appellant and, if required, an interpreter. This is also where witnesses typically sit when examined. If witnesses are called, the appellant and interpreter move to the row of seats reserved for observers that line the back wall. Witnesses are sequestered during the hearing; however, there tend to be few or no witnesses in asylum appeals. On the front wall there is an elevated ‘bench’ at which the Immigration Judge sits; the official crest of HM Courts and Tribunals Service is mounted on the wall behind. Clerks enter before judges do and order the parties to ‘rise’, as is done in other courts of law. In addition, certain Immigration Judges insist that appellants stand and undertake an oath at the outset of the hearing. Like other Scottish Courts, the entrance to the FTTIAC is highly securitised. There are usually two security officers supervising the entrance. They search Tribunal users’ bags and, in a similar way to airport security procedures, they then ask that Tribunal users submit to a metal detection scan. After passing through the security

checks and into the reception area of the FTTIAC, one is immediately met with the clerks' desk directly facing them.

The clerks of the FTTIAC are responsible for overseeing the general administration and organisation of immigration and asylum hearings. As Flood has noted in relation to the role of barristers' clerks in the English legal system, 'clerks mediate between the diverse interests of the legal system, namely, barristers, solicitors, judges...and occasionally the client upon whom the system depends' (2005: 38). He also contends that they perform the varying roles of 'counsellor, negotiator, and 'fixer' (ibid). Barristers' clerks, it could be claimed, possess a more powerful position than FTTIAC clerks due to the fact that they are responsible for collecting barristers' fees; they allocate them their work; and are instrumental in listing cases at court. However, by considering the working practices of clerks at the FTTIAC, it is possible to argue that there is a dispersal of power at the Tribunal and that the clerks do, like those in Flood's research, fulfil such varying roles.

Clerks at the Tribunal are responsible for advising Immigration Judges when all the parties to an appeal are present and ready to start with proceedings. The Immigration Judges' offices, or 'chambers', are based on the floor above the one where the appeals are heard. Clerks, therefore, usually phone judges to advise them that '[their] court is ready'. Prior to this, however, they are often involved in negotiations with solicitors who may be representing clients a number of clients on any given day or who may be planning to request an adjournment in their case and so do not want to have to wait for other cases to finish before they can make their request. These negotiations involve the clerks trying to accommodate their needs, often reorganising the court listings and trying to convince judges that the new order of proceedings is the most favourable. In addition, they regularly have to arrange the order of the hearings to allow for interpreters who may be working in different cases on the same day, and again, this involves a process of negotiation with the Immigration Judges.

During my time spent conducting fieldwork at the FTTIAC, I also observed the ways that clerks can effectively 'close' an appeal hearing to public observation. Appeal hearings at the FTTIAC are open to members of the public and anyone can request to observe an appeal hearing. When an observer has no connection to any of the parties to the appeal, clerks will often advise him/her that they need to first ensure that all parties agree to the appeal being observed before they can allow them into the hearing. On one occasion, a

clerk did this to me and effectively stopped me from observing an appeal. He advised me that the appeal was of a young woman whose case was of a ‘sensitive nature’. He noted that she may be recounting particularly traumatic experiences and that she may not want anyone to observe. Upon entering the hearing room he then informed the appellant and the interpreter that I was a student and asked if they minded that I observe. The appellant looked confused and slightly anxious. The interpreter responded that she did not think it would be appropriate, explaining that ‘if it were [her], [she] wouldn’t want anyone observing’. Not wanting to cause the appellant any further distress, I left the hearing room (Fieldnotes, FTTIAC, June 2009). The appellant and her representative had not requested a closed court for the hearing and so the clerk, on this occasion, did not, technically, have to ask anyone’s permission for me to observe it. I understood that by doing so, he had the appellant’s best interests in mind. I decided that it would not have been ethical for me to push the issue and ask to observe the case; by making the appellant uncomfortable or uneasy, my presence could have affected her ability to respond to questions and may have detracted from the judge’s assessment of her credibility⁵.

The above fieldwork example demonstrates the power that the clerks at the FTTIAC possess. And although they do not have the power to make decisions in asylum appeal hearings, it shows that Tribunal clerks are involved in negotiations with different legal actors and Tribunal users; and that they exercise a form of unofficial power and control at the FTTIAC.

2.4.3 Asylum Appeal Hearings at the FTTIAC

There are two types of hearing at the FTTIAC which relate to initial asylum appeals of Home Office refusals, these are: a Case Management Review hearing (CMR) and a Substantive Appeal hearing.

The purpose of the CMR hearing is to ascertain whether the appeal is ready to proceed and to discuss the facts at issue. In line with the faster timescales introduced with the NAM, as discussed above, the FTTIAC aims to hear a CMR hearing for an appeal within two weeks

⁵ It could be argued that my presence might have done this to appellants in cases where the clerk did not first ask if I could observe. However, to try and counter this, I would usually ask the interpreter to check with the appellant before a hearing if they were happy for me to observe the appeal.

of the appeal application being received. Additionally, the CMR provides an opportunity for legal representatives to request special arrangements in relation to the conduct of the appeal hearing, for example an all-female court and/or a closed court (closed to members of the public and others) where their client is particularly vulnerable or his /her evidence is of a very sensitive nature. It is also the time at which a legal representative may request an adjournment of the appeal hearing. This may be necessary where they have instructed expert evidence or are waiting for other evidence in support of their client's appeal. Given the quick turn-around times in asylum processes under the NAM, however, Immigration Judges are generally reluctant to grant adjournments. Usually, applicants will not attend the CMR and only their legal representative and the Home Office representative (Home Office presenting officer or 'HOPO'), and an Immigration Judge will attend. The Substantive hearing will usually be set for a further two weeks time following the CMR hearing; however, this may be extended if a successful adjournment request is made by an applicant's legal representative.

The substantive hearing constitutes the main hearing for the purposes of an appeal of a UKBA decision. Usually the appellant, the appellant's legal representative, and a Home Office presenting officer attend the hearing. Occasionally, witnesses attend the hearings, and the hearings are, for the most part, open to members of the public who may also wish to attend. The burden of proof at the hearing lies with the appellant. However, in asylum processes, the lower standard of proof of 'a reasonable degree of likelihood' applies. Generally, proceedings at the FTTIAC take on an adversarial form with the judge acting as arbiter between the Home Office presenting officer and the appellant's legal representative. Although there is more scope in asylum hearings for the judge to adopt a more inquisitorial role, in the interests of fairness and impartiality s/he is not allowed to 'enter the arena' and become a party to the proceedings by, for example, taking it upon his or herself to cross-examine the appellant. The procedure at hearings varies with the different styles of the Immigration Judge hearing the appeal (Good, 2007: 110). However, they all tend to follow the same format as regards the sequence of questioning and submissions.

As previously stated, asylum appeal hearings are structured by a series of questions and answers. Hearings begin with the appellant being examined on his/her evidence by the Home Office presenting officer (or 'presenting officer'). Most appellants have both an asylum interview transcript and a witness statement. The appellant's legal representative will usually have a copy of the asylum interview transcript and a witness statement from

their client which they will ‘establish’ as their client’s evidence by asking him/her to confirm that the contents of each are true and that the appellant wishes to submit them in evidence (Good, 2009: 3). The appellant is then cross-examined by the presenting officer who attempts to tease out inconsistencies in the appellant’s evidence, usually using the points in the refusal letter to guide the examination. The appellant’s legal representative can then examine the applicant to try and clarify or respond to any matters raised during the presenting officer’s questioning, in an attempt to satisfy the Immigration Judge that there are reasonable explanations for any inconsistencies. Finally, both representatives, the appellant’ legal representative and the Home Office presenting officer, address the court with their final submissions (ibid). The judge will reserve her decision and issue it in writing no later than ten days after the appeal. Figure 2. below illustrates this first-instance appeals process at the FTTIAC.

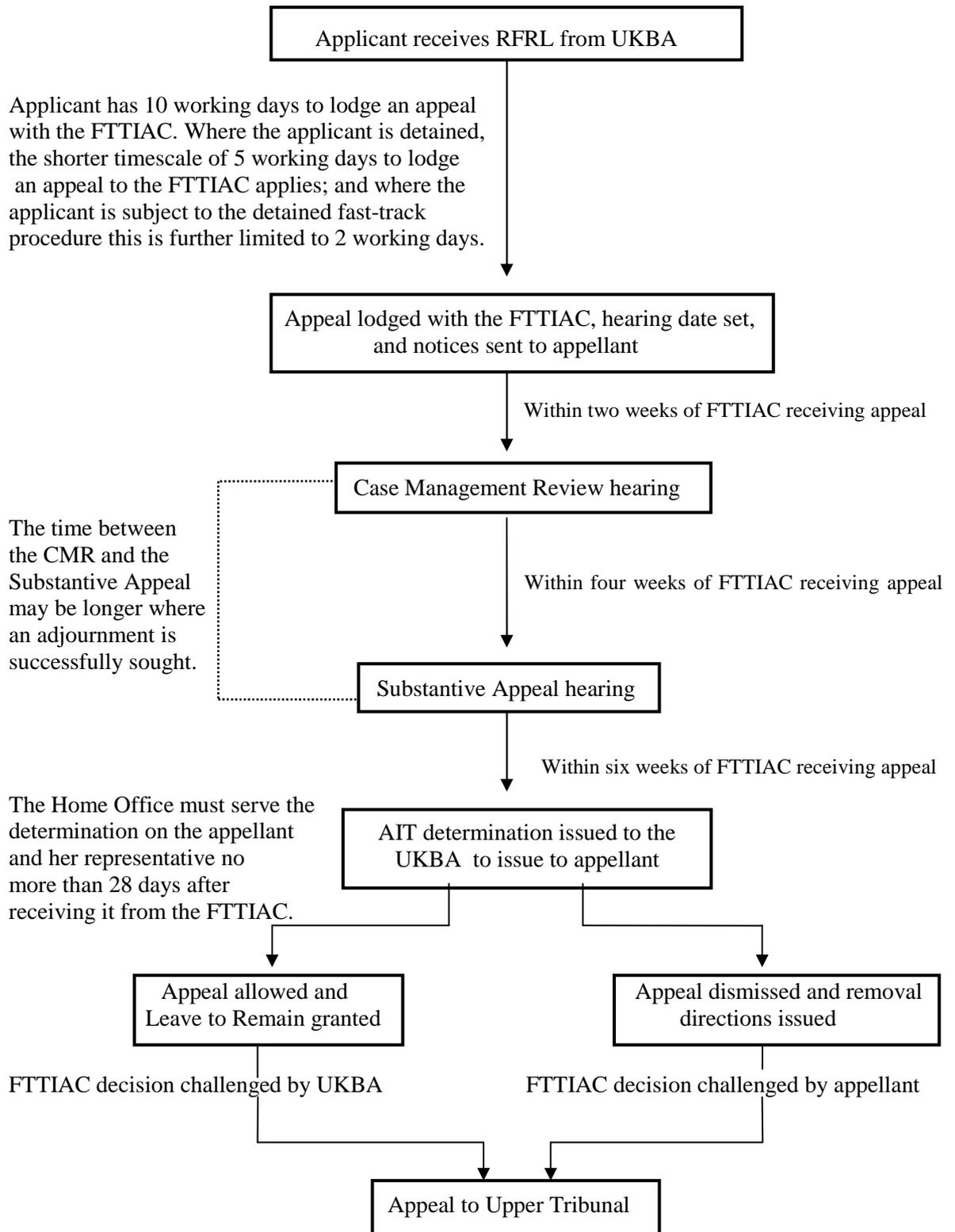


Figure 2. Initial Appeals Process

The FTTIAC issues its determination to the Home Office to distribute to the parties because, in considering an asylum appeal, the judge at the FTTIAC is technically entitled to overturn the Home Office's decision that the appellant does not have the legal right to remain in the UK. On this basis, the FTTIAC can only decide that 'leave to enter *should* be granted or that the appellant *should not* be removed' (Clayton, 2008: 411, emphasis in original). The FTTIAC does not have the power to confer refugee status upon the applicant. This right remains with the Secretary of State, on whose behalf the Home Office works. The fact of the FTTIAC serving its determination on the Home Office in the first instance is often seen by appellants and legal representatives as a contributing factor to the FTTIAC's perceived lack of independence from the Home Office (Craig et. al, 2008: 13).

2.4.4 Decision-Making at the FTTIAC: Immigration Judges and their (im)partiality

As mentioned above, Immigration Judges' asylum appeal determinations are issued, in the first instance, to the Home Office which is then responsible for forwarding the decision to the appellant. Many appellants have highlighted this arrangement arguing that it points to a lack of partiality at the FTTIAC (ibid.). One of the most frequently invoked reasons for the perceived impartiality of certain Immigration Judges, however, is the level of inconsistency in judicial decision-making at the FTTIAC.

Disparities in asylum adjudication have been shown to be particularly problematic in the US. Ramji-Nogales and her colleagues' study of asylum decision-making across the US showed there to be a lack of uniformity of decision-making over place and time. They emphasise the inconsistent nature of such decision-making, when they note that:

The statistics that we have collected and [analysed]...suggest that in the world of asylum adjudication, there is remarkable variation in decision-making from one official to the next, from one office to the next, from one region to the next, from one court of appeals to the next, and from one year to the next, even during periods when there has been no intervening change in the law (Ramji-Nogales et. al, 2009: 3).

Einhorn attributes much of the inconsistency in asylum adjudication discovered by Ramji-Nogales and her colleagues to Immigration Judges' diverse approaches to the assessment of the credibility of a claim (2009: 188). Credibility relates to whether an applicant's claim should be believed and therefore accepted as fact by the decision-maker. Einhorn highlights the difficulties associated with making credibility determinations in asylum hearings, when he states:

Reasons for this difficulty include, but are not limited to, differences in cultural norms, the effect of an asylum seeker's past traumatic experiences and flight and her ability to recall events, language barriers, the adversarial nature of the hearing, the asylum seeker's limited access to counsel, and the adjudicator's sometimes inaccurate perceptions of foreign culture (2009: 189).

Einhorn goes on to suggest that a disparity in approaches to credibility determinations has created 'an atmosphere that resembles the crap shoot of a casino more than the judicious proceedings of a court of law' (2009: 191). Writing in the context of the UK asylum process, Thomas acknowledges the difficulties raised by credibility assessments in relation to a lack of consistency in decision-making (2009; 2011: 134-59). One of the main complaints of lawyers and others relating to the inconsistency of judicial decision-making at the FTTIAC is that they believe there are certain judges who routinely make negative credibility findings and very rarely grant appeals. Indeed, as Kelly points out, some larger asylum and immigration firms have undertaken a processes of recording the outcomes of cases decided by certain judges (2012: 60-1)⁶.

Thomas cautions against regarding the asylum process as resembling an 'arbitrary lottery' (2009: 164), however, and highlights the difficult task with which Immigration Judges are faced. Thomas argues that cultural factors, a lack of quality country of origin information and institutional pressures faced by judges can all compound the already complicated task of determining credibility in asylum appeals (see 2009: 169-78). He concludes that it is probably impossible to eliminate inconsistency in credibility assessments at the FTTIAC due to the fact that such determinations depend on subjective factors (2009: 178). In fact, it

⁶ Indeed, in my own research many of the solicitors with whom I spoke mentioned that they knew straight away if their client's case was going to be refused on the basis of who the Judge hearing the appeal was. One solicitor jokingly urged me to 'Just go for it, just make your PhD about exposing those judges that never grant'. Others felt that I would be in a good position to make Freedom of Information requests to try and find out the granting and refusal figures of judges at the FTTIAC in Glasgow. I resisted turning this research into a 'witch hunt' deciding to focus as much as possible on the pre-hearing stages of the asylum appeals and the impact of these on the hearing. Such FOI requests would have proved fruitless, in any case, because the FTTIAC does not *officially* record information about individual judges' decisions.

is to an examination of the issues and problems associated with credibility assessments in asylum claims and appeals that the next chapter will turn.

2.5 Conclusion

The present chapter has provided an overview of current asylum legislation and policy in the UK. In addition, it outlined some of the key measures which have been implemented during attempts to establish a Common European Asylum System. The chapter has undertaken a detailed examination of the UKBA's arrangements for dealing with asylum claims under the New Asylum Model. Furthermore, it has considered the institutions and procedures involved in asylum appeal processes, focusing, in particular, on the work and operations of the FTTIAC.

Recent changes to the institutions responsible for overseeing asylum appeals were considered and it was argued that the perception of the FTTIAC amongst its users is very much like that of any other court, in spite of its 'Tribunal' status. I suggested that there is a dispersal of power at the FTTIAC and explored the role of the Tribunal clerks in order to support this assertion. This chapter also demonstrated the difficult task that Immigration Judges face when determining asylum appeal hearings; drawing on the findings in earlier studies of asylum adjudication in Scotland (Craig et. al, 2008) revealed that there is a perception amongst different participants in the asylum appeal process that a sense of impartiality permeates judicial decision-making at the FTTIAC in Glasgow.

Finally, the chapter considered arguments about the inconsistent nature of decision-making in asylum adjudication in the UK and the US. It supported assertions that much of the disparity stemmed from Immigration Judges' differing approaches to credibility assessments of an applicant's claim and highlighted some of the difficulties that judges face when making decisions in asylum appeals. As was mentioned above, the problems credibility assessments pose to asylum decision-making will now be considered in the next chapter.

3. The Credibility Problem

Asylum claimants regularly arrive in the UK without corroborating evidence to support their request for refugee protection. Consequently, an assessment of the credibility of the applicant's account of persecution tends to become the focal point of refugee status determination procedures. Indeed, it is generally accepted that most asylum claims and appeals are determined on the basis of whether the decision-maker deems the applicant's account to be credible or not (see Anker, 1992; Kagan, 2003: 368; Thomas, 2006; 2009: 169; 2011: 134; Good, 2007: 187-9 ; 2011: 97-8; Forman, 2008: 213; Galloni, 2008: 1045; Einhorn, 2009: 189; Clayton, 2010: 432; Kelly, 2012: 63). Certain scholars argue that credibility has come to occupy such a prioritised position in refugee status determination that there is a danger of allowing it to swallow the actual refugee definition (Kagan, 2003: 368). In fact, as the last chapter discussed, inconsistency in asylum adjudication is often attributed to the differing approaches to credibility assessments adopted by decision-makers. This chapter will therefore examine the problem posed by credibility in asylum procedures. It will first consider the importance of credibility findings made by Immigration Judges at the FTTIAC in light of the limited opportunity to appeal such findings. Moving on from this, it will examine how credibility is defined and the ways that credibility assessments are carried out in the UK asylum process. Studies which highlight the problematic nature of the principles of credibility assessments in the UK asylum process will be used to critique Home Office policy on credibility. Finally on the basis of a critical engagement with the literature on credibility assessments and witness statements, this chapter will set out the contribution that the present thesis can make to these discussions and debates.

3.1 The Importance of Credibility: Findings of fact and limited scope for onward appeal

The significance of credibility findings in first-instance asylum appeals at the FTTIAC has been stressed by commentators who note the difficulty in challenging decisions which are based on such findings (Good, 2007: 195; Craig et. al, 2008: 33). As was discussed earlier in this thesis (in Chapter 2), onward appeals of Immigration Judge's decisions at the FTTIAC are limited those that can show that the Immigration Judge has made an error of

law. In asylum adjudication, as in other areas of law, assessments of credibility are considered to be findings on matters of fact⁷. Consequently, the Upper Tribunal and upper courts are normally disinclined to consider an appeal of an Immigration Judge's initial decision which turns on the basis of an assessment of credibility (Good, 2007: 188). In fact, research has shown that superior appeal bodies are reluctant to interfere with what is regarded as the 'specialism' of the FTTIAC, and that this unwillingness extends to deference to the initial judge's finding of fact (Craig et. al, 2008: 51-2). This has been confirmed recently by the Court of Session in Scotland in the case of *TR and NR (A.P.) v Secretary of State for the Home Department* [2009], where it cited the test applied in *HA v Secretary of State for the Home Department* [2007] in relation to disagreements about decisions on the facts. The Court also drew on the established case law in *Esen v Secretary of State for the Home Department* [2006] to reiterate the point that matters of fact are to be decided by the Immigration Judge at the initial appeal:

The credibility of an asylum-seeker's account is primarily a question of fact, and the determination of that question of fact has been entrusted by Parliament to the immigration judge (*Esen [v Secretary of State for the Home Department (supra)]*, para 21). This court may not interfere with the immigration judge's decision on a matter of credibility simply because on the evidence it would, if it had been the fact-finder, have come to a different conclusion (*Reid [v Secretary of State for Scotland 1999 SC (HL) 17]*, per Lord Clyde, p 41H)...A bare assertion of incredibility or implausibility may disclose error of law; an immigration judge must give reasons for his decisions on credibility and plausibility (*Esen*, para 21). In reaching conclusions on credibility and plausibility an immigration judge may draw on his common sense and his ability, as a practical and informed person, to identify what is, and what is not, plausible (*Wani*, p 883L, quoted with approval in *HK*, para 30, and in *Esen*, para 21)...(*TR and NR*, para 15).

The Court can be seen here to explicitly refuse to interfere with an Immigration Judge's decision on matters of credibility. In recognising the importance of taking the social and cultural background of an appellant into account when assessing the probability of an appellant's narrative, the court stressed the need to handle the issue of credibility with care and sensitivity to cultural differences. However, as can be seen from the passages quoted above, it was satisfied that, where the judge ensured that s/he was a 'practical and informed' person capable of making sound credibility assessments, it would be incorrect to interfere with his or her decision on the facts (*TR and NR*, para 15). The Court offers no

⁷ In some cases, an argument can be made that an Immigration Judge has made an error of law in coming to their decision about credibility. This matter involves rather complex legal issues. For a fuller discussion of this, see Craig, Fletcher and Goodall, 2008: 33 and 43-57.

criteria against which judges might properly assess themselves to be ‘practical and informed’ persons, neither does it offer guidance on the kinds of social or cultural differences of an asylum appellant which should be taken into account when assessing credibility. In this way, the opportunity for judges to base findings of credibility on cultural misunderstandings and subjective bias is left open in asylum adjudication (Kagan, 2003: 367; Good, 2007; Byrne, 2005; 2007: 624; Einhorn, 2009: 187-201). Indeed, as this chapter will go on to discuss below, research into judicial assessments of credibility at the FTTIAC has revealed that Immigration Judges regularly base their findings on subjective factors such as an appellant’s appearance and demeanour. Before moving on to a discussion of such studies, though, the chapter will now turn to an examination of the ways that credibility is defined and assessed in the UK asylum process.

3.2 Defining ‘Credibility’

Sweeney argues that despite the fact that the 1951 Convention makes no mention of credibility in either the refugee definition in Article 1 A(2) or the prohibition on *refoulement* in Article 33(1), negative credibility findings are often used to refuse asylum applications in the UK (2009: 701). Generally, the term ‘credibility’ is considered to refer to whether or not a decision-maker believes the applicant is telling the truth about their claim (Clayton, 2010: 431). The term does, however, have a specific legal meaning. The concept of credibility corresponds to whether an applicant’s testimony should be accepted as evidence when eventually determining whether s/he has met the requisite burden of proof to show that s/he should be granted refugee status. In this way, it should be analogous to a decision about whether to suppress evidence in a criminal trial. (Kagan, 2003: 368). Commentators, such as Kagan (2003), argue that the meaning of the term credibility is often confused in refugee status determination. He attributes part of the responsibility for this confusion to the United Nations High Commission for Refugees (UNHCR). Kagan claims that the UNHCR tends to use the term to refer to different things in its publications. He explains, for example, that the UNHCR discusses credibility in relation to the testimony of a person making a refugee claim, whilst also making reference to a ‘credible well-founded fear’ or a ‘credible claim’. The latter, he argues, refer to whether a person should be successful in their claim for refugee protection (Kagan, 2003: 368). Kagan argues that credibility should only be used in the context of assessing a person’s testimony in refugee claims, when he states:

To prevent confusion, credibility in the refugee context should be used to refer only to whether the applicant's testimony will be accepted in status determination (2003:368).

This is because, he contends, it is not an imperative that a person be credible in order to be a refugee (ibid). In making this argument, he provides the example of a Tutsi fleeing genocide in Rwanda in 1994 and suggests that such a person could provide a completely false account but owing to their ethnicity and the conditions in the country at that time, they would therefore merit refugee status. Kagan here makes the point that the 1951 Convention does not exclude people who fabricate testimony or commit perjury (ibid). This is an important contention when considering the two uses of the term credibility advanced in UNHCR publications. By referring to a 'credible claim' the UNHCR creates the risk of allowing credibility to swallow the refugee definition. Sweeney (2009) draws on this point in the work of Kagan and terms these two approaches to credibility identified by Kagan as 'broad and narrow interpretations of credibility' (2009: 708). According to Sweeney's classification, a broad interpretation is used to refer to the overall strength of an asylum case. Using such an interpretation implies that a 'credible claim' is one in which the applicant's account is true and that s/he deserves international protection (Sweeney, 2009: 708). By contrast, the narrow interpretation of credibility, and the one supported by Kagan, determines that 'credible' statements are those which are deemed to satisfy the evidential pre-requisites in asylum cases such that they might be considered as the facts of a case (Sweeney, 2009: 708; see also Noll, 2005). Like Kagan, Sweeney also contends that this narrow view of credibility is the most preferable in refugee status determination. In applying this formulation to the context of the UK asylum process, however, Sweeney suggests that the Home Office uses a broad approach to the issue of credibility in the course of its decision-making. He analyses Home Office policy on credibility assessments in order to support his arguments. It is, therefore, worthwhile to turn to a consideration of the principles of credibility assessments, in general, and Sweeney's critique of the Home Office policy on credibility assessments in particular.

3.3 Refugee Status Determination Procedures and Credibility Assessments

There are no binding international rules governing credibility assessments in asylum proceedings. Some commentators, such as Byrne (2007), have argued that asylum adjudication procedures should look to developments in international war crimes courts and adopt similar models for the assessment of testimonial evidence in refugee status determination (2007: 610). In spite of the absence of enforceable guidelines for how to assess the credibility of an asylum claim, the issue is, in fact, quite widely mentioned in the United Nations Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees ('the Handbook'; UNHCR, 1992). Part Two of the Handbook provides general principles relating to the processes that should be followed when considering whether a person is a 'refugee' under the 1951 Convention. The Handbook outlines some of the procedures and methods that should be upheld and followed when establishing the facts in an asylum claim. In recognising that it is the applicants who are generally expected to meet the burden of proof in an asylum claim, the Handbook cautions that people applying for asylum may not always be able to furnish all the evidence necessary to establish the facts of their claims. Consequently, the Handbook advises that the process of establishing the facts of an asylum claim should be viewed as a mutual exercise between the applicant and the decision-maker (UN, 1992: §196). In fact, it goes on to state that:

196. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.

From this, the benefit of the doubt is said to apply in situations where 'the applicant's account appears credible'. The need for an account to be deemed credible before it can be considered to merit the benefit of the doubt is emphasised in the Handbook at Section 204:

204. The benefit of the doubt should, however, 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. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts.

When determining an applicant's general credibility, therefore, it seems that his or her statements must be considered to be 'coherent', 'plausible' and to correspond to 'generally known facts'. This is also reflected in the UNHCR's Note on Burden and Standard of Proof in Refugee Claims (UNHCR, 1998), when it states:

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' (1998: Para. 11).

These three principles of credibility assessment, namely, coherence, plausibility and correspondence to generally known facts have been adopted in Home Office policy on credibility assessments. As mentioned previously in this chapter, Sweeney is highly critical of this policy on a number of grounds. It is to a consideration of the policy, and Sweeney's critique of it, that this section now turns.

In the UK, a form of special advice on credibility known as an 'Asylum Policy Instruction' (API) has been issued to decision-makers working for the UKBA. Sweeney notes that the policy instruction on credibility was introduced in order to address concerns raised in relation to the quality of decision-making by the UKBA (Sweeney, 2009: 701). These concerns were brought to light in the UNHCR's Quality Initiative Project Reports. The UNHCR Quality Initiative project began assisting the UK government with the improvement of its refugee status determination procedures in 2003 (Sweeney, 2009: 702). Drawing on the findings produced by the UNCHR during this process, Sweeney shows that the quality of decision-making was at the time judged to be highly problematic, with strong recommendations for further training to be introduced in order to address the onset of a 'refusal mindset' at the Home Office (UNHCR, 2005: 17 referenced in Sweeney, 2009: 702 n.9). It was against this backdrop that the API on credibility was issued to immigration officials.

The API on credibility adopts three main factors which purportedly contribute to the credibility of a claim, and which must be addressed when coming to a decision about an asylum claim; these factors are, internal consistency, external consistency and plausibility. Sweeney argues that these categories are generally held to have been the ones described by Weston in her analysis of the role of Immigration Adjudicators published in 1998. Sweeney contends that by adopting these categories in the API on credibility, the UKBA can be seen to have 'converted Weston's description into rudimentary prescription' (2009:

704). However, it might also be argued that these categories for assessment correlate to those outlined in the UN Procedures Handbook ('the Handbook') as mentioned in the previous section. Sweeney does acknowledge the influence of the Handbook on the API on credibility, but argues that by drawing from the Handbook and various other sources the API fails to account for the different definitions of credibility that they use (2009: 708). His main critique of the API is that, although it summarises aspects of the narrow understanding of credibility in relation to the techniques for determining credibility, it interprets credibility as meaning the overall strength of a case and emphasises this over its narrow definition as an evidential issue (2009: 702). Sweeney supports this claim with reference to the text of the API, where he notes that the prioritisation of a broad approach to credibility is first seen in the Introduction where it states:

The process of determining whether an applicant is in need of international protection often requires a decision-maker to decide whether they believe the applicant's evidence about past and present events and how much weight they attach to that evidence. In determining this, decision makers *must assess* the credibility of *the applicant* and the evidence that they submit (API, 'Assessing Credibility': 2, quoted in Sweeney, 2009: 709, emphasis added by Sweeney).

Sweeney highlights the guidance in the API that decision-makers should assess the credibility 'of the applicant'. He suggests that this points to the API's orientation towards treating credibility assessments as being inclusive of the overall credibility of the applicant and their claim instead of focusing on an assessment of the testimony of the applicant. According to Sweeney, a consequence of the Home Office's conflated understanding of credibility, as seen in his analysis of the API above, is that the distinction between a statement which is 'credible' and one which is 'proven' becomes blurred:

A broad approach to credibility, seeing credibility as truth, would obscure the distinction between 'credible' and 'proven', consequently raising the threshold of credibility and more readily denying applicants the benefit of the doubt (Sweeney, 2009: 711).

'Being credible', he claims, should be considered as an alternative to 'being proven'. And so, when the Home Office confuses the understanding of credibility such that it becomes synonymous with 'proof', asylum claimants will suffer from having to meet a higher standard of proof than is actually required in asylum procedures. On this matter of the burden of proof in asylum procedures, Sweeney claims that the API on credibility misinterprets and misrepresents the leading case law of *Karanakaran v Secretary of State*

for the Home Department [2000] (*Karanakaran*). The case of *Karanakaran* deals with the standard of proof to be applied in asylum adjudication. It reasserts the findings in the earlier case law that the lower standard of proof known as a ‘reasonable degree of likelihood’ should apply in asylum cases (Clayton, 2010: 432). In addition, *Karanakaran* considers the relationship between past events and future risk in asylum decision-making and explains that both are to be proved to the lower standard of proof, and, moreover, that they should be considered cumulatively rather than in isolation (Sweeney, 2009: 720). In the course of his critique of the API’s interpretation of *Karanakaran*, Sweeney notes that instead of advising decision-makers to consider past events and future risk cumulatively and as one test, it directs them to treat them as separate material facts (2009: 720-1). He argues that this goes against what was set down in the case law and suggests that the API’s summary and treatment of *Karanakaran* is highly problematic (2009: 721).

Similarly, Clayton has suggested that UK immigration rules provide a demanding standard of credibility which, depending on how they are used, could in fact run counter to the case law, including *Karanakaran*, on credibility (2010: 434-5). Amongst imposing other conditions, the rules dictate that where a person cannot support their statements with documentary or other evidence, these aspects will need confirmation unless ‘the general credibility of the person has been established’ (HC 395 para 339L quoted in Clayton, 2010: 435). In this way, the interpretation of credibility can again be seen to be conflated with the ‘general’ or ‘overall credibility’ of the applicant. As explained above in relation to Sweeney’s arguments, this goes against the narrow understanding of credibility and instead leads to a broad interpretation of the concept which operates to the detriment of asylum claimants. A further measure in the rules on credibility assessments in the UK asylum process which is considered to arbitrarily penalise asylum applicants is Section 8 of the *Asylum and Immigration (Treatment of Claimants, etc.) Act of 2004* (ToC Act 2004).

3.3.1 Section 8 of ToC Act 2004 and Credibility

Under Section 8 of the ToC Act 2004 (Section 8), decision-makers are directed to treat certain behaviours of asylum claimants as damaging to the credibility of their claim. These behaviours include, amongst other things, failing to produce a valid passport, the production of a false travel document, destroying or disposing of a travel document, the failure to claim asylum in a safe third country, the timeliness of making an asylum claim,

and the failure to claim asylum until after being arrested under an immigration provision (Kelly, 2012: 64). Although decision-makers are advised that they should not provide more weight to the factors to be considered under Section 8 that they would to other factors, MacDonald describes the provisions under Section 8 as 'extraordinarily draconian' (2008: 948). Ensor and his colleagues are particularly critical of the statutory rules under Section 8, when they argue that it:

[S]eeks to bind, by statute, the thinking of decision-makers on credibility issues to a framework that has been defined by government. This framework is in essence an agenda of disbelief- there are no behaviours in s 8 that require a positive finding, only those which must be taken as 'damaging to the claimants credibility' (Ensor et. al, 2006: 95).

Moreover, they contend that the behaviours that are deemed as those which should damage credibility are behaviours which would be expected of asylum claimants in the kinds of circumstances in which they find themselves (2006: 95). They view the behavioural issues outlined in Section 8 that are associated with the timeliness with which a person makes an asylum claim and the applicant's behaviour when answering questions to be particularly problematic (Ensor et. al, 2006: 106). The requirement to take a negative view of an applicant making an asylum claim outwith the timeframes imposed by law incorrectly assumes that those fleeing persecution have knowledge of, not only the legal concept of asylum, but also the laws and policies on claiming asylum in the UK. Additionally, it ignores the impact that trauma experienced by the applicant in their country of origin, or during their journey to the UK, may have on a person's ability to speak about the persecution they have experienced in their home country. Herlihy and Turner (2009) have examined the psychological processes involved in claiming asylum. They have shown the negative effects that issues around trust, problems with recall and reliability due to traumatic memory, avoidance strategies, and dissociation with traumatic events can have on credibility determinations in asylum claims. Drawing on the work of Bögner, Herlihy and Brewin (2007), which evaluated measures of dissociation amongst asylum applicants during their initial Home Office interview, they argue that problems related to dissociation at this stage can result in an applicant being unable to disclose distressing personal experiences. Dissociation is described by Herlihy and Turner as 'the disruption in the usually integrated functions of consciousness, memory, identity, or perception of the environment' (Herlihy and Turner, 2009: 177). It may result in a person who is in a dissociated state appearing to be day-dreaming or distracted. This can take place at the time of the traumatic event and therefore makes the recall of such an event difficult;

though it may also occur when a claimant is asked to recall a traumatic event in a high stress context such as the asylum interview (Herlihy and Turner, 2009: 177-8). Similarly, Kelly has argued that the great pain of torture, which many asylum applicants will have experienced, and the subtle ways in which it is administered can often obstruct communication leading to a sense of dubiety around the existence of torture in any given case (Kelly, 2009: 778). Subsequent disclosures of persecution at a later stage in the asylum process are viewed as a discrepancy between accounts and might be regarded as an inconsistency that undermines credibility (Herlihy and Turner, 2009: 178).

The negative treatment of late disclosures has been shown to be particularly problematic in cases of female refugees who have experienced rape, either as part of their persecution, or during their journey to the UK. This issue has been taken up by Baillot and her colleagues in their examination of the barriers which may obstruct female applicants from making disclosures of rape during the asylum claim and appeal process (Baillot et. al, 2009; 2012). In addition, they consider the reasons why female applicants' accounts of their rape and persecution may not be deemed credible by professional and lay decision-makers. Baillot and her colleagues take as their point of departure issues around disclosure, and the perceived credibility, of rape narratives in the criminal justice system and set out to compare the situation in the asylum context. They identify several factors which may impact upon the disclosure of rape in the asylum process and the subsequent credibility assessment of such disclosures by decision-makers and highlight, in particular, the timing and manner of women's initial disclosures of rape (Baillot et. al, 2009: 206). They claim that feelings of shame, discomfort and a lack of trust between applicants and interviewers are likely to prevent a woman from disclosing an experience of rape. Baillot and her colleagues also note that female asylum applicants may be less inclined to report an incident of rape where the interpreter at their asylum interview is from their community; they may have a fear of being judged harshly by them or even out be concerned that the disclosure will not be treated confidentially (2009: 206-7). This raises specific issues, therefore, in relation to the statutory rules under Section 8 which direct decision-makers to look negatively upon late disclosures in asylum claims. Where women who have suffered rape do not disclose this at the first possible opportunity this may be considered to detract from the overall credibility of their claim. Moreover, when disclosures of rape follow an initial refusal of a female applicant's claim, this may be construed by immigration officials as an attempt to 'bolster' their claim. Baillot and her colleagues argue that at the early stages of the asylum process a woman may not be ready to provide much detail about her

experience of rape or recount her experiences in a coherent manner; they suggest that this might result in her claim not being judged as internally consistent (2009: 209). This points to the problematic nature of the principles of credibility assessment and so it is useful to turn to a discussion of the issues arising from the general principles of credibility assessment.

3.4 Principles of Assessing Credibility in the UK Asylum Process

As discussed above, credibility assessments involve an evaluation of the internal consistency, external consistency and the plausibility of an applicant's claim. It is useful, therefore, to consider each of these categories in turn along with some of the problems to which they give rise.

3.4.1 Internal Consistency

According to the API on credibility, internal consistency means that a person's testimony is:

[I]nternally coherent and consistent with past written and verbal statements, and consistent with claims made by witnesses and/or dependants and with any documentary evidence submitted in support of the claim (Home Office, API on Credibility: (a)(i)).

Inconsistencies or discrepancies in an applicant's account of persecution are regularly raised by the Home Office to point to a lack of credibility of their claim (Thomas, 2011: 141). Often, minor inconsistencies such as contradictory dates or details of events are used by the Home Office to imply that an applicant's account does not have the requisite level of internal consistency to be deemed credible. Bohmer and Shuman (2008) have pointed out that a body of research shows that 'the memory for details like dates and times is notoriously unreliable' (2008: 135). Moreover, Herlihy and her colleagues have reported on research findings which question the validity of associating truth with narrative

consistency in asylum seekers' accounts (Herlihy, Scragg and Turner, 2002; Herlihy, 2005; Herlihy and Turner, 2006; 2009; Herlihy, Gleeson and Turner, 2010).

Herlihy and Turner (2009) point to the repetitive nature of the asylum process as a contributing factor to enforced discrepancies in an applicant's account which further detract from the overall credibility of their claim (2009: 187). They contend that repeated interviews tend to 'introduce inconsistency, particularly in the more vulnerable applicant' (2009: 187). By drawing from Cohen's (2001) research on omissions and discrepancies in successive statements, they argue that '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' (Herlihy and Turner, 2009: 188). These problems are compounded, Herlihy and Turner argue, where applicants suffer with mental health problems such as depression or Post Traumatic Stress Disorder (PTSD); which as Herlihy's earlier work shows, are common problems amongst asylum applicants (2005: 130-4).

In addition to dissociation and discrepancies which arise as a result of repeated interviewing, traumatic memory may also contribute to inconsistency in asylum applicants' accounts. This raises particular issues in relation to the assumptions that are made in the guidance on credibility issued to Home Office decision-makers, when it states:

The level of detail with which an applicant sets out his claims about the past and present is a factor which may influence a decision maker when assessing internal credibility. It is reasonable to assume...that an applicant relating an experience that occurred to them will be more expressive and include sensory details such as what they saw, heard, felt or thought about an event, than someone who has not had this experience...It is reasonable to assume that an applicant who has experienced an event will be able to recount the central elements in a broadly consistent manner. An applicant's inability to remain consistent throughout his written and oral accounts of past and current events may lead the decision maker not to believe the applicant's claim (Home Office, API on Credibility: (a)(i) and (ii)).

The assumption that applicants will be able to recount traumatic experiences in an expressive manner that includes sensory details and which is generally consistent, is highly problematic when considered in light of Herlihy's and Turner's arguments about traumatic memory, when they claim:

[M]emories 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 recognised 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 (Herlihy and Turner, 2009: 177).

From this it can be seen that there are issues to be borne in mind when assessing the internal consistency of a claim which relate to the effects of trauma on memory and recall. Without a 'verbal narrative to tie them together', an applicant's memories of traumatic events will not satisfy the assumptions that Home Office decision-makers are advised are reasonable to make when assessing internal credibility.

This issue of the conflicting expectations regarding narrative structures between asylum applicants and immigration officials who try and glean a political narrative of persecution from such personal experiences have been highlighted in the research of Shuman and Bohmer (2004). Shuman and Bohmer undertook qualitative research within a non-profit centre in the US designed to help refugees identify and access social and legal services available to them (2004: 399). In the course of their research they were involved in assisting asylum claimants with their applications to the Bureau of Citizenship and Immigration Services (BCIS) and used this role as a way of examining the 'process by which asylum applicants frame their claims in an effort to match their cultural circumstances with the legal rules for granting asylum' (2004:396). They highlight the difficulties inherent in the reframing processes that applicants partake in when they recount an experience that '...they often understand as a personal trauma into an act of political aggression' (2004: 396).

Shuman and Bohmer conclude that as applicants negotiate the different legal and welfare processes when claiming asylum, they reformulate their accounts of persecution to meet the particular demands of the discourses within which they have to articulate their claim for assistance or protection. However, the complexities that pervade applicants' accounts of persecution do not accord with the policies of the BCIS which demand consistent and detailed accounts that follow a 'linear narrative progression' in order to be deemed credible (2004: 410). Instead, they found that the multiple and competing voices which often saturate asylum narratives contradict the reductive narrative model of the BCIS around

seven key issues: time, relevance, chronology and coherence, emotional presentation, corroboration, dates, details and evidence, and plausibility.

Their findings around the themes of time, relevance, chronology and coherence and dates, detail and evidence accord with the findings discussed above in relation to the psychological factors which impact credibility assessments of asylum narratives. The issues of emotional presentation and plausibility as having an impact on credibility assessments are worth exploring in that they illustrate the specificities of Western legal narratives and the important role of legal representatives in the co-construction of credible accounts of persecution.

Shuman and Bohmer highlight the difficult balance that applicants must often strike in conveying emotion in their accounts. They rely on the work of Conley and O'Barr (1998) into the language used by rape victims when giving evidence in court of law, to suggest that overly emotional asylum accounts will not be well received. They claim that 'telling the story with too much emotion will also have a negative impact in that the interviewer may dismiss the asylum claimant as simply hysterical' (Shuman and Bohmer, 2004: 407). They assert that the legal system 'values calmness, rationality, and objectivity in the narratives presented in court' (2004: 407).

The problem that they predict asylum applicants will face, therefore, is to construct a narrative that establishes their claim under the 1951 Convention by meeting the normative legal standards in asylum legislation for a 'credible' account and the structural narrative standards for a coherent account in law. Whilst at the same time, constructing a narrative that addresses the disjuncture between culturally-specific ways that people tell their life-stories in order to persuade decision-makers of the credibility of their claim. This was recognised by Shuman and Bohmer, when they point out that:

Lawyers and others who provide assistance to claimants fill a crucial role in reframing the claim not only to be consistent with the law, but also, to correspond with current Western social values, regardless of the merits of any particular claim (2004: 398).

As I will go on to discuss below, Good has also relied on the work of Conley and O'Barr in his discussion of credibility and asylum narratives.

Another scholar who, like Shuman and Bohmer, has investigated the conflicting narrative structures of asylum applicants and immigration officials is Maryns (2005; 2006). Maryns' research focuses primarily on Belgian asylum procedures and concentrates in particular on asylum applicants of African origin. Her work explores the effects of African asylum claimants in the Belgian asylum procedure being forced to assimilate their language to English in order that they may take part in the monolingual interview process with Belgian immigration officials (Maryns, 2005). Key insights that might be taken from Maryns' work relate, amongst other things, to how the structure and organisation of the interview itself may put asylum applicants at a disadvantage and enable officials to refuse their claim. For example, Maryns illustrates the ways that the initial 'bureaucratic' style of questioning in the asylum interview breaks down the opportunity for a narrative flow to be provided by the claimant when answering the questions put to them (2006: 32). The constraints posed by these interview norms prevent the contextualisation that is needed in order to make sense of the asylum narratives provided. When officials feel that applicants are providing detail that is ancillary to answering the basic questions put to them, they will often interrupt the claimant. This means that spaces for the applicant to provide their account and 'story' are closed down. I will go on, later in this thesis (in Chapter 10), to discuss the effects that the transcripts that are produced during such interviews have on the subsequent witness statement that a legal representative prepares with their client.

Thomas has examined the treatment of such witness statements in his study of the FTTIAC (2011: 118-9). In his discussion of credibility, Thomas argues that the FTTIAC is aware of problems with narrative consistency when assessing credibility and claims that this is evidenced by its recognition that 'consistency and truth do not necessarily go hand-in-hand' (2011: 141). He claims that the Immigration Judges that he spoke to during his research into asylum adjudication were mindful of the need for caution when examining apparent discrepancies and inconsistencies in an applicant's written and oral evidence (2011: 142). In the context of the internal consistency principle, Thomas highlights the difficulties judges apparently experience when deciding how much evidential weight to give to reports by psychiatrists when they conclude that applicants are suffering from depression or PTSD caused by their past traumatic experiences (2011: 145). This raises questions about the treatment of expert evidence by the Tribunal more generally, and it is

to a discussion of this in the context of external consistency, plausibility and expert evidence that this section now turns.

3.4.2 External Consistency

The external consistency of an applicant's account refers to the correlation between what the applicant claims happened to them and what is known about the conditions in that country. It relates to the point in UNHCR guidance which states that applicant's testimony should 'correspond to generally known facts about a country' in order to be deemed credible. And it is dealt with in the API on credibility, where it directs decision-makers to refer to the Country of Origin Information reports (COI reports) produced by the Country of Origin Information Service (COIS, formerly known as the Country Information Production Unit (CIPU)) when assessing the external consistency of an applicant's account (Home Office, API on Credibility: (b)). Recently, significant concerns have been raised regarding the quality of the COI reports produced by the COIS, and also about the ways that they are used by UKBA caseworkers in their decision-making (Vine, 2011). These concerns were presented in a report by the Independent Chief Inspector of the UKBA following research into the production and use of COI over the period October 2010-May 2011. The report showed that 17% of refusal letters made 'either selective use of country information or unjustified assertions based on the evidence available' (Vine, 2011: 3). Moreover, it demonstrated that in 33% of cases country information was poorly referenced to the point that it was difficult for applicants and legal representatives to identify the source of the information. This prevented them from being able to check the information and consider whether the decision was justified (2011: 3). Importantly, the report also recognised that many of the authors of COI reports were not, in actual fact, research trained.

Academics and other commentators have raised similar concerns about the production and use of COI reports (Good, 2007; 2011; IARLJ, 2012). Good argues that early COI reports were criticised for containing factual errors and questionable interpretations. In the case of COI on Sri Lanka, for example, reports could be seen to deliberately distance their findings from those contained in reputable sources which detailed human rights abuses (2007: 212-3). Moreover, Good shows that the reports were selective and at times omitted important passages from quoted material which 'created a falsely positive impression' (2007: 214).

He notes that in order to address these concerns a user panel and an expert panel of topic and country experts were set up to monitor the quality of the COIS (formerly the CIPU) output (2007: 215). Good is slightly sceptical of the composition of the expert panel that was set up. He explains that the academic members that were chosen seemed to never have acted as expert witnesses in asylum cases; neither did they appear on the Immigration Law Practitioners' Association's (ILPA) *Directory of Experts* (ILPA, 1999 in Good, 2007: 215). He contends, in fact, that the official who was given the responsibility to improve the COI reports on Sri Lanka over the course of Good's research in 2003-4, had not visited the country prior to 2001 (2007: 215). This seems all the more problematic in light of Good's argument that 'judicial criticisms of *Country Reports* are almost unheard of, even though they are mere compilations of UK-based civil servants with no expertise whatever on the countries concerned' (2007: 215). He claims that, unlike UKBA decision-makers who rely largely on the COI reports, legal representatives will regularly draw from a more broad range of sources, such as reports by Amnesty International, Human Rights Watch and the US State Department, to show the external consistency of their client's accounts (Good, 2007: 213). In addition, they will often instruct reports from country experts, such as Good himself, and he discusses the contribution that this can make towards showing that an applicant's account is both plausible and externally consistent.

3.4.3 Plausibility and Expert Evidence

As noted above, credibility assessments involve a decision about the plausibility of an applicant's account. A judgement about the 'plausibility' or 'apparent reasonableness of the basis of a claim' (Thomas, 2011: 147) may be distinguished from a decision about whether it is credible or not. In fact, one of the dangers in asylum decision-making is to determine that an account is incredible merely because it seems implausible (Thomas, 2011: 148). Thomas points out that it is problematic to allow cultural assumptions about the likelihood of events occurring the way an applicant describes to shape a decision-maker's determination about whether the account is plausible or not. This is because 'what may be plausible for a person in a western environment may be completely implausible for a person in a non-western environment' (*Ibrahim Ali v Secretary of State for the Home Department* [2002] quoted in Thomas, 2011: 148).

Good examines the role that expert witnesses play in contributing to a decision-maker's assessment of the plausibility of an applicant's account. He draws from both his ethnographic research into the UK asylum courts and his own experience as an expert witness in asylum cases to suggest that the line between making assessments of plausibility and credibility is a difficult one for expert witnesses to negotiate. He points out that experts provide, and undertake an assessment of, key elements of the objective evidence and are often asked to comment on the plausibility of an account (2007: 199). Good contends that, because experts are asked to make these assessments, 'it is hardly surprising if they are also tempted to take what must appear the small further step of commenting on the implications of their assessments for the applicant's credibility' (2007: 199). He claims that experts who are not forewarned against doing so by instructing solicitors may provide such assessments in their report. Good highlights the negative response that this often elicits from Immigration Judges who may devalue the reports of experts they wrongly believe are trying to 'usurp their authority' and undermine their judicial hegemony (Good, 2007: 200). In addition to the difficulties often posed by assessments of plausibility to credibility in the asylum process, interpretations by decision-makers about the demeanour of the asylum applicant can also prove problematic.

3.4.4 Demeanour

Studies have drawn attention to the problematic nature of relying on judgements about a person's demeanour when assessing the credibility of their asylum claim (Kagan, 2003; Byrne, 2007). The most substantial investigation into judicial assessments of credibility at the FTTIAC was that carried out by Jarvis (2000), herself an Immigration Judge. Jarvis' research involved questionnaires in which Immigration Judges were asked to rank 27 factors relating to credibility in order of importance; Jarvis also conducted follow-up interviews with some of the participants. The responses revealed that a large proportion of credibility decisions were made on the basis of judges' 'gut feelings, their application of common sense, or recourse to personal experience' (Jarvis, 2000: 16 quoted in Good, 2007: 197). Notably, Jarvis' findings demonstrate that judges base their decisions about credibility on an appellant's demeanour and also their attractiveness (Jarvis, 2000: 40-1 discussed in Good, 2007: 198). Good points out the dangers of basing credibility decisions on the attractiveness of the appellant, particularly in relation to 'misconceptions about rape

as an expression of sexual attraction' (2007: 198). He argues that this might mean that the fears of attractive young women would be deemed well-founded whilst claims of older women would not (2007: 198).

Generally, the UKBA will base their initial decision about a person's asylum claim on the answers that they provide at interviews with the Home Office. In appeals of these first instance decisions, though, Immigration Judges will additionally consider the appellant's witness statement which they would have prepared with their solicitor. Owing to the crucial role that they play in the asylum appeal determination process, scholars have turned their attention to the role of witness statements in credibility assessments in refugee status determination.

3.5 Credibility and Witness Statements: Key studies

Although studies in other jurisdictions have considered the issue of narratives and credibility, it has been argued that many of these have been based on a consideration of case law and doctrinal analysis (Good, 2011: 200 n.9). This section will consider, in particular, the work of those who have sought to empirically examine issues around the production and treatment of witness statements in the UK asylum process. In so doing, it will restate the research aims of the present thesis and suggest its intended contribution to existing literature.

Good (2007; 2011) has undertaken substantial legal anthropological research into issues around the UK asylum claims and appeals process. Earlier in this chapter, I discussed his work in relation to the difficulty in establishing what the 'generally known facts' about a country are when evaluating the external consistency of an applicant's account; regarding the use and treatment of expert evidence in the asylum process; and in relation to the significance of an appellant's demeanour in Immigration Judges' assessments of credibility. Additionally, Good has focused on the issue of credibility and witness statements in asylum appeals. Like Shuman and Bohmer, Good draws on the work of Conley and O'Barr in his discussion of asylum narratives. He refers to their later work (1990) on the varying success of litigant story-telling in small claims courts in the US in order to apply their findings about narratives to the asylum context. In so doing, Good

suggests that asylum narratives are more likely to be considered credible where they follow a 'rule-orientation' and suppress or omit relational-oriented claims that are framed around social relationships, and emotive and subjective articulations of wrong-doing or harm (2007: 20-5; 2011: 100-2). Good highlights the significance of the witness statement to credibility assessments of an appellant's claim and points to the important role that solicitors play in helping reframe clients' narratives that adopt a relational-orientation into accounts which follow a rule-oriented approach. He argues that there is a dearth of research 'about how asylum lawyers structure their clients' statements to maximise their acceptability as evidence' (2007: 190, and see Good, 2011: 100) and points to important studies in the literature on credibility to emphasise their, largely, doctrinal approach (2011: 100 n.9). The research in the present thesis, therefore, aims to contribute to the work undertaken by Good in relation to the role of solicitors in the co-construction of asylum narratives in the asylum appeal process. Similar research has been carried out in relation to proving experiences of persecution and torture in asylum appeals (Kelly, 2012) and on the issue of disclosures of rape and asylum narratives (Baillot et. al: 2009; 2012).

In their study of disclosures of rape and credibility issues in the asylum appeal process, as discussed above, Baillot and her colleagues explain that they decided to limit the scope of their research to female experiences of rape (2012: 5). They point out that this choice was made in order to investigate distinctive gender issues at stake in victimisation and because of the higher incidences of rape amongst female asylum applicants (2012: 5). In addition, they contend that making female experiences the primary focus of the research allowed them to draw on a stronger body of pre-existing literature in other contexts (2012: 5). Baillot and her colleagues claim that 'the structures and processes, as well as the heavily politicised context, of asylum decision-making may contribute towards a silencing of sexual assault narratives' (2012: 1). They argue that female applicants are less likely to disclose an experience of rape because of, amongst other things, 'the structured format and process adopted for asylum interviews and the procedural mandates of the appeal hearing' (2012: 1). They go on to suggest that these factors occlude the narratives of 'asylum-seeking women who have suffered sexual violence' and also pose a barrier to securing justice (2012: 2). The reference which Baillot and her colleagues make to 'the procedural mandates of the appeal hearing' relate to restrictions on an appellant's ability to provide full oral testimony at the hearing. They assert that this effectively results in the silencing of appellants by Immigration Judges at appeal hearings. This is done by limiting what a solicitor might ask their client in light of the material included in the pre-prepared witness

statement. The research that informs the present thesis has shown this to be the case for male and female applicants even where there is no element of rape in the claim. This thesis aims to show that structural aspects of the asylum appeal process constrain and ‘silence’ the narratives of the majority of asylum applicants and that this is not solely the case for female applicants who have suffered forms of sexual violence. Of course, experiences of rape and a reluctance to disclose them, will likely compound the problems that such applicants already face, but the research in this thesis shows that such problems are by no means exclusive to females whose asylum claims include a disclosure of rape. In this way, the present thesis can supplement existing literature by widening the application of Baillot and her colleagues’ findings.

Thomas has conducted in-depth research into the issue of credibility assessments and asylum adjudication at the FTTIAC in England (2011). His work also shows the way that witness statements are adopted and dealt with during asylum appeal hearings. In fact, this thesis draws on his work in relation to these matters (in Chapter 9). Thomas’ research, however, maintains its focus on the FTTIAC and he does not carry out research into the pre-hearing stages of asylum processes, for example, with solicitors and their clients. This point is not to be considered a critique of his work. He makes an important contribution to the literature on asylum adjudication and it is not his aim to investigate what happens in appeal cases before they arrive at the FTTIAC. Instead, it should be viewed as a contribution that this thesis can make to the literature, in that it aims to consider what happens in the course of asylum appeals prior to the appeal hearings at the FTTIAC.

3.6 Conclusion

In this chapter I have considered issues around credibility assessments in the asylum appeal process. By outlining the limited scope for appeals of Immigration Judges’ decisions about the credibility of an applicant’ claim, I have highlighted the crucial importance of judicial assessments of credibility at the FTTIAC. I have drawn on the work of scholars who argue that there are varying interpretations of the concept of credibility and suggested that the appropriate definition of the term is a narrow one which focuses on the evidential role that credibility assessments play when determining whether an applicant’s testimony may be accepted by a decision-maker. In the context of credibility assessments in the UK asylum process, I have considered the arguments of commentators

who claim that, by interpreting it as a reference to the ‘general credibility’ of the applicant or ‘overall strength’ of a person’s case, the Home Office incorrectly adopts a broad approach to credibility. In so doing, it unfairly discriminates against asylum applicants because such broad interpretations do not recognise the lower standard of proof which asylum applicants need to meet when establishing their claim. In my discussion of UK asylum law and policy on credibility, I relied on the arguments of Sweeney (2009) who asserts that Home Office policy and guidance is highly problematic because it instructs decision-makers to apply a broad understanding of credibility when considering asylum claims and also because it misinterprets leading case law on the issue of credibility. Additionally, I examined the statutory rules on credibility assessments contained in Section 8 of the *Asylum and Immigration (Treatment of Claimants, etc.) Act* of 2004 which obligate decision-makers to view certain behaviours of claimants as damaging to their credibility. I drew on the work of Ensor and his colleagues (2006) in this regard to suggest that these measures arbitrarily penalise asylum applicants on the basis of behaviours which are to be expected of them in the situations in which they often find themselves. I focused, in particular, on the rule that decision-makers should treat claims that are made outwith official timeframes and the late disclosures about aspects of an account as damaging to credibility; I argued that such rules fail to recognise the impact that traumatic experiences may have on asylum applicants’ ability to recall and discuss details about past persecution.

In moving on to consider the principles of credibility assessment, I argued that the effects of traumatic experiences and memories can influence the ways that an applicant recounts aspects of their asylum claim such that it may not be deemed to have the requisite internal consistency to be deemed credible. This chapter has also argued that cultural assumptions and misunderstandings can give rise to decision-makers believing applicants’ accounts to be implausible. Problems with the production and use of country of origin information reports have been shown to compound these misunderstandings; the selective use of information in these reports can often paint an overly optimistic picture of the situation in many countries. The role that expert witnesses can play in providing background information about the situations in applicants’ countries of origin is an important one and they offer the much needed context in which decision-makers can then assess the plausibility of an asylum account. Considering the experiences of expert witnesses, such as Good (2007), however, revealed that Immigration Judges do not always treat expert witnesses and their reports with the respect they deserve as fellow professionals.

Additionally, I have argued that asylum applicants struggle to frame their narrative and account of persecution in a way that corresponds to the narrative structure adopted in legal discourse. The work of those who have examined this issue (Shuman and Bohmer, 2004; Bohmer and Shuman, 2008; Good, 2007; 2011) demonstrates that legal narratives tend to follow a rule-oriented approach that suppresses the relational aspects of an account and which favours rationality and objectivity over emotive language or subjectivity. Furthermore, it shows the important role that legal representatives play in reframing applicants' narratives so that they not only meet the demands of this rule-oriented approach, but that they also correspond to Western cultural values and norms (Shuman and Bohmer, 2004: 398). I provided a brief overview of some of the most important studies on credibility assessments and witness statements which address these issues and suggested the ways that the present thesis makes a contribution to this existing literature. In particular, I claimed that this thesis can contribute to research that has been carried out into asylum adjudication at the FTTIAC. I asserted that because this thesis aims to examine pre-hearing interactions in the asylum appeal process, it can supplement studies that focus largely on in-court exchanges at asylum appeal hearings. In the chapter that follows I will, therefore, consider the most suitable theoretical approach through which to examine such pre-hearing interactions and exchanges.

4. Theoretical Approaches to Language and Narrative in Legal Settings

Douzinis and Greary argue that in the course of legal interpretation and decision-making judges deal in, amongst other things, fear, pain and death (2005: 72). They claim that this is an example of the ‘violence’ of legal judgements and statements and contend that this ‘violence’ extends to language itself (2005: 72). They assert that a ‘violent injustice’ operates in legal processes due to the fact that judges and those who are judged do not share the same language or idiom; they offer the asylum process as a key example of this, when they state:

This is the standard case with asylum-seekers who are routinely asked by immigration officials to present their case and to recount the brutalities and torture they have suffered in a language they do not speak (2005: 72).

Their argument reflects how asylum procedures are not carried out in the native language of asylum claimants; however, Douzinis and Greary are referring, in this context to legal language. Issues around power and language in legal discourse, and the formation of stories and narratives in legal settings, have been subject to much academic enquiry. This chapter considers the varying theoretical approaches adopted in the course of such enquiry. In so doing, it will engage with conversation analysis, narrative studies and literatures which draw from a variety of related social constructionist perspectives. I will argue that in spite of the contribution that conversation analysis and narrative studies can make, it is necessary to move beyond the study of in-court interactions when considering how appeal claims are produced in the asylum process. In support of my claims, I will utilise perspectives offered by studies which have sought to take into account the interplay between the oral and the written in legal proceedings and which analyse the importance of ‘pre-trial’ or ‘pre-court hearing’ processes. In pointing to the importance of these pre-hearing stages, I will focus on studies which have sought to analyse the role of lawyers in the production of asylum appellant’s accounts of persecution as part of their asylum appeal. Asylum appeal cases prepared by solicitors involve multiple elements including objective evidence about the situation in appellants’ countries of origin; medical evidence

about the nature of any persecution or torture claimed to have been experienced by appellants; legal arguments which support the appellants' claims that they deserve international protection and so, should not be returned to their home country; and other documentation in support of the appellants' purported identity or life experience in their country of origin which relates to their claimed persecution. Underpinning most of this is the appellant's account of the persecution they suffered in their home country. This is often referred to as their 'account of persecution' or 'asylum narrative' in the literature and is usually presented in the form of a 'witness statement' which is prepared by appellants' legal representatives. As discussed previously in this thesis (at Chapter 3), owing to the lack of corroborating evidence or witnesses in asylum appeal cases, the most important piece of evidence tends to be this account of persecution, or narrative, when asylum appellants present their case to an Immigration Judge; they cannot be cross-examined on medical or objective evidence and so the only evidence which they may speak to is that contained in their account of persecution. For this reason, it is important to focus on the role of solicitors in the production of the witness statement as part of the appeal case preparation process.

4.1 Conversation Analysis Approaches to Legal Settings

Studies of courtroom interactions using conversation analysis have contributed to the investigation of the power dynamic during such interactions. These studies highlight, amongst other things, the ways that pre-determined turn-taking of participants in legal processes creates an asymmetrical distribution of power whereby considerable conversational influence and control are held by the participant who is sanctioned to ask questions (Atkinson and Drew, 1979). Such imbalances of power in courtroom dialogue have been the particular focus of studies which seek to examine processes of revictimisation of rape victims during in-court proceedings at trial (Matoesian 1993; Conley and O'Barr, 1998).

Conley and O'Barr, for example, have revealed the ways that victims of rape are revictimised by their experiences during cross-examination (1998: 15-38). In developing this argument, they use Matoesian's (1993) work into the ways that rape is reproduced in court at trial. They explain the different ways that power is enacted by prosecuting and

defence lawyers in court in order to show how such processes revictimise the rape survivor. Their examination of the power asymmetry in rape trials that facilitates this revictimisation is influenced by Foucault's notion of discourse (1970; 1972). They show how deviating from, or not being equipped or trained to communicate within, the dominant discourse in legal settings can place the rape victim at a disadvantage because 'the relative credibility of witnesses is influenced by the manner in which their testimony is presented' (1998: 65). Conley and O'Barr argue that the legal system values calmness, rationality, and objectivity in the narratives presented in court such that the emotive accounts of those who have alleged to have been raped may not be well received at trial.

In the asylum context, the work of Conley and O'Barr may be applied to the reception of asylum applicants' responses to questioning at asylum appeal hearings and potentially in other institutional settings. Shuman and Bohmer (2004) have drawn on Conley's and O'Barr's (1998) work on the effects of the language used by rape victims when giving evidence in court in their examination of asylum applicants' experiences of narrating their claim when applying for asylum in the US. Shuman and Bohmer write instructively on the difficult balance that asylum applicants must often strike in conveying emotion in their accounts and claim that: 'telling the story with too much emotion will also have a negative impact in that the interviewer may dismiss the claimant as simply hysterical' (Shuman and Bohmer, 2004: 407).

Conley and O'Barr also carried out conversation analysis of the adversarial processes in small claims courts in the US. They investigated the success of the competing claims of lay members of the public as litigants in these courts. Their research argued that the most effective strategies for articulating successful claims in adversarial disputes involved claims that followed the rule-based model whereby problems were evaluated in terms of neutral principles whose application transcends the particularities of any individual claimant (Conley and O'Barr, 1990: ix). This research has been used in Good's (2007; 2011) and Shuman's and Bohmer's (2004) work on accounts of persecution within asylum claims; it offers a particularly useful conceptual approach with which to consider the ways that witness statements are co-constructed by asylum applicants and their legal representatives and their subsequent reception and treatment by different actors at the asylum appeal hearing.

Studies in the conversation analysis tradition have also revealed the devices used during cross-examination for producing inconsistency in, and damaging implications for, a witness's evidence (Drew, 1992: 472). Again, these approaches are useful when studying the interactions and courtroom discourse in asylum appeal hearings, where the cross-examination of asylum appellants forms a large part of the hearing process (see Chapter 9).

4.2 Theoretical Contributions from Narrative Studies: the reception of facts in court

Jackson has taken up the study of narratives and the factors that affect their perceived truth in legal settings (1988: 1994). He adopts a semiotic approach to law and denounces correspondence theories of truth found in legal positivism, arguing instead for a coherence theory of truth. As MacLean points out, for Jackson reality is filtered through the frameworks we impose on it: "our only access to the outside reality, our only way of making sense of it, is mediated through signifiatory systems" (Jackson 1991: 179 discussed in MacLean, 2012: 31). These systems of signification are found at the level of 'narrative structures'. Narratives provide us with the limits within which to negotiate the construction of sense. As MacLean explains:

Very often we see only what we expect to see but sense construction means comparing the empirical data received through observation with our internalised narrative expectations and interpreting these data with respect to those internalised narratives' (MacLean, 2012: 33).

In legal settings, then, the internalised narrative expectations of legal actors will affect the ways they receive and interpret the narratives of others, such as, in the context of my research, the testimony of asylum appellants provided during asylum appeal hearings. Jackson (1988) examines the application of narrative models to the understanding of criminal adjudicatory processes, exploring the approaches of lawyers, social psychologists, and semioticians in this connection. In so doing he argues, amongst other things, that 'the plausibility of facts proved in court is a function of their narrative coherence and of the narrativisation of the pragmatics of persuasion...; and that the application of law to facts thus [turns] out to be not a logical process, but one consisting of the comparison of

narratives' (Jackson, 1994: 97). It is to a consideration of Jackson's arguments about the 'pragmatics of persuasion' in adjudicatory processes that I will now turn.

In his discussion of the narrative model of fact construction in the trial, Jackson (1988) draws on the work of Bennett and Feldman (1981) in order to build up his own perspective on the narrativisation of pragmatics. Bennett and Feldman explored the factors which lead jurors in American criminal trials to accept the truth of facts advanced to them; they came to the conclusion that truth construction in court was essentially a matter of the overall narrative plausibility of the story told. Plausibility was, in this case, based on the stock of social knowledge of the jury with such social knowledge itself organised on the whole in narrative terms (see Jackson, 1994: 98). Although juries are not used in asylum appeal hearings, these arguments and the ways in which Jackson builds upon them are still relevant to the present research. During criminal trials, the jury have to decide the facts of a case while the Judge is responsible for dealing with the law that applies in the case. In asylum appeals, Immigration Judges have the job of deciding on both issues of law and fact. Bennett's and Feldman's conclusion that finding a story as true depends upon its narrative plausibility, and that such plausibility is based on the story's recipient's stock of social knowledge can be applied in the asylum context. Reference to their conclusion makes it possible to argue that Immigration Judges will themselves have narrativised stocks of both social and legal knowledge which they may apply to their assessments of the narrative plausibility of an asylum account. As I have discussed earlier in the thesis (in Chapter 3), the terms 'plausibility' and 'credibility' are different for the purposes of asylum law and policy. Jackson's theory is used in the present thesis, therefore, to suggest that a decisions-maker's assessment of whether an asylum applicant is credible or not will depend, in part, upon the *narrative* plausibility of their account. It is for this reason, as other writers have highlighted (Good, 2011), that legal representatives who work with asylum appellants to construct witness statements can be seen to perform a crucial role in ensuring that the witness statement meets the demands for narrative plausibility in law.

Bennett and Feldman, like many of the authors of the studies upon which Jackson draws, carried out research into the legal procedures and settings involved in criminal law. As I have shown in the review of the current literature into asylum narratives and credibility (at Chapter 3), scholars working in this area have adopted a comparative perspective to analyse the similarities and differences between the ways that credibility assessments

operate in asylum and criminal law processes (Baillot et al, 2009; 2012). Comparing the positions of the asylum system and the criminal justice system in those contexts is useful to highlight similarities and differences with respect to the ways that women's disclosure of rape is treated. I would argue that even beyond the context of rape and disclosure, theories and literature about criminal legal processes might be seen to have intellectual purchase in discussions about asylum procedures. In spite of the differing standards and burdens of proof in the two systems, both are adversarial in nature with two competing parties trying to convince decision-makers about the truth or credibility of their accounts. In the discussion which follows, I draw from studies that have taken criminal justice settings as their point of departure. I will, therefore, outline the relevance of the arguments made in each case to the asylum appeals processes that I study in the current research.

An important study which takes the criminal trial as its point of departure is *Reconstructing reality in the courtroom: Justice and judgement in American culture* by Bennett and Feldman (1981). Jackson endorses the work of Bennett and Feldman but argues that a weakness in their research is that they reduce the trial to one semantic level (Jackson, 1988: 63). In contrast, he argues that it is necessary to ask 'how the overall story is built up: quantitatively, qualitatively, atomistically, holistically, and in what combination. Bennett and Feldman simply assume that there is just one story being constructed and that each one of these versions is built up atomistically by the evidence of multiple tellers' (1988: 67). According to Jackson it is crucial instead to approach the story at trial as an interaction between a 'series of interlocking stories, the credibility of each one of which is assessed as a factor in the credibility of the whole' (1988: 66). While during 'trials' there tend to be several witnesses with competing viewpoints, there are often no witnesses in asylum appeal hearings. In spite of this, Jackson's approach may still be considered relevant in that there tend to be competing and multiple versions of the asylum claim advanced by the parties that appear before the Immigration Judge.

Jackson's (1988) work, therefore, has important implications for the exploration of the processes associated with the development, articulation and reception of the asylum claim during the asylum appeal hearing. The reception of an applicant's claim as factual and therefore credible, for example, may be dependent upon their account of persecution being structured in a similar way to the 'narrative model of fact construction' (Jackson, 1988: 61) that operates within legal processes. In a later reflection on his arguments in this work, Jackson (1994) assesses the methodological contribution that his conceptual structure

could provide to the study of truth and narrative in legal settings. He identifies four contributions that his theory could make to examinations of a statement's prospects of being received and judged as true in court proceedings. In considering his discussion of these four points, in conjunction with work which relates to them, it is possible to evaluate their relevance and applicability in the context of my research into the role and working practices of solicitors who assist in the co-construction of witness statements with their clients and the subsequent reception and treatment of these narrative accounts during asylum appeal hearings.

4.2.1 Internal Psychological Processes, Prior to any Act of Enunciation

Although Jackson is primarily interested in studying persuasion in court interactions and utterances, he draws attention to arguments of story grammarians who suggest that there are prior narrative stages that should be taken into account, namely, the perception, recall, and testimony of the witness him or herself (Jackson, 1994: 98). As Jackson explains:

Thus the witness encodes what the information-source transmits to him/her; the witness later recalls that message; and the witness tells the court what was observed. Only then can the jury process that which is transmitted (1994: 98).

Using insights from the work of Mandler and Johnson (1977), Jackson emphasises the significance of their observation that memory and successful recall are themselves influenced by narrative models, such that 'narrative forms a link between perception and communication' (1994: 98). In this way idealised narrative structures will impact upon the way people recall and communicate stories. Jackson goes on in his discussion of Mandler and Johnson's research to draw out valuable aspects of their findings as they relate to legal procedures. As Jackson notes, an important implication of Mandler and Johnson's work is that 'the longer the delay between telling and recall, the more recall will come to approximate to an ideal narrative schema instead of the actual story heard' (1994: 99). The relevance to the development and articulation of the asylum claim, which is provided, in large part, in the form of a narrative in the witness statement, here can be seen in that by the time an asylum appellant comes to the appeal hearing, s/he will have to 'rely

substantially upon idealised narrative schemata even for recall- to say nothing about persuasion' (1994: 99). The relevant narrative schemata in asylum appeal hearings would be the one idealised in legal and bureaucratic contexts.

As discussed above (in Chapter 3), Herlihy and her colleagues (2009) have examined the effects of traumatic experiences and PTSD on memory and recall in asylum applicants. However, Jackson's argument lends an additional consideration to these processes, namely that the narrative structures required for sense-making in legal settings will also have an impact on the way that asylum applicants *recall* their past experiences. The process that the legal institutions impose for eliciting the narrative from the asylum applicant may, in effect, alter the ways that the asylum applicant recalls memories of (traumatic) experiences each time that they are asked about them. It is reasonable to assume that asylum applicants may be prompted to recall their memories of persecution during the different stages of asylum process, such as the screening interview, the asylum interview, as is the case during meetings with their solicitor, in a way that fits with the narrative models of those interactions and processes. This is an important observation because it allows one to explore the possibility that the way that applicants tell their story is affected by their experiences of the asylum process but also that the way that they recall and organise the memories of persecution might be influenced as they progress through the different stages of the asylum claims and appeals procedures. In this research, I was able to observe the ways that this process occurred during asylum appeal hearings when appellants provided responses during cross-examination; this is the main process through which the Immigration Judge can evaluate first-hand the credibility of the appellant's claim.

4.2.2 The Act of Enunciation Itself, Viewed Strategically from the Viewpoint of the Enunciator

Jackson (1994: 100) argues that an enunciation must be meaningful to both enunciator and receiver. He suggests that an enunciation tends to be made to fulfil a communication need or demand and so will need to be tailored to that demand to ensure that it is meaningful to both the person making the enunciation and the person eliciting and receiving it. He makes interesting use of social psychology in his discussion to emphasise the role that interpersonal factors play in this process. The effective communication of a story will depend on relationships of trust between the person telling the story and the person educating

it. Jackson cites the work of Gudjossan and Clark (1986) who apply this way of thinking about the enunciation of stories in the context of police questioning of witnesses. As Jackson notes, Gudjossan and Clark suggest that:

A prerequisite for yielding to suggestions is a person's belief that the interviewer's intentions are genuine and no trickery is involved. People who are suspicious of the interviewer will be reluctant to yield to suggestions offered, even under conditions of increasing uncertainty (Gudjossan and Clark, 1986: 98, quoted in Jackson, 1994: 100).

A comparison with the asylum context can also be made in relation to the ways that asylum solicitors need to build up relationships of trust with their clients. This will be discussed later in the thesis (in Chapter 7) in relation to the nature of casework and lawyer-client relationships. The notion of the communicative success of an enunciation elaborated by Jackson also extends to processes of cross-examination (Jackson, 1994: 100). He suggests that such factors may also apply to the witness' ability to construct their story in their own terms and as such, reveals something of the relationship between the semantic and the pragmatic in such instances (Jackson, 1994: 101). Referring to the works of Stone (1984) and McBarnet (1981), Jackson argues that question and answer take on a different function in cross-examination procedures from their usual speech-act function (1994: 101). Often, they may be used as part of a tactic to lead a witness to make particular statements or even to take a witness by surprise (Stone, 1984: 300f in Jackson, 1994: 101, n4), as opposed to being used to discover something not yet known. In this way, the pragmatics of the cross-examination process will impact upon the witness's ability to communicate their story using their own narrative structure. In contrast, the semiotic role of a legal representative during examination-in-chief is one of 'helper' whereby the witness is assisted in communicating their story by an extensive and sympathetic question-and-answer process. In making this argument, Jackson relies on McBarnet's (1981) assertions about the position of the unrepresented accused in legal procedures. McBarnet suggests that the unrepresented accused is disadvantaged by not being examined on their evidence or story by their own legal representative, due to the fact that they are denied the opportunity to gain procedural knowledge and that they are also not afforded the chance of having their story drawn out through questioning (McBarnet 1981: 128, discussed in Jackson, 1994: 101).

This is a useful premise to draw on when considering cross-examination during asylum appeal hearings. As I will go on to argue (in Chapter 9) the structural imposition of the adoption of a pre-prepared witness statement as the asylum appellant's evidence-in-chief precludes the stage of sympathetic examination-in-chief carried out by the appellant's representative. The exclusion of this important step, outlined in McBarnet's discussion (1981: 128) of the disadvantages faced by the unrepresented accused in criminal proceedings, means that asylum appellants are not given the opportunity to be examined in a sympathetic manner by their own legal representative. The asylum appellant's solicitor should have had the opportunity to make their 'case' in the written witness statement and they should be permitted to ask follow-up questions after cross-examination. However, it seems striking that the main process of questioning is one that is aimed at casting doubt on the appellant's story or even, as Stone argues (1984), is one which may be designed to lead them to particular statements or to trick them. In this way, in the actual court hearing, the appellant is not afforded the opportunity to have their account made into a (credible) case before their story is then 'attacked' or cast in a dubious light by the Home Office.

In addition, Jackson's claim that a witness may potentially be obstructed from telling the story in their own way finds resonance in the work of Maryns (2006). Maryns's findings in relation to the interview process in asylum claims procedures, discussed above (in Chapter 3), lend credence to Jackson's theoretical claims and indicate that it is a relevant approach to adopt and apply in the asylum context. A similar connection to the relevance of language in institutional settings is to be found in Jackson's third methodological contribution.

4.2.3 The Meaning of the Act of Enunciation, as Perceived by its Addressees

In his consideration of the reception of stories by those to whom they are told, Jackson again draws on the work of Bennett and Feldman (1981). During their exploration of the relationship between story structure and plausibility, Bennett and Feldman also note the need to take into account sociological factors when developing a framework of narrative theory. They argue that it is necessary to consider these sociological factors or biases, such as 'class', for example, 'as mediated through [their] effect upon narrative frameworks' (Jackson, 1994: 103). Jackson draws from their findings to suggest that:

Those more familiar with the formal languages of institutions may have an advantage over those who rely upon the normal public language, with its greater reliance upon context, its more fragmented accounts, and its greater reliance upon tonal, gestural, kinesthetic and other such factors (1981: 172 discussed in Jackson 1994: 103).

It is necessary, then, to consider such factors in the context of their impact on the narrative models and frameworks adopted by those participants in court proceedings. It is possible to compare this with the work of Conley and O'Barr, discussed above, which demonstrated the ways that lay members of the public who articulate their claims in a relational-oriented format in legal proceedings tend to be less successful than those who make their claims in a rule-oriented fashion. The role of a legal representative who can effectively translate claims from one form into another, then, is a crucial one. Legal practitioners therefore have to articulate clients' claims in a way that meets the criteria in law to merit international protection under the UN 1951 Convention.

The role of legal actors in the reception of witnesses' stories or enunciations is considered by Jackson in his final proposed contribution to the study of narrative and truth in legal settings.

4.2.4 Negotiation of the Outcome of the Act of Enunciation between the Parties Concerned

Jackson again relies on the work of sociologist Doreen McBarnet (1981) in order to describe the important task that legal actors carry out in relation to strategies of persuasion in legal settings.

In addition to emphasising the important function of a legal representative in conveying the persuasiveness of a narrative to a legal audience, McBarnet also indicates the significance of legal education as a socialisation processes for legal actors. In Jackson's terms, one of the purposes of legal education is that law students learn the idealised narrative structures favoured in law. This line of inquiry has been taken by scholars such as Mertz (2007) who carried out research into the ways that law students undergo a transformation during their

legal education in terms not only of how they use spoken and written language but also of how they 'think'. Mertz's findings have important implications for the potential impact that such socialisation processes may have upon the ways that legal representatives approach their casework and processes of lawyering. This point will be developed later in the thesis (in Chapter 7) where I consider the impact of such processes on asylum solicitors.

4.3 Moving Beyond In-Court and Spoken Interactions

Scheffer has considered the contributions of conversation analysis and narrative studies to examining the development of cases in the field of criminal law (2002; 2003; 2004). He suggests, however, that such studies fail to take account of the interplay between the oral and the written in legal processes. Moreover, in his view, the literature 'does not reveal many insights when it comes to the methods and techniques by which stories are developed for the use in court in the first place' (2003: 313). Scheffer suggests that there may be various reasons for the lack of pre-trial research in the criminal process. Amongst other things, he points to the difficulty of gaining access to the relevant pre-trial settings and interactions as a factor contributing to the paucity of these kinds of studies in the literature. However, he also argues that the lack of academic attention to such processes may be due to a 'talk-bias' in such qualitative research 'based on the idea of proximate, local face-to-face interaction' (Scheffer, 2003: 313).

Scheffer and his colleagues recently conducted cross-jurisdictional research into the criminal court procedures in the UK, Italy, Germany and USA in which they sought to undertake an analytical micro-sociology of court hearings (2003: 3), which would move beyond solely studying in-court interactions. One criticism that may be levelled at the work of Scheffer is his use of several theoretical approaches in his study of the trajectories of stories in legal settings. To be sure, the aim of the project initially was to devise conceptual tools with which to analyse such processes and to try and allow for comparisons between such processes in varying jurisdictions (2002). Early findings and arguments can be viewed, then, as ways of 'testing-the-water' to ascertain which might be the most useful approaches to apply. Owing to this, the theoretical approaches that he advances can, at times, appear contradictory. His use, for example, of both the systems theory of Luhmann and actor-network theory (ANT) advanced by Latour do not seem to fit comfortably

alongside one another in a theoretical schema designed to interpret or undertake a micro-sociology of court hearings. Scheffer's initial reference to systems theory seems to offer a useful framework through which to analyse the reception and development of stories in legal processes. This is because, in the terms of systems theory 'communications can flow into a social system, for example, but will only affect the system if they can be translated by the system into its code' (Mackenzie, 2004: 112). In the context of law, and asylum processes, in particular, then, a person can only have their claim to be recognised as a refugee allowed where it is articulated in a form that matches the code upon which the system of law operates. Only claims that are communicated in the code upon which law operates could be assessed as credible. Indeed, one of the core aims of this thesis is to examine the role of solicitors in this translation process. In spite of the apparent fit between an exploration of this translation process and systems theory, I do not consider it to provide the most appropriate theoretical framework for the present thesis. As I will go on to argue (in Chapter 6), structural factors such as legal aid funding arrangements affect the ways that solicitors carry out their work when representing clients. In this sense, structural factors external to the system of law impact upon and alter the strategies of solicitors when translating asylum claims into the code or language of law. Proceeding on this basis, the coding process of claims as credible/not credible is therefore affected by factors outwith the bounded system of law. A systems theory approach does not provide for an examination of how such external factors alter the way the system itself functions.

Moreover, I would contend that combining systems theory with ANT, as Scheffer does, creates something of a theoretical schism. This is because, it can be argued, a systems theoretical approach is too deterministic for ANT. For Latour, a 'network' is semi-permanent and open; it can become 'undone' (Thomson, 2003: 79). By contrast, a 'system' is relatively closed and self-referential; it is not indeterminate and does not consist of actors but of communication (Noe and Alroe, 2002: 10). A 'system' may accept communications from outside of its boundaries, but these communications will only have an effect on the system if it can translate them into the code which forms its basal structure (Mackenzie, 2004: 112). Regarding the two theoretical frameworks as complimentary is therefore problematic because systems theory constitutes too deterministic an approach for ANT.

Additionally, Scheffer's reliance on Latour's work in ANT would seem to cast doubt on his then being able to advance a 'social constructionist' approach to his micro-sociology of

court hearings (2003: 315). Although Latour's early work was concerned with the social construction of scientific knowledge, in particular in his work with Woolgar (1979): *Laboratory Life: The Social Construction of Scientific Facts*, his later thinking resulted in the rejection of the use of the term 'social'. This is because, according to Latour and his colleagues, the term 'social' has become devoid of meaning (Latour and Woolgar, 1986 discussed in Restivo and Croissant, 2008: 217) and is a term that cannot be used to describe 'external, independent forces or causes of specific human practices or associations that have their own intricate, shifting logics' (Cotterrell, 2011: 507). I would maintain, however, that following Scheffer's attempt to undertake a 'social constructionist' approach is still a useful way to examine the role of solicitors and the effects of their working practices on the construction and development of clients' cases within asylum appeals procedures. Despite these seeming contradictions, therefore, it is possible to take useful insights from Scheffer's work.

I will move on to consider the arguments that he advances in these works in order to suggest their relevance to the study of similar processes in the asylum context. In particular, Scheffer's findings and arguments in relation to his examination of the emergence and development of cases as they make their way to court (2003), the potentially binding nature of what he terms the 'pre-trial' (2007a), and the approach of solicitors to casework (2007b) are significant to my research.

4.3.1 The Emergence and Trajectories of Cases on their Way to Court

In his examination of the mobilisation of stories in legal cases, Scheffer seeks to trace the development and trajectory of stories through the legal process from pre-trial to trial (2003: 319). Using the example of an alibi story as it makes its way to court, Scheffer observes the various stages that the alibi story goes through when making this journey (2003). He notes that:

The way the alibi-story is staged in court is not just a product of the local circumstances. The story is not just, as Conversation Analysis scholars may put it 'locally accomplished' by the turn-by-turn exchange of co-present participants. It is as well the result of distributed and configuring practices. The story enters the courtroom as a copy, a

repetition, as a fabricated artefact, a written and copied scheme. When reaching this stage the narrative has already travelled a long way through the pre-trial (Scheffer, 2003: 319).

It is this journey through the 'pre-trial' that Scheffer sets out to explore in this example. In order to do so, as well as drawing from insights in conversational analysis and narrative studies, Scheffer also claims to take inspiration from Laboratory Studies. In particular, as mentioned above, he draws on the work of scholars such as Bruno Latour who made their object of inquiry the quotidian ordinary practice that is, on the whole, 'black-boxed in scientific textbooks and results' (Scheffer, 2003: 314). In addition to exposing the 'pre-products and uncompleted of social practice' (Scheffer, 2003: 314), Laboratory Studies also highlighted the grouping of human and non-human actors in scientific practice and production processes. These factors motivated Scheffer to examine the human and non-human elements of case-making and statement production in legal processes. Inspired to conceive of the story once narrated as an 'actant' that acts and reacts to certain conditions imposed on it, Scheffer's aim in this study is to trace stories in criminal cases in terms of their mobilisation and agency (2003: 313-5).

Scheffer's use of ANT shows that it can offer insights in terms of the relationship between human legal actors and documents, case-files, legal judgements, statements and so on. In fact, Latour has undertaken ethnographic research in the *Conseil d'État*, the highest administrative court in France, where he sought to examine the internal workings of this legal institution (Latour, 2010). However, one aim of this thesis is to show that asylum solicitors are constrained by the processes within which they work when preparing clients' claims and witness statements during asylum appeal procedures. Stories, documents, statements and narratives, therefore, will here be shown to have very limited agency, being controlled and manipulated by the very legal and bureaucratic structures and human actors that elicit, interpret and ultimately construct them. An example of this is the binding effect of the Reasons for Refusal Letter (RFRL). This document is issued to the applicant by the Home Office following the refusal of an asylum claim and it draws on the statements made by the applicant at their substantive Asylum Interview with an immigration officer. The RFRL forms the basis of the Home Office's case at the subsequent appeal and many of the solicitors in this research referred to the RFRL when discussing the practices which they adopted when preparing witness statements with asylum clients. This will be more fully discussed later in the thesis (at Chapters 9 and 10).

The use of ANT notwithstanding, the relevance of Scheffer's contribution in this study can still be seen in his discussion of the processes by which utterances are converted into systematic discourse in legal proceedings (Scheffer, 2003: 317). This highlights the importance for asylum research of analysing the ways that utterances and responses at interviews are constructed into an account of persecution which is then attributed to the applicant in the asylum process. Although access to observe Home Office asylum interviews was not secured in this research, the work of others who have studied such processes in the UK and other jurisdictions is useful for considering the ways that this might occur, in line with Scheffer's findings on criminal procedures. Moreover, Scheffer's study of the alibi-story's route to court also demonstrates the ways that stories are subject to repetition and modification in different circumstances whilst journeying through legal procedures (2003: 339). The transformation process from the spoken to the written is an important step in a story's journey from pre-trial to trial. Scheffer emphasises the way that such transformation processes are undertaken collaboratively through casework in legal proceedings:

The idea that social products are achieved via close collaboration is undoubtedly useful to examine legal casework. Casework rests on correspondence, meetings and telephone talk. All these forms of social exchange are open to sequential analysis... Along these lines, official ascription of individual authorship comes into view as reductionist and simplifying. Statements as well as narrative come into view as products of ensemble-work and social situations rather than subjective expressions (2003: 337-8).

This will be discussed later in this thesis (in Chapter 9) in relation to the ways that asylum claims are transformed from responses at interviews with immigration officers into officially recorded accounts of persecution which are then used in decision-making processes⁸. For the moment, it is sufficient to note that Scheffer's work is useful because it emphasises the importance of looking beyond the asylum appeal hearing and exploring the ways that what is said or (socially) enacted at the hearing is itself affected by what has gone on before, particularly during the preparation work carried out by solicitors, at the

⁸ A written record of asylum applicants' responses during Home Office interviews is taken by the immigration official and, as observation during hearings at the FTIAC during this research showed, that written record then generally forms the basis of questions during cross-examination of the appellant by the Home Office Representative during asylum appeal hearings

pre-hearing stage. Similarly, as will be discussed in the next section, Scheffer's research is relevant because he focuses his attention on the 'binding' effects of early disclosures or utterances during the pre-trial which then shape what might be said at the trial.

4.3.2 The Binding Nature of pre-Trial Interactions

Scheffer suggests that pre-trial processes often impact upon what goes on at the trial to the extent that statements at the trial are the result of, and are indeed bound by, previous utterances and statements. What can be said at trial, then, is often restricted by pre-trial procedures. In his discussion of the binding effects of early utterances in legal proceedings Scheffer uses the term 'binding' to denote 'a phenomenon generated amid the sequence of statements that create the discourse of a particular legal proceeding' (2007a:7); such binding occurs by means of an organised or procedural memory that does not allow much modification, least of all a fresh start (2007a:7). In this way, then, he recognises that his definition differs from traditional sociological understandings of the term which are concerned with the relational bonds that exist between individual and society (2007a:7). Scheffer uses this concept in the context of early defences in criminal procedures. This can be seen in his articulation of the general rule of the binding procedure:

[A] contestant gets ever more entangled in the unfolding discourse. Every contribution made reduces the range of options left. The contestant is bound not by external coercion, but by the ways of self-involvement and the traces it leaves in the procedural past. The one who is accountable for these discursive facts cannot get rid of them easily. As a result, binding institutes norms about what should or should not be said 'from now on' (2007a:9).

Although Scheffer uses this concept in relation to criminal proceedings, it is also of potential relevance to the asylum appeal process. It is possible, therefore, to apply Scheffer's concept of binding to the ways that the asylum applicant's account of persecution when claiming asylum becomes binding as s/he progresses through the asylum appeal process. A written (and occasionally an audio) record is kept of answers to questions in the substantive asylum interview and that record is referred to in the RFRL

and at the appeal stage. This can be observed through both references to RFRLs and a reliance on appellants' asylum interview responses made by Home Office representatives during asylum appeal hearings at the FTTIAC. In this way, then, they impact upon what may be said subsequently, in that the applicant is identified with these earlier versions or accounts and that to contradict these would mean that such divergences could be used by the Home Office or an Immigration Judge to suggest the inconsistency, unlikelihood and unreliability of the applicant and their story (see Scheffer, 2007a:8-9).

Scheffer shows how the story of the accused in a sexual assault trial unfolds during the pre-trial, in particular, through the dialogue of the question-answer play at the police interview (2004: 381). He illustrates how, by way of police questioning, the co-narration of the story moves into the terrain of guilt and shame. In the absence of a counter-narrative (the accused simply replies that he 'cannot remember' doing what the victim claims), Scheffer argues, the 'victim's story becomes the hegemonic account' (2004: 382). Those critical of the way that the law treats victims of sexual assault may argue that the victim may not often feel as though their account is the 'hegemonic' one in the trial and 'pre-trial' processes as suggested by Scheffer. I take Scheffer's use of the term 'hegemonic' here to mean that, in not having a counter-narrative to offer at the police interview, the accused in the above example is unable to resist the narrative that the police officer presents to him and attributes to the alleged victim. Instead of refuting the allegations that the police officer makes, the accused states that he cannot remember if they are true. In this way, therefore, the version that has arisen out of the victim's own question-answer play at police interview becomes the one that is recorded. The defence solicitors then have to work within the confines of this account in order to demonstrate the credibility of the accused and of his response that he cannot remember what happened. Insights from this example may be applied when considering the task faced by asylum solicitors, who took part in this research, when co-constructing a witness statement with their client in light of the 'hegemonic account' which is put forward in the refusal decision of the first decision-maker. They also have to work to gather evidence to support their client's claim and to rebut the arguments made by the person who prepared the RFRL.

In Chapter 10, I aim to show that the procedural memory of such hegemonic accounts affects the casework of the solicitor, generally, and the production of the witness statement,

in particular. The present chapter will now turn to consider Scheffer's argument in respect of casework and filework and the relationship of this to different styles of advocacy.

4.4 Styles of Advocacy and Lawyer-Client Interactions

Differing advocacy styles amongst legal practitioners have been discussed by Scheffer (2007b) in relation to the ways that solicitors and barristers approach file work. Scheffer argues that 'File work...carries implications for the time that the lawyer spends on certain subjects: on colleagues, the client, the papers, or the adversary. Time thus becomes directly or indirectly a matter of legal ethics' (2007b: 57). Due to the quick processing of asylum claims and appeals (see Figures 2.1 and 2.2 in Chapter 2), solicitors are faced with significant time pressures when lodging and preparing asylum appeals. Kelly notes that time pressures in the asylum process mean that solicitors often focus their work on the appeal of a refused claim, as opposed to the initial asylum claim (2012: 52). Similar working practices were adopted by the solicitors who took part in my research (see Chapter 10). In line with Scheffer's argument about the relationship between the time spent on a legal file, or case, and the ethics of the lawyer working on it, Kelly goes on to highlight the varying approaches and motivations of asylum and immigration solicitors, where he writes:

Immigration lawyers run the spectrum from the dedicated, who share the concerns of their clients at a deep political level, to the solely pragmatic and instrumental. Many lawyers entered the field in the 1990s, when immigration was a boom area for legal practice, and did so for entirely strategic reasons rather than a commitment to the area (2012: 52).

In Chapter 6 of the present thesis I consider the conflicting priorities of the asylum solicitors who took part in my research in relation to their political motivations for entering the area of asylum law and the pressures put on them to generate profit for their employers. I follow Sommerlad (2001) in this regard and suggest that, due to the imperative to generate fees to ensure the profitability of the legal organisation within which they worked, the solicitors in my research could not be described as 'cause lawyers' (see Sarat and

Scheingold, 1998; Sommerlad, 2001: 336-7; Berenson 2008: 3) in spite of the political or humanitarian concerns that motivated their original interest in asylum law. In spite of this, the solicitors who took part in my study were not ‘solely pragmatic and instrumental’ and did at times appear to invest personally and emotionally in their casework.

In comparing different types of advocacy, Scheffer suggests that where solicitors deal with all aspects of a client’s case up to and including their representation in court, this may demand personal and emotional involvement (2007b: 69). The need to separate the legal from the emotive in casework is discussed by Sarat and Felstiner (1995) in their work on the lawyer-client relationship in divorce proceedings. They emphasise how a client’s lack of trust in their lawyer may hamper the latter’s ability to advise them in negotiating settlements with their spouse. The divorce lawyers in their study attempted to convince clients of the need to approach the different aspects of their divorce so that they could focus on the legal situation and siphon off the emotional aspects that might cloud their judgement during such proceedings. A discussion of emotions and casework in the asylum law context has been elaborated in Westaby’s (2010) study of emotional labour undertaken by solicitors when representing asylum applicants. This will be addressed, in detail, elsewhere in this thesis (in Chapter 7) where I consider her arguments in light of the experiences of the solicitors who took part in this research.

4.5 Conclusion

I have argued in this chapter that conversational analysis is the approach that has traditionally been applied when examining how cases are presented and treated in legal proceedings. At the beginning of this chapter, I outlined the contribution of conversation analysis to studies of law and language and suggested ways that it could be applied in the asylum law context. On the basis of a critical engagement with some of the key literature in this area, I asserted that conversation analysis alone does not provide a sufficient conceptual framework through which to analyse asylum appeal processes.

In the second section of this chapter, therefore, studies of narrative and truth in legal settings were examined in order to discuss the ways that the narrative structures of stories may affect how they are received and interpreted by participants in legal processes.

Through a consideration of Jackson's pragmatics of narrativisation (1988, 1994), which deals with the relationship between narrative models and adjudicatory processes, I sought to suggest areas of potential congruency between his claims and what may be observed in the context of the asylum appeal hearing process. I have argued that we can analyse the pragmatics of narrativisation in legal procedures giving weight to the importance of legal actors and their dominion over legal narratives; the significance of legal representation; and the role of narrative schemata inherent in institutional processes that affect even the recall of stories by witnesses and others during asylum appeals at the FTTIAC.

The third section engaged with literatures which refer to, and build upon, those discussed in the previous two. I have drawn from the works of Scheffer in order to highlight that, in spite of the contributions that CA makes to the study of legal discourse, it is important to move beyond the trial or court hearing as the unit of analysis and to consider earlier stages in the legal process. By looking to the 'pre-trial' stage in legal proceedings, Scheffer's suggestion that statements and utterances can have a binding effect on what goes on or might be said at trial is a useful one to pursue during the examination of asylum appeal processes. Scheffer uses insights from systems theory, actor-network theory (ANT) and discourse analysis as frameworks through which to undertake a micro-sociology of court hearings. I have highlighted the sometimes contradictory theoretical approaches that his studies adopt, but argued that some of the conceptualisations provided by them allow for the tracing of a historiography of legal cases and stories as they make their way through the different stages of legal proceedings. Amongst other things, they provide examples of the ways that initial utterances or articulations can be binding in legal processes; that cases are built up over the course of pre-trial interactions such that what may be said at court is heavily shaped by such interactions; and that the file-work of a legal case constitutes one of the materialities of the court hearing.

In considering the importance of pre-trial interactions, this chapter has emphasised the importance of research by those who have studied lawyer-client interactions. Sarat and Felstiner, for example, have shown that in divorce proceedings solicitors face the task of having to negotiate a relationship of trust with their clients which involves some working through of the client's personal problems as well as legal ones. I have argued that such interactions are significant when considering the role that the solicitor-client relationship

may have in asylum law settings and outlined the ways that this will be explored later in this thesis.

The theoretical approaches discussed in this chapter demonstrate the important role that legal representatives can play in the processes of persuasion of the credibility of an asylum claim in legal settings. The consideration of this role of solicitors necessitates the use of qualitative research methods in order to study and examine the processes and conditions under which solicitors co-construct witness statements with asylum clients during the preparation of asylum appeal cases and the subsequent reception of these stories and accounts in asylum appeal procedures. It is to a discussion of the methodology and research methods used in the course of my research into asylum appeal processes that I now turn to in the next chapter.

5. Methodology and Methods

In the preceding chapter I considered theoretical approaches to the examination of the ways that narratives emerge and develop in legal processes. I argued that it is necessary to move beyond in-court settings when studying the ways that stories are created and evaluated in legal discourse. I claimed that it is important to also study the pre-hearing processes which affect how narratives are produced and develop in legal procedures.

This chapter discusses the methodological approach that I adopt in order to explore these working practices of legal actors and legal processes. In the first section, I review the methodological approaches advanced by other (socio-legal) scholars working in the field of asylum law and suggest that the most appropriate methodology for this research is an ethnographic one. By discussing the methods of data collection that I use in the research, I reflect on some of the methodological issues that arose whilst using them. In discussing the positionality of the researcher within the field, I acknowledge the need for reflexivity in data collection and analysis. I consider the benefits, and potential drawbacks, that a researcher's educational and personal background and experience may have in helping to secure access to the field and build rapport in the research process. I finish with a discussion of the ethical considerations associated with this methodological approach.

5.1 A Legal Ethnographic Study

Previously, when the issue of credibility in judicial decision-making has been considered in the literature, it has tended to have been examined through case law analysis of asylum appeals (Weston, 1998; Coffey, 2003; Kagan, 2003; Byrne, 2005; 2007; and Millbank, 2009). Although these are important studies which offer insights into the factors that affect credibility assessments in asylum appeals, their focus on the outcome of asylum claims and appeals means that they do not account for the process of preparing the appeal undertaken by the asylum appellant and their legal representative. Moreover, due to the fact that they are based on analyses of case law, they do not allow for a contextual examination of the interplay between the reception of the asylum narrative and the impact of the different

interactions and relations during appeal hearings on an Immigration Judge's determination. This kind of investigation of the process calls for an ethnographic approach to research.

Ethnography is a term that refers to both a particular form of research and the eventual written product of it (Davies, 1999: 4). Although ethnographic fieldwork is traditionally associated with social and cultural anthropology (Atkinson et. al, 2001: 9), it was also adopted as a method of inquiry by the Chicago School of Sociology in the 1920s and 1930s. Here too, ethnographic investigation of social life was conducted by way of studying 'face-to-face everyday interactions in specific locations...The descriptive narratives portrayed 'social worlds' experienced in everyday life within a modern, often urban, context' (Deegan, 2001: 11). Ethnography, however, is no longer the exclusive domain of anthropological and sociological approaches to research. Instead, it has been appropriated by a wide range of disciplines in recent years. As a result, there are ever more diverse interpretations of what ethnographic research entails (Donnan and McFarlane, 1997: 262). It is helpful, therefore, to first outline how ethnography is understood and used in the current thesis, before turning to a discussion of the methods of data collection that I use in this research.

Ethnography is often used to describe research involving an element of participant observation. However, for research to be 'ethnographic' it necessarily involves '...more than "participant observation" alone' (Macdonald, 2001: 60). As Reinharz notes, it tends to include 'observation, participation, archival analysis and interviewing, thus combining the assets and weaknesses of each method' (Reinharz, 1992: 46). The multi-method nature of ethnographic research is emphasised by Willis and Trondman who state that ethnography is:

[A] family of methods involving direct and sustained contact with agents, and of richly writing up the encounter, respecting, recording, representing at least partly in its own terms, the irreducibility of human experience. Ethnography is the disciplined and deliberate witness-cum-recording of human events (2000: 5, italics in original).

In spite of the various methods of data collection that typify ethnographic research, what defines ethnography for Atkinson and his colleagues is that:

[E]thnographic research remains firmly rooted in the first-hand exploration of research settings. It is this sense of social exploration and protracted investigation that gives ethnography its abiding and continuing character (Atkinson et. al, 2001: 5).

As these conceptions of ethnography suggest, the emphasis in ethnographic research tends to be on capturing the ‘social meanings’ (Brewer, 2000: 10) and understandings of research subjects in the field of research. Ethnographic research also enables an examination of the ways that people construct these ‘social meanings’ in specific situations and the constraints that such situations may place on these understandings and interpretations (Wilson and Chadda: 2009: 549). As such, an ethnographic approach to researching legal processes is particularly useful in that it enables one to explore the ways that ‘legal institutions and actors create and transform meanings’ (Merry, 1992: 360) on the ground. In relation to the research discussed in this thesis, therefore, ethnographic research will provide the opportunity to investigate the ways that ‘credibility’ is created and transformed by various participants during the different stages of the asylum process.

In support of ethnographic approaches to legal scholarship, Starr and Goodale have argued, similarly, that ‘deep and thick ethnography is one of the best routes we have in comprehending the complexity of law and legal processes in a changing society’ (2002: 2). In addition, they contend that ‘[e]thnographic methods are useful tools for accessing the complex ways in which law, decision-making, and legal regulations are embedded in wider social processes’ (Starr and Goodale, 2002: 2). Using an ethnographic methodology to conduct research here means, therefore, that decision-making in the asylum process can be unpacked and explored in relation to the multiple components that feed into and help inform the eventual decision of an Immigration Judge. Moreover, owing to the emphasis in my research on the co-construction of ‘credible’ asylum narratives by applicants, their legal representatives, and interpreters, a research methodology that provides the opportunities to study the processes of narrative production is necessary. As Ewick and Silbey point out, ‘because narratives are situationally produced and interpreted, they have no necessary political or epistemological valence but depend on the particular context and organisation of their production for their political effect’ (1995: 197). Proceeding on this basis, an ethnographic approach may be considered the most appropriate for addressing the aims in my research because it makes possible the study of the contexts and processes of production which Ewick and Silbey identify as shaping the meaning and interpretation of narratives.

In spite of its evident suitability to the research objectives here, ethnography has been challenged by supporters of more positivistic forms of social science. Similarly, as Ewick

and Silbey point out, narrative analysis has suffered the same treatment at the hands of socio-legal scholarship (1995:198). The focus on interpretive accounts in ethnography that aim at capturing the individual's point of view through rich and 'thick descriptions' (Geertz, 1973; Clifford, 1990) and its recognition of 'reality' as socially constructed are at odds with positivistic paradigms and research methodologies. An ethnographic approach to research is one which eschews the scientific models associated with positivistic forms of research and knowledge production. Positivism adopts a stance that suggests '...there is a reality out there to be studied, captured, and understood' (Denzin and Lincoln, 2005: 11), whereas ethnography rejects the assumption of 'a priori constructs or relationships' (LeCompte and Goetz, 1982: 83). As Flood suggests, the ethnographic research process is one which adopts a 'bottom-up' strategy for knowledge production rather than implementing a deductive form of research which states a hypothesis or truth claim and subsequently uses research data for its ratification (2005: 34).

In spite of the stance against positivism adopted by scholars using ethnographic research methods, Denzin and Lincoln point out that early qualitative researchers attempted to add a sense of validity and rigour to their research results by framing them in quasi-statistical formats (2005: 11). Often academics who support positivism in research point to the lack of reliability and rigour in ethnographic research⁹ and so this positivistic framing of qualitative research results could be seen as one move to defend their reliability, validity and generalisability (Davies, 1999: 84). This 'crisis of legitimation' (Atkinson et.al, 2001: 3) in ethnography was closely followed by a 'crisis of representation' whereby the 'privileged and totalising gaze' of ethnographers was called into question (ibid). Essentially, this 'crisis' relates to the failure of many researchers to recognise that the ethnographer does not merely represent the reality of research subjects as constructed by them but that these representations or accounts are necessarily mediated through the ethnographer and therefore also constructed by her (Pollner and Emerson, 2001: 124). This notion is captured well by Ewick and Silbey, when they write:

The world does not really present itself to perception in the form of well-made stories, with central subjects, proper beginnings, middles and ends, and a coherence that permits us to see 'the end' in every beginning. That ordering and interpreting work is supplied through scholarly narrativity. Thus, the scholarly representation and

⁹For a discussion of reliability and validity in ethnographic research, see LeCompte and Goetz, 1982. This article is an example of the authors evaluating arguments around the validity and reliability of ethnographic research but framed within a very positivistic model or approach to such an assessment; they use 'scientific' criteria and language throughout their discussion.

analysis of social action can be itself an act of narration- sociology *as narrative* (1995: 204, italics in original).

In the context of this research, therefore, the study of the construction of asylum narratives will result in what can be conceived, following Ewick's and Silbey's formulation, as an act of narration. It will be necessary to subject the construction of the resultant narrative to the same interrogation as those produced by the subjects of research. Such critical examination could be seen as an exercise of researcher reflexivity, as will be discussed in more detail below.

On this matter of research being produced by both the researcher and research participants, Denzin and Lincoln point out that:

Any gaze is always filtered through the lenses of language, gender, social class, race, and ethnicity. There are no objective observations, only observations socially situated in the worlds of – and between- the observer and the observed. Subjects, or individuals, are seldom able to give full explanations of their actions or intentions; all they can offer are accounts, or stories, about what they have done and why. No single method can grasp all the subtle variations in ongoing human experience. Consequently, qualitative researchers *deploy a wide range of interconnected interpretative methods, always seeking better ways to make more understandable the worlds of experience they have studied* (2005: 21, italics added).

In this research, therefore, attempts to deal with the difficulties associated with capturing the nuanced differences in 'ongoing human experience' are made by adopting an ethnographic study involving participant observation, interviews and document analysis.

5.2 Methods of Data Collection

In order to investigate the research objectives outlined earlier in the thesis (in Chapter 1), I undertook an ethnographic study in and around Glasgow. The main methods of data collection used were participant observation, interviews and document analysis. This multi-method approach provided the opportunity for greater triangulation of data (Denzin, 1970) and added greater rigour, breadth and depth to the research (Flick 2002: 229 discussed in Denzin and Lincoln, 2005: 5).

Glasgow was chosen as the research site due to the fact that it is the only ‘dispersal’ area for asylum applicants in Scotland; in fact, as has been confirmed recently, the city houses the greatest number of dispersed asylum applicants in the UK overall (Stewart, 2012: 33). Consequently, there is a large concentration of asylum and immigration solicitors working in and around the city. In addition, the First Tier Tribunal of the Asylum and Immigration Chamber (FTTIAC) is located in Glasgow. The city of Glasgow may, thus, be considered to form the core of legal activity in relation to the (initial) asylum appeals process in Scotland.

During the early stages of this research (June-September 2009), I carried out participant observation at asylum appeal hearings at the FTTIAC and conducted semi-structured interviews with several solicitors I had met at these hearings. This served as a way for me to engage with legal practitioners in order to gain information about the issues they faced in dealing with assessments of clients’ credibility and the ways that they sought to deal with these. Sustained fieldwork took place over the period June 2010-December 2011. Observation at the FTTIAC hearings (appeal hearings $n= 152$; bail hearings $n = 171$ ¹⁰) at the Eagle Building in Glasgow allowed me to explore the structure of asylum hearings and the interactions between asylum applicants, solicitors, judges and language interpreters more fully than a document analysis of case law and statutes alone would have provided. Moreover, because FTTIAC hearings are not officially recorded observation was crucial to explore the ways that the credibility of an applicant’s claim is, explicitly or implicitly, challenged by the various participants during the appeal hearing process.

It was originally my intention to conduct participant observation in different law firms that provide legal advice and assistance in the areas of asylum and immigration law. I had thought that this would enable me to observe solicitor-client meetings and interactions; follow the claim and subsequent appeal as it developed through the asylum process; attend the appeal hearing at the FTTIAC and obtain a copy of the Immigration Judge’s written determination, which could then be analysed. It was my belief that participant observation would provide greater insight than other research methods into the ways that practitioners deal with the issue of credibility in the process of representing an applicant. In addition, I thought it would allow me to examine the relationships between the various participants in

¹⁰ Bail application hearings tend to move faster than asylum appeal hearings. It is possible to observe anywhere from 2 or 3 to up to as many as 10 bail hearings in one day.

the process and the influence that these have on the way that the credibility of an applicant's claim develops throughout the process.

I was able, to some extent, to do this with five asylum appeals at three different law firms. I focus, in particular, on one of these appeals, that of Mr. I, later in the thesis where I consider the processes of solicitors who prepare witness statements with clients during the appeal process and the ways that these statements are treated and, at times, modified over the course of the appeal hearing process (at Chapters 9 and 10).

I drew less from the remaining four appeal cases for several reasons. One of the cases was that of a Pakistani asylum applicant, I was able to attend two of the meetings that this applicant had with his solicitor prior to the appeal hearing; during the meetings, the solicitor took the appellant's witness statement and responses to the Reasons for Refusal Letter (RFRL) issued by the Home Office. The appeal date for this appellant clashed with Mr. I's and I had to make a decision about which appeal to observe. Mr. I's solicitor intended to make an adjournment request while he awaited medical evidence, I decided to observe the adjournment request, which I believed would be granted, and then to join the rest of the appeal hearing for the other asylum appellant. The adjournment request was refused by the Immigration Judge, however, and so I observed the duration of Mr. I's appeal hearing which meant I was unable to observe the other hearing. For this reason, I did not feel well placed to make claims about the ways that the asylum appellant in this second case had his credibility challenged by the Home Office representative or the Immigration Judge at the appeal hearing.

I was able, to some extent, to observe the preparation of a third asylum appeal case, that of a young man from Iraq, with the Firm where I conducted most of my observation of solicitor-client meetings. The solicitor did not advise me of the case until he had already met with his client two or three times. I was therefore only able to observe the final meeting between the solicitor and his client where the interpreter read the appellant back his witness statement. I did not feel able, therefore, to come to conclusions about the ways that the witness statement had been prepared by the solicitor and the asylum appellant. The same situation occurred in the case of a Palestinian journalist who was claiming asylum and whose case I was only made aware of by the solicitor representing him days before the appeal. In this instance, I was again able to observe the final meeting between the solicitor and the appellant but did not have the opportunity to gather data during the meetings

between the solicitor and the appellant where they prepared his case. The appeal hearing of this case again clashed with the final case that I observed with a further solicitor and his client. That case was of a Chinese researcher whose case was at the Upper Tribunal, Immigration Judges do not revisit the facts of a case at this stage. I continued to observe the case because I had hoped it would lead to the solicitor allowing me to observe others at his firm. The focus of this thesis was on the First Tier Tribunal and so the case at the Upper Tribunal, although informative on a comparative basis, did not form part of the arguments advanced here.

Initial difficulties with access meant that I was not able to fully undertake this process with more asylum cases. It is useful to consider studies which address access issues when conducting ethnography in order to reflect on some of the difficulties with securing access in legal research.

5.2.1 Issues with Gaining Access: Some reflections

In her account of the process of conducting ethnographic research in ‘Hollywood’, Ortner (2010) focuses on the problems around gaining access to the most powerful members of the film-making community. Reflecting on the relative lack of ethnographic work on Hollywood by anthropologists, Ortner suggests that this can mainly be explained by difficulties in securing access to conduct ethnographic research (2010: 212). On the basis of her own struggle to secure such access, she partly frames her account as ‘(meta) ethnographic’, that is, as an ethnography ‘of what trying to do ethnography in Hollywood is like’ (2010: 215). Although, I do not seek to provide such a ‘metaethnographic’ account in relation to my own research, I find Ortner’s candid discussion of the problems she encountered when trying to gain access to those she hoped to study refreshing. This is because issues around access are often overlooked in studies which adopt a qualitative approach. The resultant write-up of much research does not truly reflect the difficulties researchers experience when trying to negotiate access in social research.

Ortner outlines some of her attempts to secure access to conduct participant observation within production companies and on film sets. She describes the process of having to go through multiple channels or contacts in order to try and find the appropriate person to

grant her request, each time getting more excited as momentum builds and her phone calls are returned, only at what seems like the final hurdle to be refused access or for her calls to be simply ignored. One of the explanations she offers for the difficulties in securing access when one has to go through several channels in this way is that it is necessary to secure an ‘insider’s interest’ in the project:

[T]he missing ingredient in these sorts of contacts is the insider’s interest, in either or both senses of the term. It may be a question of pragmatic interest...But there is also the question of interest in the sense of curiosity, of intellectual or ‘gut’ engagement with the idea: somebody needs to feel, for whatever reason that this is an interesting project, and get behind it (2010: 217-8, italics in original).

I had similar experiences with Solicitor A when trying to arrange access to observe his meetings with clients and ‘trace’ his clients’ cases through the appeals process. Solicitor A was an associate solicitor at Firm X. I had originally conducted interviews with one of his colleagues, Solicitor L, and his boss, Solicitor D, who was the Immigration and Asylum Law Partner at Firm X during my preliminary research in September 2009. Both of his colleagues were encouraging and committed to their work; they were concerned with the academic aspects of asylum legal work and displayed a real interest in my research. For these reasons, I decided to contact them when I started my fieldwork towards the end of June, 2010.

Solicitor D replied to my initial e-mail¹¹ to advise that he was happy to be part of the research but that he would need to consult the managing partner of Firm X who was, at that time, on annual leave. He asked that I contact him the following week after which point he would be able to confirm matters with me. I duly contacted him the next week to enquire as to whether the managing partner had agreed to my proposed research. On 21 July 2010, I received an e-mail from Solicitor A advising that Solicitor D had passed on my details and requesting that I call his office to discuss my research. When I called Solicitor A, as he suggested, we realised that I had in fact observed an asylum appeal the previous week in which he had acted. At that hearing we had briefly discussed my research before the start of the case. After discussing what my research might entail, Solicitor A asked whether all the partners of Firm X had agreed to it. I replied that Solicitor D told me he would check

¹¹ Because of my undergraduate studies in law, I was able to consult informally with peers and acquaintances with whom I studied who advised me that the most appropriate way to contact solicitors about my research was simply to ‘drop them a brief email’ rather than write to them or phone them in the first instance. On reflection, I think that a follow-up call after introducing myself to them at the FTIAC may have proved more useful.

with the managing partner and that I assumed he had done so having asked Solicitor A to contact me. Solicitor A sounded anxious, however, and asked that I e-mail Solicitor D again just to make sure that I had a record that he and the other partners were happy for me to do my research with Firm X. I agreed and did so, and on the same day received Solicitor D's response which stated that the managing partner '[had] no problem with this'. I forwarded the e-mail to Solicitor A along with further information about my research. He subsequently was on annual leave for two weeks from 26 July 2010, which I discovered upon receiving an automated 'out of office' response to a follow-up e-mail I had sent him the week after our telephone conversation. On not hearing back from Solicitor A by the end of the week when I knew he was due to return from leave, I tried to call him at his office, but was advised that he was 'out visiting a client'; and so, I sent him a further e-mail. Upon not receiving a response by phone or e-mail from Solicitor A within the following fortnight, I decided to try and use the hearings at the FTTIAC as a chance to speak to him in person perhaps at the end of a hearing, where I would not feel as though I were interrupting his work in the same way as my phoning him at his office may have seemed to him like an intrusion or resulted in him ignoring the phone call.

This strategy proved successful: on approaching him after a bail hearing to formally introduce myself¹² he immediately responded by addressing the fact that he hadn't replied to my e-mail:

KF: Hi there, I'm Katie Farrell- we have spoken on the phone but I thought it might be useful for you to put a face to a name/

Sol A: /Hi, I haven't replied to your e-mail, sorry, when I saw you come in, I thought it was you and I remembered I hadn't gotten back to you...

(Fieldnotes FTTIAC, Bail Apps. 27/08/2010)

After this discussion we agreed that I would phone Solicitor A that afternoon to try and organise his participation in the research. The clients that he had identified as potential research participants were at the very early stages of the asylum process, with one not even having claimed asylum at that point. Solicitor A advised me, therefore, that he would contact me when he was due to receive these clients. I decided to continue attending bail hearings so that Solicitor A would not forget about me and the research, as he had admitted

¹² We had spoken at a previous asylum appeal hearing and so I knew who he was, however, we had not introduced ourselves at that time and I had not met him in person again since our telephone conversation and e-mail correspondence

during our discussion at the Tribunal that he ‘tend[s] to “task” and then forget e-mails’. I understood this to mean that he would use the ‘task’ function in his e-mail account to set reminders to reply to e-mails or deal with the tasks they gave rise to. I assumed that he must have been doing this with my e-mails and then dismissing the reminders when prompted to address them. I was aware though that my research would not have been a priority for Solicitor A and it seemed right that he should be more concerned with focusing on the work he needed to do for his asylum clients. I decided at that stage, however, that I would try and observe at least one hearing a week that Solicitor A was appearing in so as to stay ‘on his radar’ and also to provide me with the opportunity to discuss potential cases that I might observe as they arose.

During this process of trying to arrange initial access, I experienced the same ‘highs’ described by Ortner, as when Solicitors D or A would respond to my e-mails and be available to take my phone calls. Whilst I persevered with trying to arrange access with Solicitor A, my own trepidation at not wanting to be seen to be too ‘pushy’ and risk having Solicitor A decide not to take part at all might have contributed to the initial delays in securing access at Firm X. I continued to attend asylum appeal hearings at the FTTIAC at this time in order to try and familiarise myself with other solicitors working in asylum law practice. However, I decided not to abandon my attempts to gain access to Firm X in order to pursue my research with other solicitors. I had decided that I would only focus on carrying out research with one firm at a time. This was because I didn’t want to risk the chance of meetings at multiple firms clashing and me having to privilege some cases over others; I also felt that this would not be an ethical or a ‘professional’ way to carry out research with the solicitors who had agreed to take part in my research. By having to cancel my attendance at meetings which clashed with other solicitor-client appointments, I might have conveyed a sense of indifference to or of being ungrateful for the participation and assistance of those legal representatives whose meetings I did not attend. In fact, a similar problem arose in my research in relation to the hearings of two cases which I had followed throughout the appeal process. Both hearings were scheduled for the same day at the FTTIAC. Both appellants looked pleased to see me when I arrived at the hearing centre and I spent the time before hearings at the FTTIAC commenced going between them to sit and chat. When both cases were called at the same time, I had to decide which appeal I would observe. In one of the appeals, the solicitor intended to request an adjournment because he was awaiting a medical report for his client. I decided that it may be possible to

observe the adjournment and, assuming it were granted, then join the other hearing and observe the remainder of it. The solicitor's request for an adjournment was denied and the Immigration Judge decided to hear the appeal in absence of the medical report. Upon leaving the hearing room at the end of proceedings, I met the solicitor who had been acting in the other appeal that formed part of my research. As I was with the legal representative whose client's appeal I had just observed, this prompted the solicitor to comment:

Solicitor B: Oh, I see, you chose to go in and see his appeal instead of mine eh?

(Fieldnotes, FTTIAC, 6/1/2011)

Solicitor B appeared to be joking; I sensed, however, that he may have felt 'put out' by me not observing his client's appeal. I decided from that point on to try and avoid negotiating access with any more solicitors whilst these two solicitors were happy to take part in the research.

The FTTIAC publishes 'court lists' that detail the name of the legal firm representing appellants. However, the names of individual solicitors are not mentioned and so it was necessary to ask which solicitor would be acting in a case where Firm X was listed for multiple hearings on the same day. My strategy to try and observe at least one of Solicitor A's hearings a week was made easier by the fact that my relationship with the clerks at the FTTIAC developed to a point where they were happy to advise me of the hearings in which he was set to appear on the days that I attended the Tribunal.

5.2.2 Participant Observation at the FTTIAC: Researcher positionality and recording events at hearings

As I mentioned in the previous section, my relationship with the clerks at the Tribunal developed over time and to the point where I enjoyed a relationship of trust and had a good rapport with them. However, when I started attending appeal hearings at the FTTIAC, I was initially treated as an 'outsider' and in my first few trips to observe hearings was mistrusted by the clerks. This became apparent on one occasion when a clerk to whom I had introduced myself as 'a researcher carrying out fieldwork on issues around credibility

and asylum appeals' approached me after an appeal hearing and the following exchange took place:

Clerk: Where did you say you were from again?

KF: The University of Glasgow, I am a research student there.

Clerk: Oh right. I saw you talking to Ms. S earlier; I thought you said that you were a law student?

KF: I was, I went to uni with Ms. S but now I am doing research. Would you like to see my student ID?

Clerk: Yes please, that might be quite helpful.

(Paraphrased fieldnotes, FTTIAC, July 2009)

I had met Ms. S, by chance, in the bathroom at the Tribunal before the appeal hearings started. It had been several years since we had studied together and so we began to talk about what we had done since leaving university and the work that we were involved with at the Tribunal. Ms. S was a solicitor working in asylum and immigration law with a firm in Edinburgh and so was at the Tribunal to represent a client. We continued our conversation in the waiting area before the commencement of the appeal hearings. By referring to the fact that I had been talking to Ms. S, the clerk seemed to suggest that this somehow meant that I was not who I said I was. He revealed later on in our conversation that because of how I was dressed¹³, he and the Immigration Judge who had heard the appeal that I observed thought that I might have been a journalist. In addition to being mistrusted in the beginning, I was also, left out of hearings that I had requested to observe. On occasions when this occurred, the clerks had advised me that they would check with the judge that it was okay for me to observe the hearing and that they would let me know. Because I had to, in effect, wait for their permission when they subsequently forgot to come and advise me that I was allowed to observe the appeal, I effectively missed the opportunity to observe the hearing.

By attending the hearings more frequently and becoming a familiar face amongst the clerks and legal representatives, I gradually began to build a greater rapport with them and the clerks, in particular. Although I did not achieve the status of 'insider' (Merton, 1972) at the FTTIAC, by virtue of the fact that I did not actually work there with the clerks, I was 'let in' and privy to some of the inner workings of the FTTIAC as an institution. After having

¹³ I had decided to dress formally in order not to stand out from the legal representatives and in the belief that the clerks and others would take me more seriously than if I had turned up in the casual attire I would have worn to classes at University.

attended hearings for several months, for example, I was asked, during a particularly long adjournment, by one of the clerks if I ‘would like any juice or crisps from upstairs?’ I did not fully understand what he meant and then the clerk explained that he ran a ‘tuck shop’ for the clerks and Immigration Judges. This involved him buying cans of juice, crisps and sweets from the supermarket and selling them to his colleagues. I never saw the clerks offer the legal representatives or Home Office representatives the same consideration, and so, by inviting me to take part, I felt, was a sign of being accepted by the clerks. From then on, I would often buy cans of juice from the Tribunal ‘tuck shop’ during adjournments or long breaks between cases. This also allowed me to ‘hang about’ the clerks’ desk during these breaks and this provided me with the opportunity to meet legal representatives who might come to check with the clerks on matters related to their clients’ hearings. As well as being allowed access to such institutionalised arrangements, I was often privy to shared jokes amongst the clerks and also, on occasion, to institutional rule-breaking on their part. In one instance, I was present when a clerk looked up a future diet of cases to let a solicitor know by which Immigration Judge his client’s appeal would likely be heard. This meant that the solicitor could seek an adjournment in advance, if the Judge was one he did not feel would look favourably on his client’s case. This occurred in the clerk’s offices and not at the main desk, and so, by being allowed access to such matters made I felt as though I had come to be trusted by the clerks¹⁴.

In recording such events, I was generally able to note down ‘scratch notes’ relating to these exchanges. These scratch notes prompted my memory when I came to type-up a fuller account of a day’s fieldwork. Sanjek points out that scratch notes are what Clifford refers to as inscription, when he writes that:

A participant-observer jots down a mnemonic word or phrase to fix an observation or to recall what someone has just said (1990: 96).

Like Partridge (Kimball and Partridge, 1979), I tended not to like physically writing out these scratch notes in front of my participants. I felt that it broke the normal flow of conversation and it seemed un-natural to me to do so. I would therefore often take the

¹⁴ In explaining the nature of participant observation fieldwork to the clerks, I made a commitment to advise them of any papers or articles that I might present or try to publish which documented our conversations or encounters.

chance, once I had left the waiting area or clerks' desk and had moved into a hearing room, to make these kinds of 'scratch notes' before appeals started.

Taking fieldnotes at asylum appeal hearings posed its own challenges. As other commentators who have undertaken research into the asylum appeal process have pointed out, 'there are no official transcripts of proceedings in asylum appeals' (Good, 2007: 43). Good has reflected on this in relation to his own work on asylum appeals and it is useful to engage with his discussion on these matters as a way of grounding a discussion of my own experiences with taking fieldnotes. In order to have as full an account as possible of the dialogue and interactions in hearings at the FTTIAC, it is necessary to rely on one's own detailed fieldnotes. Good recognises this in a discussion of his own fieldwork, and notes that:

This involved much frantic scribbling, and was only physically possible because of the repeated hiatuses introduced by the need to interpret questions and answers (Good, 2007: 43).

I too found this to be my experience when taking fieldnotes at appeal and bail hearings. Initially, I struggled to transcribe what was being said whilst also observing non-verbal communications and interactions. However, as Sanjek has noted, 'fieldnotes are "of" the field, if not always written "in" the field (1990: 95), and so, in a similar fashion to what Good did, I eventually developed an abbreviated way of writing which allowed me to type-up a fuller version of events after the fact. Drawing on Atkinson and Drew, Good acknowledges that:

Social scientists seldom have the technical competence or the stamina to produce a verbatim transcript (Atkinson and Drew, 1979: 3 quoted in Good, 2007: 45).

And so, like Good, I do not purport that my accounts of proceedings are to be regarded as verbatim transcripts. Instead, it should be borne in mind throughout the present thesis that they are sometimes paraphrased accounts of dialogue or proceedings which I have tried to write-up in as true a version of the actual events as possible.

5.2.3 Interviews and Document Analysis

Over the course of this research, I conducted 12 semi-structured interviews with solicitors and other legal actors within the asylum process; with the interviewees' permission, I recorded the interviews using a dictaphone and transcribed them fully. The semi-structured nature of the interviews enabled me to ask questions about specific issues that had arisen in the field and during the course of observation. They also permitted the direction of the interview to be steered, in part, by the participant. In this way, the open-ended aspect of such interviews allowed issues and information not yet disclosed during observations to arise. Participant observation and interviews were supplemented by document analysis.

The files of some of the cases that I observed provided a textual representation of the various processes involved in the construction of an applicant's claim. Analysing them also allowed me to examine how a 'credible asylum narrative' might emerge within the asylum process. Comparative data analysis of interview transcripts, fieldnotes, and legal documents, using discourse analysis, enabled me to explore the multifarious and overlapping factors that affect the likelihood of an applicant's appeal being successful.

The aim here, therefore, was to collect data across sources. Ideally, I would observe solicitor-client interviews during the preparation of an asylum claim; the preparation of the subsequent appeal; the appeal hearing and then analyse the appeal determination; and interview the legal actors involved in this claim and appeal process. In this way, the approach to the research could be considered a 'holistic' one. I had hoped that by doing this, the research would meet the calls in the literature for an 'end-to-end' tracing of claims in order to investigate the multiple factors that impact upon the credibility assessment of an applicant at the various stages in the asylum process (Baillot et. al, 2009: 219). Collecting data across sources in this way also contributes to a rigorous and systematic approach to data collection. Interpretations that I made of solicitors' comments and behaviour during participant observation, for example, could be cross-referenced with their responses to questions on similar issues to those to which I observed them respond whilst conducting fieldwork.

5.3 Analysing the Data

Adding validity to ethnographic research is not only accomplished through rigorous and systematic data collection, however, it is also highly dependent on the way that the data are analysed. Recent sociological debates about approaches to analysis in research, including how these choices affect methodological approaches, have centred on the tension between two perspectives on data collection and analysis in fieldwork, namely, Grounded Theory (GT) and the Extended Case Method (ECM).

Tavory and Timmermans (2009) consider the methodological differences between what they see as the two main and divergent approaches to ethnography in sociological research. In explaining what they understand by ECM they use Burawoy's definition of it as an approach which:

[A]pplies reflexive science to ethnography in order to extract the general from the unique, to move from the 'micro' to the 'macro', and to connect the present to the past in anticipation of the future, all by building on pre-existing theory (1998: 5).

In delimiting what they conceive to be a grounded theoretical approach to research, they posit that 'fieldworkers in the GT tradition take their theoretical clues from the "ethnos", the lived experience of a people as bounded by various structures and processes' (Tavory and Timmermans, 2009: 245). This kind of research would reject the emphasis on macro-theories favoured, it would seem, by ECM. However, the premise furthered by grounded theory that theories emerge from the data, from 'the ground up' (2009: 245) fails to account for the role of the researcher in the 'emergence' of the theories.

Tavory and Timmermans do claim that both approaches are situated on a continuum between theory and fieldwork (2009: 245), and this is useful for the approach to research adopted here. They argue that grounded theory dictates that the theoretical boundaries are not set prior to entering the field and that 'ethno-narratives of the field appear before the casing within sociological theory' (2009: 254). In a similar vein, it was my aim to remain open and responsive to research participants' ethno-narratives or lived experiences as they arose in the research setting. By doing this, I hoped to avoid merely reducing ethno-narratives of the actors that I encountered in the field to theoretical narratives that concern more macro-forces.

An important aspect of grounded theoretical approaches to research, identified by Tavory and Timmermans, is the emphasis on the meticulous approach to undertaking fieldwork in order to render familiar settings strange:

By estranging the seemingly obvious interactions seen in the field, the unexpected ways in which narratives are constructed and 'cased' in the field come to the fore (2009: 253).

Such an approach, they argue, is downplayed in the ECM tradition. The need to make the familiar strange in research comes to the fore in relation to ethnographic research which is conducted in familiar settings. The need to continually question what is normally taken for granted in research is a feature of discussions surrounding the need for researcher reflexivity in social research.

In going on to discuss this, I will expand upon comments made above about my position as a researcher in terms of my previous undergraduate legal education, as a way of framing a discussion about the need for reflexivity in fieldwork and specifically in relation to the research in this thesis.

5.4 Reflexive Ethnography

Davies defines 'reflexivity' broadly as 'a turning back on oneself, a process of self-reference. In the context of social research, reflexivity at its most immediately obvious level refers to the ways in which the products of research are affected by the personnel and process of doing research' (1999: 4). These effects, she argues, permeate all stages of the research process and are particularly important in ethnographic research when the society and culture of those being studied is particularly close to that of the researcher (1999: 4). These sentiments are echoed by Wolfinger in relation to processes of data collection in ethnographic research, when he notes:

Ethnographers frequently choose to record a particular observation because it stands out. Observations often stand out because they are deviant, either when compared to others or with respect to a researcher's existing knowledge and beliefs. Either way, background knowledge influences which cases are chosen for annotation (2002: 90).

Wolfinger's comments can be used to support the argument that writing up fieldnotes involves a process of construction of social realities (Atkinson, 1990: 57). In constructing these social worlds, then, it is important to be critically reflective about the fact that the researcher does not descend upon the fieldwork site *tabula rasa* and free from any prejudices or biases. This becomes more difficult when conducting research in familiar environments 'at home' (Peirano, 1998: 107).

In conducting this piece of ethnographic research into legal processes, therefore, I was conscious of the need to make a concerted effort to view what may seem self-evident as unfamiliar, new or other. This became increasingly difficult, especially when trying to engage critically with legal terms, because of my earlier university studies of law. In this respect, the arguments of Pierre Bourdieu, who was committed to a process of reflexivity in social research, are particularly salient:

What needs to be objectivised, then, is...the social world that has made both the anthropologist and the conscious or unconscious anthropology that she (or he) engages in her anthropological practice- not only her social origins, her position and trajectory in social space, her social and religious memberships and beliefs, gender, age, nationality, etc., but also, and most importantly, her particular position within the microcosm of anthropologists. It is indeed scientifically arrested that her most scientific choices (of topic, method, theory, etc.) depend very closely on the location s/he occupies within her anthropological universe...' (Bourdieu, 2003: 283; see also Bourdieu and Wacquant, 1992).

Reflecting on some of the literature concerning the process of legal education and training allows for the kind of critical engagement, suggested by Bourdieu above, with some of the problems that could arise while conducting legal ethnography.

5.4.1 Learning the Language of Law

In his work on theories of linguistic relativity, Lucy has considered how the particular language we speak influences the way we think about reality (1997: 291). The principle of linguistic relativity holds that the structure of a language affects the ways in which its speakers conceptualise their world. Lucy argues that the potential influences of language on thought can be classed into three categories (Lucy, 1997: 292). The first is a semiotic level which addresses how speaking any language at all can affect thinking; in this way a

semiotic relativity of thought can be invoked to make comparisons with the cognitive processes of non-speaking species (Lucy, 1997: 292). The second level, or category, is a structural one which deals with the impact that speaking one or more particular languages can have upon thinking (Lucy, 1997: 292). Finally, the third level, and the one that is most relevant in the current research, is functional and concerns whether using language in a particular way might affect thinking. Lucy notes that this level is the one that is most of interest in discourse analyses of languages, and he writes that:

[U]sing language in a particular way (e.g. schooled) may influence thinking. The question is whether discursive practices affect thinking either by modulating structural influences or by directly influencing the interpretation of the interactional context. If so, we can speak of a functional relativity of thought with respect to speakers using language differently (1997: 292).

Lucy comes to the conclusion that the development of a theoretical account of the ways that ‘languages interpret experiences and how those interpretations influence thought’ (1997: 291) is necessary to add weight to the linguistic relativity hypothesis.

The linguistic relativity hypothesis in relation to legal language or language in legal education is supported by Mertz (2007). Mertz explores the transformations in how students approach language and legal problems as they progress through their first year at law school. Mertz claims that different forms of legal pedagogy are adopted by professors to shift students away from moral and emotional frames for thinking about conflict toward frameworks of legal authority. Here we can draw parallels with the theories of Conley and O’Barr, discussed above, in relation to language in law (see Chapter 3 and Chapter 4).

Similarly, in his work on legal education in the North American context, Jonathan Yovel has highlighted how ‘prospective legal agents- young lawyers, law students- are initiated into a complex linguistic culture through various modes of instruction that are, more often than not, non-transparent to the linguistic ideology that underlies them’ (2002: 1). In this way, the researcher as a ‘product’ of prior legal education comes to the field with not only prior assumptions about what may be found, or what to expect, but potentially, with a set way of thinking that is shaped by a legal consciousness.

Consequently, reflection on uses of terms and concepts, and constant unpacking and revisions of interpretations were necessary in order to ensure that the structural influences

or interpretations of legal discourse were not reproduced in my ethnographic research. In this respect, it became important to question the terms used by solicitors in the course of our discussions and those used by the Home Office in their policy and guidance. Rather than taking for granted terms and definitions of practices which would not be questioned in legal settings, it was necessary to look behind the ‘sanitised’ language that the Home Office would use in relation to controversial or questionable practices, such as the use of immigration detention. Despite this proving difficult, initially, it did, in fact, act as an aide to the reflexive process.

Although my position as a researcher with prior legal knowledge necessitated a critical and reflexive engagement with the processes of data collection and analysis, I had hoped that it would facilitate entry into the field. I had thought that prior legal training or knowledge may enable me to be more useful to potential research respondents, by virtue of my having more to offer in terms of casework assistance in return for their participation. As explained above, my aim was for initial access to be secured via solicitors and then renegotiated over time as new clients were taken on and given the option to take part or not. Using solicitors as gatekeepers to recruit participants, as I did, raises important ethical considerations. There are, in fact, multiple ethical concerns that must be addressed in relation to the current research, and it is to a consideration of these which I will now turn.

5.5 Ethical Considerations

I applied for, and was granted, ethical approval by the University of Glasgow to undertake this research. Pels argues that institutionalised ethics discourses and procedures have become increasingly codified along legalistic and juridical lines (2005 referenced in Harper and Corsín Jiménez, 2005: 10). Beyond satisfying the institutional criteria in place to receive approval to undertake the research, therefore, it was my aim to continually engage with and assess any ethical issues as they arose during the research. Ferdinand and his colleagues describe this approach to ethics as ‘processual’ and note that it involves self-regulation and an assessment of the actual situation in which a researcher conducts research (Ferdinand et. al., 2007: 520). A concern which Harper and Corsín Jiménez identify with the managerial nature of institutional ethics procedures is the fetishization of technical issues such as establishing participants’ ‘informed’ consent (2005: 10). The consent doctrine is often considered to be the most prevailing ethical issue in research with

human participants (Brady, 1979: 6). The principle of ‘informed consent’ within the research process essentially holds that potential respondents should be able ‘to agree or refuse to participate in light of comprehensive information concerning the nature and purpose of the research’ (Homan, 1991: 69). The two aspects of informed consent dictate that participants should be made aware of what is to occur and what might occur during the research process, and that they should be capable of understanding this information (informed); and that they are competent to make a rational judgement to agree to participate and that this agreement to participate is be voluntary (consent) (Homan, 1991; 71).

In relation to the asylum process, therefore, the problematic nature of being able to secure the informed consent of potential respondents becomes evident when considered in light of the fact that applicants may be suffering from Post-Traumatic Stress Disorder and may therefore be unable to grant valid consent to take part (Newman and Kassam-Adams, 2006). Regarding instances where social research begins to look at whether ‘subjects’ are deemed to be competent or not, Sin (2005) argues that ‘competence’ is not ‘all or nothing’ but rather it is task-specific (2005: 280). For Sin, the ‘changing nature of informed consent necessitates a reflexive approach to its engagement’ meaning that ‘there can be no universal set of criteria for ascertaining competence; definitions and interpretations of competence have to be agreed upon for individual studies’ (Sin, 2005: 279-280). Therefore, I was of the opinion that deciding whether participants were able to provide valid consent or not would entail a degree of reflexivity whilst in the field.

I did believe that applicants should be given all the information relating to the research in their own language. In the cases where I did observe meetings between lawyers and clients, the interpreters hired by the solicitors conducting the appeal were happy to translate the information sheet which I had prepared for potential research participants in line with institutionalised ethics procedures. I prepared separate information sheets for ‘asylum applicant’ participants and ‘non-asylum applicant’ participants, namely solicitors (See Appendix 1 and Appendix 2). On one occasion, I paid to have the information sheet translated into Urdu for a client of Solicitor B’s that he had identified as a potential participant. However, between the time of my having the information sheet translated and

the solicitor's next scheduled meeting with the client, the client had changed solicitors¹⁵. After that incident, I decided to wait until the actual meetings solicitors were to have with clients and let the solicitor ask the interpreter to translate the information sheet for the client.

In addition to asking the clients' permission at meetings, Solicitor A told me that he would also explain to the client when I wasn't there (usually when he walked them from the meeting room of Firm X to the reception following the conclusion of a meeting) that they were under no obligation to take part. He assured them that if they didn't want me to attend future meetings they only had to let him know.

I was aware that by using solicitors as gatekeepers to potential asylum applicant respondents, the 'voluntary' element of those respondents' consent could be called into question. Power relations in research are often discussed relative to the researcher-researched relationship (Bhavani, 1988; Bell and Nutt, 2002). When considering the institutional settings in which asylum applicants were approached to take part in my research further questions might be raised about 'gate-keepers', in this case solicitors, who may be in a position of some power over vulnerable would-be-participants (Miller and Bell, 2002: 67). It could be argued that this may be inevitable when coming to study such processes and that being explicit about the decision to participate being a voluntary one, as Solicitor A and I were, and being as open as possible about research aims and objectives may be some of the ways that allowed for this power imbalance between would-be-participants to be addressed. On the other hand, I had thought it would be interesting to consider the idea of refusals by asylum applicants to take part as an example of their deploying agency to subvert or resist the power relations that the process automatically sets up between them and their solicitor. However, this did not happen with the appeal cases that I observed and, instead, clients seemed on the surface quite content to have me attend their meetings.

The power of the researcher should also be acknowledged, especially when considering the writing-up of research once away from the field. The role that ethical considerations and the effects of research relationships play when deciding what should be included or omitted when analysing data are also important factors when addressing the ethics of

¹⁵ The client was a female from Pakistan who solicitor B explained was 'a gender case'. She had sought help from an all-female department of specialist solicitors at a local law centre who dealt exclusively with women's asylum claims.

research. Striving to feedback to respondents is one way of addressing this power imbalance in the process of representation in writing-up research. During a chance meeting with Solicitor A after the field research was completed, I informed him that I was presenting a paper at an academic conference and asked if he minded if I use a quote of his in the title of the paper. He stated that he didn't and then asked if 'out of interest' I could send a copy of the paper to him. Although I felt quite nervous about it, I agreed to do this because I viewed it as a way of providing feedback to him.

The ability to promise that the data would be confidential and the potential to completely anonymise them were questionable in relation to my proposed research. It has been highlighted by other researchers that due to the small community of practitioners in the area of asylum and immigration law in Scotland, here specifically Glasgow, and their ability to identify one another through their work and modes of expression or opinions, it is difficult to guarantee anonymity of participants (Craig et. al, 2008). Moreover, due to the small number of appeals that may be heard on any given day involving applicants with similar narratives and countries of origin, it may be possible to identify who has been involved in the research. This issue is not fully dealt with in the literature by social researchers who have conducted similar research due to the fact that their research dealt mainly with information that was in the public domain or that was gathered during proceedings in courts that were open to the public.

In summing up, therefore, carrying out qualitative research with 'vulnerable' groups, and the area of asylum processes in particular, can be seen to give rise to a range of significant ethical issues. Adopting a processual approach to ethics may be one way of ensuring that research is reflexive and aware of the power relations and imbalances that may affect the process of securing 'informed' consent. Providing clear information for potential respondents and subjecting consent forms to the rigours of ethics processes may be one way for research to be viewed as 'ethical'. It must be borne in mind, however, that this suggests ethics to be normative and, in actual fact, consent and ethical considerations must be subject to review and renegotiation throughout the research process.

5.6 Conclusion

This chapter has outlined the methodological approach that I adopted in order to explore the ways that narratives develop and are received in the asylum appeal process. In the first

section, I reviewed the methodological approaches advanced by other (socio-legal) scholars working in the field of asylum law and suggested that the most appropriate methodology for this research was an ethnographic one. I elaborated on my discussion of why this research called for an ethnographic approach and made a case in support of the use of ethnography in legal scholarship, more generally.

In this chapter, I also discussed the methods that were employed to carry out the research and, in so doing, I reflected on some of the issues around access that I experienced when trying to organise participant observation with solicitors and their clients. I discussed how I moved from a position of relative outsider to one where I was trusted and accepted by the clerks to the Tribunal. Building a strong rapport with the clerks allowed me to negotiate access to cases that I was keen to observe as part of my research. Moreover, my ability to ‘hang around’ the clerk’s desk during breaks and adjournments provided me with the opportunity to communicate with solicitors who came by the desk to check on cases and speak to the clerks.

I considered the benefits, and potential drawbacks, that a researcher’s educational and personal background and experience might have in helping to secure access to the field and build rapport in the research process. My experiences as a law student at undergraduate level also afforded me some advantages in creating links with potential research participants by virtue of our social connections or similar experiences from having studied at the same law school. In addressing these factors I have outlined my attempts to maintain a commitment to reflexive ethnography throughout. I argued that the need to maintain self-reflexivity in ethnographic research is heightened when carrying out research ‘at home’ and when operating within the strictures of a familiar discourse as I was doing in this research.

This chapter also identified certain operational issues which arose whilst carrying out participant observation in appeal court settings. The rapid pace of legal proceedings meant that taking fieldnotes whilst also following what was actually happening became a difficult process to negotiate. In accordance with the practices of scholars conducting similar research (Good, 2007: 43-46), therefore, the reports of interactions at appeal hearings that I present throughout the thesis tend to be paraphrased accounts of proceedings.

Finally, I explained the ethical considerations associated with the methodological approach I adopted in my research. I drew on the work of commentators who have pointed to the highly legalised and juridical format that institutionalised ethics procedures have adopted in recent times to argue that it is necessary to view an engagement with ethics as processual during the research process. I explained that I tried to assess the ethical issues which arose in the situations in which I found myself during the research. Although I acknowledged the difficulties around the notion of ever being able to achieve the 'informed' consent of participants, and, in particular, of asylum applicants that could be considered to be a 'vulnerable' group, I outlined the steps that I took to try and provide as much information as possible about the research to potential participants. Additionally, I claimed that a commitment to ethical research extends beyond the field and into the write-up of events. On this basis, I explain in this chapter how I have tried as far as possible to anonymise the identities of my research participants. And also the ways that I have attempted to provide feedback on the research to those who have requested it.

I have contextualised the research in this thesis by outlining the institutions and procedures involved in the asylum appeals process (in Chapter 2); reviewing key literature in this area and the contribution that this thesis can make to it (in Chapter 3); and setting out the theoretical and methodological approaches that were followed in this study (in Chapter 4 and Chapter 5). In the remaining chapters of the present thesis, I will now turn to a discussion of the empirical findings of the research.

6. The Triangle of Misery: the changing nature of legal aid funding and its impact on solicitor morale and access to justice in the asylum process

Sol A: We had a Firm X Team Building Weekend and it was all management speak and we had this thing called a Transition Curve that this management consultant was telling us about. I can't actually remember what it is now, but with the Transition Curve you start out okay and something bad happens and you go like this (**Sol A motions down with hand**) you're at the lowest of the low and then you go up again when things get better. And the joke was that at Firm X you're always at the bottom of the Transition Curve and then I invented the Triangle of Misery that was, the Scottish Legal Aid Board, Clients and the Home Office; because sometimes it feels like you are getting it from everywhere in this job.

KF: And are you in the middle of the triangle of misery?

Sol A: Yeah, at the bottom of the Transition Curve whilst inside the Triangle of Misery

(Solicitor A, Interview, July 2011)

The desperate sentiment expressed in the above interview extract reflects the almost daily struggles that many legal aid solicitors experience in relation to their work. In focusing on the Scottish Legal Aid side of the 'Triangle of Misery' described by Solicitor A, this chapter will explore some of the reasons behind the feelings of despondency experienced by this, and other, legal practitioners working in the field of asylum and immigration. It will be important also to investigate the 'Clients' and 'Home Office' elements of the Triangle, however, and this will be done elsewhere in the thesis.

The chapter will go on to consider the impact that issues around legal aid funding have on solicitor morale and their working practices. It will argue that restrictions on legal aid arrangements may lead to a lack of quality legal services for asylum applicants; this in turn raises questions about access to justice in the asylum process. The chapter will then conclude by suggesting that proposed changes to the nature of legal aid funding in Scotland, which would bring it more in line with arrangements in place in England and Wales, would only serve to intensify such problems and further compound issues of access to justice for applicants in the asylum process.

6.1 Legal Aid Funding in Scotland

The Scottish Legal Aid Board (SLAB) is responsible for the administration of the legal aid system and the legal aid fund in Scotland. SLAB was established in 1987, taking over responsibility for managing legal aid from the Law Society of Scotland. It operates as a non-departmental public body and is funded by and responsible to the Scottish Government. There are generally two types of legal aid funding available in Scotland: criminal legal aid and civil legal aid. Legal aid for asylum cases is funded under the civil legal aid branch and tends to be granted under the more simplified form of Advice and Assistance or Advice By Way of Representation (ABWOR).

Legal aid funding structures have undergone reform in recent years with the most current proposals for transformation subject to a consultation process (ongoing at the time of writing) being carried out by the Scottish Government (2011). The consultation document, *A Sustainable Future for Legal Aid*, pledges to implement reforms which ensure the best value and protection for the taxpayer (Scottish Government, 2011: 5), the motivation to maximise the value and efficiency of legal aid expenditure being presented as one of the driving factors behind the proposals for change. Wilson described the year 2011 as a ‘crunch’ time for access to justice in Scotland. This was due to the 8.22% cut in the legal aid fund which took place during that period (Wilson, 2011: 2). In addition SLAB’s expressed commitment to ‘ensure value for money, to do more with less, and to find ever more innovative ways to deliver services’ (SLAB, 2010: 170) was a recurrent theme in its 2011-14 Corporate Plan. As the latter states: ‘A key priority this year is...to continue to further increase value and efficiency in legal aid expenditure’ (SLAB, 2011: 10).

This rhetoric of value for money and efficient spending in the public sector has been identified by scholars such as Hilary Sommerlad to be part of the micro-processes of New Public Management (NPM), which she describes as ‘the shorthand term for the regulatory programmes put in place throughout the public sphere, including the legal aid sector, to rationalise cost, raise quality and increase efficiency’ (2008: 181). Like others critical of

NPM (e.g. Dent et. al., 2004), Sommerlad regards the processes implemented under these forms of public administration as following a neoliberal logic that positions the citizen as consumer and reconfigures the meaning and substance of access to justice and social justice (2004: 346). Although a full discussion of processes of New Public Management does not fall within the scope of this chapter, its impact on the legal aid sector will be briefly considered in order to address questions around legal aid funding and access to justice.

Sommerlad has argued that despite proposals for reform to legal aid being made with reference to the need to ensure ‘access to justice’ and social inclusion, these phrases actually serve as a ‘rhetorical cover for a shift to a meaner and more conditional form of legal aid...which prioritises value for money (VFM) for the taxpayer’ and in fact, marginalises those other values (2008: 181). She goes on:

As in other areas of the public sector, this neo-liberal economic discourse has framed legal aid in terms of affordability: the reasons proposed for cut backs include the growth in the legal aid budget and the fiscal crisis of the state. In arguing that this rationale is essentially ideological, I am not, of course, claiming that budgets are infinite. But framing the policy in these terms has made it possible to constitute ‘justice’ as any other ‘product’, with the result that the ‘right’ of access to it can be reconfigured in relation to other selected public goods; typically for example expenditure on legal aid may be compared in terms of desirability to expenditure on hospitals (2008: 181).

During the micro-processes of NPM, money-saving measures and policies are introduced. Sommerlad has argued that when this took place in the past, with the capping of the legal aid budget, the legal aid solicitor was depicted in political discourse as a ‘rent seeker’ who manufactured clients’ needs and demand for legal aid services in pursuit of his or her own self-interest (Sommerlad, 2008: 182). This occurred in particular in 2008 when, as Sommerlad notes, government ministers expressed outrage at the use of legal aid funding to lodge judicial reviews of their decisions about asylum (2008: 182 n.26). Sommerlad recognises that there may have been some validity in relation to claims that certain practitioners induced demand for their legal services, but she highlights that the representation of lawyers as ‘complete hucksters’ who regard ‘legal aid as a gravy train’ was one which was exploited in order to legitimate reform (2008: 182-4).

Sommerlad has explored the impact of these aspects of the restructuring of legal aid arrangements in England and Wales on legal aid practitioners (2001; 2008). During the time I spent conducting participant observation, comments, discussions and anecdotes about legal aid permeated my observation of solicitors at the Tribunal and in other settings. Throw-away comments about what SLAB would or wouldn't fund or general frustrations that solicitors were experiencing in trying to get 'the Board' to pay out on cases became a routine feature in conversations with legal representatives. It was this consistent reference to SLAB during my observation research which prompted me to broach the subject with research participants in a semi-structured manner during interviews.

Although the ways that legal aid funding is arranged and administered differ between Scotland and England¹⁶, it is possible to draw similarities between Sommerlad's findings and the situation amongst solicitors undertaking publicly funded asylum law work in Scotland. Sommerlad investigated the effects of changes to legal aid funding under NPM on the morale and everyday working experiences of what she termed 'political private-practice legal aid solicitors' (2001; 2008). Her use of the term 'political private-practice legal aid solicitor' was motivated by a distinction between lawyers involved in the kind of work encompassed by the label 'cause lawyer' or 'radical lawyer' and the practitioners with whom she carried out research. 'Cause lawyer' is a term used by Sarat and Scheingold (1998) to describe lawyers who attempt to use legal means in order to achieve social change (see Berenson, 2008: 3). They are generally committed activists who seek to use their legal skills to advance a political cause (Bloom, 2008: 1). The participants in Sommerlad's study were involved in legal aid work and, although committed to the transformative potential of their work in relation to social justice, were employed within private law firms that sought to meet the needs of individual clients rather than fight for particular over-arching causes (Sommerlad, 2001: 336 n8).

The solicitors who were involved in the research that I undertook would also fall into the former category adopted by Sommerlad. Most of the solicitors that I spoke to about their

¹⁶ In England, legal aid is administered by the Legal Services Commission, a cash limited organisation that enters into contracts with legal firms in relation to legal aid work. This means that only franchised firms that have entered into contractual arrangements with LSC can carry out legal aid work. As opposed to a system of hourly rates, the English legal aid scheme operates on the basis of fixed fees, which specify the budgets within which suppliers of legal aid services can operate (Sommerlad, 2001: 341). This system has now evolved with the introduction of a process of tendering whereby firms can bid for legal aid contracts with the lowest bidder usually being awarded the contract. This process of tendering means that there are fewer providers of legal aid legal services (Sutherland, 2010: 188).

motivations for entering the field of asylum law expressed a desire either to use the law to help people, to find more fulfilling work or to work in an area that involved a commitment to ensuring the promotion and protection of human rights. In addition, the majority of the solicitors worked in private legal firms and so had the same pressures to generate income for their firm as those working in other departments in the same organisation. Unlike cause lawyers who usually work for law centres or charities, lawyers who took part in my research, typically, worked in the immigration departments of private practice firms. In order to consider the different pressures and working conditions experienced by these solicitors, it is useful to briefly consider the different types of legal organisations that tend to undertake asylum and immigration casework.

6.1.1 Asylum and Immigration Law: Private practice firms and law centres as legal service providers

Generally, law centres aim to provide legal services to people around issues to do with housing, social welfare, employment, immigration and mental health. They provide advice and representation without charge to those who need it. Law centres are non-profit organisations which tend, in the Scottish context, to receive funding from local government, the Scottish Executive and by claiming payment for their work from the Scottish Legal Aid Board. Often, they receive additional funding from charities and national trusts. Generally, law centres have salaried staff including solicitors, paralegals and community workers; they often specialise in social welfare law and work which has a 'wide social impact' (Chambers Student, 2012). Owing to the non-profit nature of law centres, there is not the same pressure on the solicitors who work there to generate income for the centre through earning fees for their work. In the context of asylum representation, as noted above (at 6.1), these fees would generally be met by the Scottish Legal Aid Board because asylum applicants tend to have no form of income and so are eligible to apply for publicly funded legal representation.

By contrast, private practice firms are for-profit and are made up of a number of self-employed partners working on a profit-share scheme supported by employed solicitors. Partnerships vary greatly in number from sole practitioner through to over one hundred

within larger national or international firms. Of the solicitors who took part in my research, most were employed within small to medium sized private practice firms, with the number of partners ranging from one to thirteen. There was an imperative, therefore, for those solicitors to meet targets in relation to the fees which they brought in for the firm. These targets were set by the partners of the firms in order to sustain the business and also generate profit. Due to the fact that most of the asylum work that the solicitors in my study undertook was funded by the Scottish Legal Aid Board, the negotiations with the Board in regards to payment for their work carried with them the additional pressure of ensuring they were paid in order to meet their monthly departmental fee targets.

Similarly, Sommerlad's research into the effects of legal aid restructuring focused on solicitors working in small to medium sized private practice firms. Her research provides important insights into the experiences of 'political private-practice legal aid solicitors' as they dealt with new and ever-more-restrictive legal aid funding policies. Sommerlad found that amongst these lawyers the increased bureaucracy and reduced fees that were introduced as part of a reorganisation of legal aid structures resulted in legal aid solicitors feeling undermined and mistrusted, over-burdened by additional administration and generally that they were being under paid in light of the complexity and number of working hours involved in many aspects of their casework (2001: 354). She discovered that the most demoralising effect on her respondents was 'the distrust of their commitment and professionalism' (2001: 355).

In a similar vein, and like one of the lawyers in Sommerlad's studies, in particular, who felt she was devoting most of her time to justifying herself and all the work that she did (2008: 186), some of the solicitors in my own research also described how they were being made to feel like 'chancers' or even professionally incompetent by SLAB. For example, Solicitor A commented as follows:

Sol A: Well SLAB don't want to pay you. Effectively, they don't want to pay you. I mean I understand that they have got cuts that they've been told they have to make, I mean everybody's getting it at the moment. And all SLAB are interested in, I think, is where they can cut money or cut the payments they are making. Even when you submit an account to the Legal Aid Board, that account then gets abated. They will routinely knock 50-100 quid off every account and you have to then go back and argue with them about it, which is just soul destroying. Because basically, there are solicitors who are at it but not any that I can think of. None that do this sort of stuff cause you do make money out it, but it's not big bucks. Nobody's chiselling the system and you are just made to feel by SLAB that you are a chancer. They will ask,

‘Why are you submitting this?’ And you think well, ‘Because I did it and I deserve to be paid for it’. And stuff like, say a perusal time, you get a file of papers from previous reps and it’s 300 pages and you have to trawl through it and find out what has been submitted before and what the previous decisions are. That can take, what, a couple of hours of your time and they’ll come back to you and say, ‘well, we think it is reasonable that that would take you an hour and a half’. You think, ‘well are you saying that I’m lying about the two hours or are you saying that I am bad at my job? Because it took me two hours and I deserve to be paid for it’ and stuff like that...you always feel like you are justifying what you’ve done.

(Solicitor A, Interview, July 2011)

In addition, some solicitors felt that they were locked in a ‘constant fight’ (Solicitor A, Interview, July 2011) or ‘battle’ (Solicitor D, Interview, August 2011) with SLAB when it came to claiming payment for work undertaken to which SLAB had in principle agreed, but which it would then subsequently question during a process of abatement.

This frustration seemed to be shared by various legal practitioners during a training session on *Asylum Law Beyond the First Tier* held in Glasgow on 23 November 2010. During the course of this workshop, it transpired that two representatives from the Scottish Legal Aid Board were in attendance. In an interactive section of the workshop that involved dialogue amongst participants one practitioner commented on the difficulties they were having in getting the money back for an expert report that they had instructed in an asylum appeal case. The solicitor commented that SLAB had agreed for an ‘increase’ on the case to allow for the report but that when she came to claim payment the need to get the report was questioned by Scottish Legal Aid Board. One of the representatives from SLAB tried to deal with the query but the discussion amongst the floor turned into a continuous stream of legal representatives with similar experiences until one of the advocates in charge of the session intervened and effectively ended the discussion.

The problems that these solicitors discussed at the seminar reflected the comments of Solicitor A about having to ‘go back and argue with [SLAB]’ in order to secure payment for completed work. This negotiation process involved more form filling and ‘paperwork’¹⁷, thus creating an added administrative burden for solicitors. Similarly, a further source of frustration amongst solicitors who took part in my research, also akin to those who took part in Sommerlad’s research (2001), seemed to stem from changes to the

¹⁷ I use the term ‘paperwork’ metaphorically here due to the fact that most of the forms and legal aid administration is dealt with online through the Board’s webpage [‘Legal Aid Online’](#).

legal aid administration which conferred a greater level of bureaucratic responsibility on to solicitors.

6.2 Changes to Operations as a 'Hindrance to Justice'

The most recent changes to operational aspects of civil legal aid transfer the responsibility for checking the financial position of those claiming legal aid, in order to ensure that they are entitled to do so, to solicitors. This involves solicitors having sight of bank account information and wage slips or benefits provisions to make sure that their client is entitled to receive legal aid for the work done on their case. During the consultation process on the introduction of new rules for financial verification procedures, these measures were considered by those working within the legal aid sector to constitute a burden for legal aid practitioners and a hindrance to access to justice for clients (SALC, 2010). Following implementation, they posed problems for solicitors working in the field of asylum, in particular, where, more often than not, asylum applicants will not have bank account documents or financial information to provide. They do not, therefore, have any evidence to demonstrate that they are entitled to publicly funded legal representation. This caused particular problems and frustrations for one research participant who felt burdened by the task of having to verify client eligibility for legal aid and felt as though SLAB did not fully appreciate the position that asylum solicitors are in:

Sol A: You need to be able to show that the client is on NASS support or doesn't have any income at all. The Board used to do their financial verification themselves, but obviously nobody's got any money and the Board are trying to make cuts so now they are asking us to do their job for them and check whether clients do qualify for Legal Aid. So before you get an application for Legal Aid granted you have to make sure that the client is on NASS, they have to bring evidence of that to the first meeting, or if they're not getting any money you have to get them to sign a mandate now. Which I am not sure I agree with because as a solicitor you're getting the client to sign a form saying 'I qualify for Legal Aid' and you're signing a form saying 'I believe the guy qualifies for Legal Aid' and then you're having to do the Board's job for them where you're having to do all the financial verification as well. It is just extra work that we don't get paid for, basically.

(Solicitor A, Interview, July 2011)

This particular solicitor also felt that the extra work incurred in taking on responsibility for financial verification of new legal aid clients was also compounded by the way that SLAB responded to such applications:

Sol A: You get back messages where SLAB don't even read your applications. You get two boxes at the end that says 'I haven't seen documentary evidence that says he's got the income that he says he has' and 'I haven't seen documentary evidence that he's got capital', so you are meant to see bank statements and things like that. For an asylum seeker who has arrived in the country four days ago, he doesn't have a bank account, he's not eligible for work, he's not getting any support at the moment because NASS hasn't started, so 'No, I've not seen these things, and I am telling you I've not seen them' and they write back and say 'Why haven't you seen these things?'. And so you say, 'Like I have told you in the application, would you read it please!' It is just, *soul destroying* at times having to answer all this rubbish because we might sign up 3 or 4 clients a day and if you multiply that over two weeks you get all these messages back at the same time, saying the same thing and you have to sort all that out before you can get paid.

(Solicitor A, Interview, July 2011)

Another solicitor commented on the changes during informal discussion at the Asylum and Immigration Tribunal. On this occasion, several solicitors were gathered chatting at the clerk's desk in the Tribunal when I approached the clerk to check the arrangements of an appeal I wished to observe. It seemed as though they were discussing legal aid funding and, in particular, responses from SLAB. Following my discussion with the clerk, one of the solicitors in the group who I knew turned to talk to me and enquired about how I was getting on with my research. I replied and then asked if she and the other solicitors had, in fact, been talking about the new arrangements for checking the financial situation of their clients, I also commented sympathetically that she must be finding it a difficult requirement to fulfil. The solicitor agreed and went on:

Sol G: It is ridiculous. I mean if we have to show this for every client in order to get paid, we'll go out of business. We just can't do it with our clients.

(Paraphrased from fieldnotes FTIAC May, 2011)

This solicitor practised exclusively in the areas of asylum and immigration and so the difficulty with carrying out this process which is suggested in her comments: 'We just can't do it with our clients', reflects the problems explained by Solicitor A above in relation to asylum applicants often having no financial records to examine or present to SLAB as a means of demonstrating that they qualify for legal aid. However, for some

solicitors it seemed that the restrictions and extra administrative tasks functioned as a positive change in relation to their business prospects in that they posed a disincentive to law firms that carried out asylum work as an ‘extra’ as opposed to their main practice area. As another solicitor commented following the interaction with Solicitor G above:

Sol E: Ach, I know it is a bit of a pain but it is actually quite good for us because it means people who just dabble in it are not as keen to anymore and I mean this is our bread and butter so...

(Paraphrased from fieldnotes FTTIAC May, 2011)

Others were cognisant of the difficulties facing SLAB due to budget cuts and were reticent to complain about the Board despite expressing difficulties in securing funding:

Sol F: I would say you know, I don’t want to be too hard on the Legal Aid Board, because to be honest as long as we explain everything to them and give them enough information and are clear in what we say to them then they generally will give us funding. So, I don’t want to say that Legal Aid are really difficult but it is an added administrative burden.

(Solicitor F, Interview, December 2011)

However, during another discussion in the same interview, the solicitor’s response suggested that legal aid provisions posed an obstacle and prevented him carrying on with what he considered a *good* case:

KF: So, when you say ‘fresh claims’, what is that?

Sol F: Yeah, that’s Immigration Rule 353. It’s when they’ve been refused and they have new evidence that’s not been before the court. It could take any form, it might be, a good example is one which hasn’t gone because Legal Aid wouldn’t give us an increase for us to be paid for the letter (**both Sol F and I laugh incredulously**) because we had spent all of the money getting statements and all of the time, you know, and they wouldn’t give it, but I have been messaging them, so hopefully we will get that back. So it is sitting here getting ready to go.

(Solicitor F, Interview, December 2011)

Others were positive about the fact that they felt that in Scotland the profession had been somewhat ‘protected’ from the severe cuts that were being made to legal aid in England and Wales:

Adv A: We’re very fortunate in Scotland. We have not been effected by the pruning of Legal Aid that there has been South of the Border and there don’t appear, and I am touching wood for your notes, to be any proposals of plans that there should be. I

have to say that I think in Scotland, we are actually well catered for and I don't really want to criticise the Legal Aid Board and the Scottish Government, because they've either forgotten about us or they've made a conscious choice to protect us. But. Legal Aid is being hacked back in all areas South of the border and that is a matter for concern.

(Advocate A, Interview, August 2011)

In spite of this, during discussions about the appropriate way to prepare an asylum narrative or 'witness statement' in an asylum case this interviewee was of the opinion that legal aid funding was not sufficient in order to carry out the task in a competent manner:

Adv A: What used to happen is that people would be issued what were called Statement of Evidence Forms or SEFs, and it involved taking as much care as you could in doing a good Statement and, I have to say, that this is where I think the subsidised law centres come into their own, because I don't think that is something that the Legal Aid Board funds properly. To take a proper Witness Statement is something which just takes hours and hours and hours because people do not come in to you...well, you do not get a Zimbabwean coming into you and saying 'I have a well founded fear of persecution in Midlands Provence, internal relocation is not available to me because I do not have access to economic resources elsewhere in Zimbabwe, there is an insufficiency of protection for me as the State is the origin of my fear of persecution and I am not excluded from refugee protection because I haven't been involved in any violation of...' You know? People come in with their lives in a tumble and they need to have it teased out of them and this again incidentally is something that I think credit has to be given specifically to the subsidised law centres because they're very good at building up long-standing relationships with people, giving them space and time to relax and give thorough statements. The Legal Aid Sector just can't, it just doesn't have time for that and I think that's probably a structural problem.

(Advocate A, Interview August 2011)

This particular Advocate emphasised the fact that subsidised law centres provide best-practice in this area:

Adv A: What you do is you have several meetings with the client, you see again I was in a subsidised law centre so I had that luxury, but you write down what the person is saying, you write it down and then you structure it...and I would be trying to put it all in chronological order and it would be all over place so you would be turning from page 18 to page 4 and then to page 31 and then back to page 2 and it really was like a Rubik's cube, but doing it properly that is how you do it. You put it into a structure, you develop it chronologically or thematically and then you produce in hard copy a draft of the word processing and then you have a final meeting with the client and you give the client the opportunity to revise and finalise it. That however, is a counsel of perfection and as I say, outside the law centres I don't think anyone is funded to do that.

(Advocate A, Interview August, 2011)

From Advocate A's comments above, it seems that legal representatives working on asylum appeals in law centres benefit from being able to take their time over the preparation of the witness statement. They are able to have several meetings with clients, which Advocate A describes as a 'luxury' that those not working in law centres are not able to enjoy because, it appears, they are not funded to do so. When asked if training would improve what he describes as poor practice in preparing witness statements amongst certain practitioners, he reiterated that the main fault lay in the lack of funding to carry out the task properly, as opposed to the problem being with incompetent solicitors:

Adv A: I think, to be really fair to most of them, it is a resources issue. The additional training would be helpful but I don't know what the answer to the resources question is either. I mean I don't for one minute delude myself that there is anybody going to throw any more money at this area.

(Advocate A, Interview August, 2011)

Advocate A's comments that 'it is a resources issue' which impacts upon the working practices of solicitors are apt and merit further examination. It is appropriate, therefore, to consider the role that legal aid structures have on casework. The imperative to be remunerated for work carried out and the pressure on solicitors to generate income for their employers dominates considerations and decisions when conducting an asylum appeal.

One solicitor spoke of the pressures associated with SLAB 'abating' his accounts:

Sol A: Well SLAB like to apply a sort of 'one size fits all things' to every case. Asylum appeals are templated, which means there is a template increase that you can get from SLAB. The initial Advice and Assistance sum is 95 pounds, because you can get a client in and have a meeting and see what is going on in their case and you are covered with your 95 pounds for that. If it is an asylum appeal, you can automatically get an increase to 1800 and they have a template which shows what they will pay for under that. But when you submit an account they have an idea of what they think it is reasonable to pay. And my opinion is, and other solicitors share this, if you come in under the 1800 pounds, you should get paid straight away for everything you have done because you have brought it in under the 1800 which is what they say you should need. But no, we are usually 1200 or 1300 for an appeal, depending on what has happened in it and how complicated it is and they will routinely abate 200 quid off everything you put in.

(Solicitor A, Interview, July 2011)

This solicitor stated that he felt at times that he was not being paid for work he had done. The representative was a salaried solicitor and so it was not that his wages were dependent on SLAB granting his claims for legal aid. It appeared both a matter of principle that he should be paid for work that he felt was of worth and also that he was aware of the fact that the law firm was an income-generating business. During discussions of the need to instruct expert and medical reports to ensure a fully prepared appeal for a client, he commented:

KF: I was going to ask, if you wanted to get an expert report would that be outwith the template?

Sol A: Yeah, yeah you would need to get sanction for that.

KF: And if you didn't get sanction, but you still felt that you really had to get it, would you be able to order it or would that have to go through the partners in your firm?

Sol A: Well, if you can't get funding for it you can't get it. Cause I mean, a legal firm is not going to pay 900 quid for an expert report out of the goodness of their own heart, I am afraid, we're not a charity.

(Solicitor A, Interview, July 2011)

Despite this imperative to be paid and the business awareness of several of the solicitors I interviewed, there was a genuine commitment to ensuring that the legal need of asylum applicants was met. This became apparent when discussing the possibility of the introduction of a 'merits test' into the Scottish civil legal aid scheme for asylum appeals.

6.3 Proposed Changes and the Future Landscape of Legal Aid in Scotland

As part of its commitment to ensuring efficiency and best value of legal expenditure, SLAB implemented a programme of Best Value Reviews (SLAB, 2011d: 10). Under this programme, SLAB conducted a Best Value Review of Asylum and Immigration (SLAB, 2011a). One change that the Board appear keen to explore is the introduction of a merits test for legal aid funded appeals of United Kingdom Border Agency refusals (SLAB 2011a). The existence of a merits test in England and Wales has been subject to sustained criticism from NGOs and activist organisations who report that the test results in large numbers of asylum applicants remaining unrepresented within the asylum system (Asylum

Aid, 2005; Louveaux, 2010). The rather restrictive test, as outlined by SLAB in the Best Value Review, dictates that:

For asylum and immigration work, the legal aid rules stipulate that solicitors must apply a merits test before taking on an appeal, based on a 50/50 or better prospect of success. In onward appeals, the tribunal also has the power to determine after the event that the practitioner should not be paid where there was no significant prospect that the appeal would be allowed on reconsideration. In addition, the contract terms mean that a firm is at risk of losing its contract if its actual success rate falls below a certain level (SLAB: 2011a: 7).

James and Killick (2009; 2010; 2012) argue that asylum and immigration law caseworkers in England have struggled to come to terms with the ‘merits test’ when assessing the likely success of their clients’ claims. The difficulties in legal funding arrangements meant that the case workers with whom they carried out research were forced to stringently apply the ‘merits test’ to ensure that ‘risky’ cases were not taken on by the law centres in which they worked. These caseworkers, therefore, found themselves in the contradictory position of having to prejudge the outcome of cases in which they believed their role should have been to act as an advocate for their client (James and Killick, 2012: 441). This resulted in many of the caseworkers feeling ‘increasingly compromised’ in relation to their ethical obligations to clients in need of representation (2010: 15); with some subsequently moving into ‘less onerous’ areas of legal practice (2012: 454). Like the experiences of the case workers in James’ and Killick’s research, and as some of the following excerpts illustrate, the introduction of a ‘merits test’ was not considered by my interviewees to be a prudent or positive idea:

Adv A: /Merits test in immigration and asylum in particular is a very, very frightening concept because, I have to tell you, and I do say to my clients, and it is a terrible thing to say but any lawyer practises in this field will tell you that you are prospect of succeeding at the First Tier hinges critically on who your Judge is. There are, for whatever reasons, some Judges who are far more inclined to make adverse credibility findings than others. And the other thing to is that you just can’t, I mean I have a terrible knack of losing the un-loseable cases and winning cases I wasn’t expecting to win. I don’t see how you can really operate a Merits Test in this field it’s not like banking law, there aren’t actually, it is very difficult to make right and wrong decisions. It is a matter of discretion and judgement, it is very hard to be precise.

(Advocate A, Interview, August 2011)

According to Advocate A, the prospects of success hinge ‘critically on who [the] Judge is’ in a given asylum appeal. This lack of consistency in judicial decision-making meant that, in his opinion, it would be impossible to predict the outcome of an asylum appeal at the

FTTIAC. The introduction of a ‘merits test’, therefore, would prove highly problematic for Scottish asylum solicitors. Difficulty when predicting the outcome of cases was also referred to by Solicitor D when discussing the issues he thought that the ‘merits test’ would give rise to:

Sol D: I really don’t like the idea of a merits test. Because you get cases where you might not think you have any chance of success and you get it granted.

(Solicitor D, Interview, August 2011)

Similarly, Solicitor A was of the opinion that being unable to predict whether a client would win their appeal or not was one of the ‘biggest problem[s] with the merits test’. He was also concerned that firms may ‘err on the side of caution’ when applying the test and that this would result in the underrepresentation of asylum applicants:

Sol A: Well, the biggest problem with the merits test in England, as far as I am aware, is that the contract they have with the legal services authority is that if you don’t win a certain amount of your appeals, you’re not allowed to do it anymore. Because even if you are erring on the side of caution, I don’t see how you can predict that you are going to win certain appeals. I just do not see how we could do that. Because sometimes you get appeals that you think, ‘this is a weak appeal, I can see why the judge would refuse this’, and then they get granted. And then you have other appeals where you think that this is a stonewaller, it is absolutely cast iron, he has to win this appeal and it gets refused, so you can’t predict and I mean I think the merits test is flawed as well because you then just end up with hundreds of applicants who are just not represented.

(Solicitor A, Interview, July 2011)

In addition, not many of the representatives that I spoke to about this seemed to set much stock by the notion that it might be a real possibility in the Scottish asylum context. It seems, however, as though SLAB retains a strong inclination to consider seriously the implementation of a merits test for asylum and immigration cases, when it states:

On the face of it, indicative data on the outcomes of asylum appeals suggest a significantly lower success rate in Scotland compared to England and Wales. This would therefore appear to support the hypothesis that the use of merits testing in England and Wales, combined with the solicitors’ contractual obligations, is acting as a filter in ensuring that the cases with the poorest prospects of success are not taken to the tribunal (2011a: 7).

The fact that SLAB posits the introduction of a merits test in the area of asylum and immigration cases as one of the areas for consideration, and even invites comments from stakeholders about the proposition in the Best Value Review on Asylum and Immigration, is a worrying aspect of the potential changes to the legal aid landscape in Scotland and their likely negative impact on access to justice in the asylum process.

The possible restructuring of the legal aid scheme in Scotland, which would bring it in line with the scheme in England and Wales, and which is discussed in the most recent consultation document issued by the Scottish Government on legal aid reform, would see the introduction of contracting and tendering by law firms for legal aid work. This would restrict the availability of quality legal services for asylum applicants. From informal discussions with legal aid solicitors in the field it seems that there is a real concern that future restructuring will result in a legal aid system such as that in place in England and Wales. Indeed, before it went into administration in July 2011, the Immigration Advisory Service in Glasgow had been selected by SLAB in its *Best Value Review of Immigration and Asylum* (2011a) to be awarded an exclusive contract by the Board to provide an on-site legal service at Dungavel House Immigration Removal Centre in South Lanarkshire. This measure was taken in order to remove the need for other solicitors to travel to Dungavel, thus saving the Board money for their travel costs. This suggests that SLAB may be inclined to adopt similar contracting and tendering arrangements in the area of asylum and immigration more generally in the future, raising further questions about the quality of legal representation for asylum applicants and access to justice in the asylum process in Scotland.

6.4 Conclusion

In this chapter, I have argued that legal aid funding plays an important role in relation to access to justice in the asylum process and that it impacts upon solicitor morale and in some cases can shape the working practices of asylum solicitors. In drawing on the work of Sommerlad in the English context, I have sought to suggest that similar processes under New Public Management in Scotland are having similar effects on the solicitors conducting publicly funded legal work. Such processes are fuelled by the commitment to value for money for the taxpayer and economic efficiency that permeate public administration and, in particular, the discourse and ethos of the Scottish Legal Aid Board.

An example of this was the introduction of the measure making the solicitor responsible for financial verification procedures in order to ascertain whether a client qualifies for legal aid funding. This was viewed by some legal aid solicitors as acting as a hindrance to access to justice for legal aid clients and was the source of much frustration and added bureaucracy for participants in my study. In addition to the introduction of this responsibility for solicitors, there was also the issue of the template structure for funding in asylum cases. This was unpopular amongst solicitors where they came in under the cap when conducting a case and yet were still abated when claiming back the money for the work that they had done. The questioning of the amount of money claimed and the limits put on the amount of time that the Board thought reasonable for certain tasks made some solicitors feel as though their professional competence was being undermined or that their integrity was questioned by being made to feel like a 'chancer' for taking more time to carry out tasks.

Some solicitors were more positive about the changes in the nature of legal aid funding for asylum cases in that they saw it as a way of reducing competition in the area by firms who 'dabbled in it' while for them it was their main source of income. These solicitors considered that they had a good relationship with SLAB and didn't explicitly feel hard done by in the way that their claims were handled. Further discussion with these solicitors, however, revealed that their working practices were perhaps subconsciously organised around ensuring that they would get paid for their work by SLAB. Such motivations were, at times, influenced by the external pressures of the solicitors' employers to make sure that they were generating income and business for their legal organisation. However, the desire to be paid for work which a solicitor had done was also driven by a sense of worth and of deserving to have their work recognised and valued by SLAB. Similarly, through observations and interviews, it seemed that these solicitors routinely worked late hours and weekends in order to fully prepare cases. This appeared to be internalised by one solicitor as her needing more time than her colleagues to deal with cases as opposed to her regarding this as the amount of time that is actually required to prepare a case and for which she should, therefore, be paid by the Board.

Generally, during conversations with solicitors about their work and asylum cases there would be reference made to decisions about how to proceed which were influenced by what SLAB would or would not fund. The imperative to be paid for work undertaken on a case seemed to take priority for the asylum solicitors who took part in my research.

Whether they were conscious of it or not, this resulted in the solicitors adopting strategies to ensure that they would not do work that was not likely to be remunerated. In this way, it appeared that the legal aid system, in addition to pressures from their employers to generate income, had an effect on the ways that solicitors prepared cases and organised their working practices.

One aspect which arose during conversations about the preparation of asylum narratives or witness statements was the fact that ‘in order to do them properly’ one would have to go about preparing them in a way that would just not be feasible under SLAB funding arrangements. Several solicitors commented that in order to take a ‘proper’ statement one would need more time and resources than are generally available under legal aid funding alone. The work of subsidised law centres was highlighted here as best practice in this area. This appeared to be due to the extra time that solicitors who work in law centres, relative to that of those who work in private practice firms, can take with clients in order to build rapport and construct their witness statement. This raises questions then about quality legal services and access to justice in relation to asylum appeals where clients are not able to have their case taken forward by a subsidised law centre; given the dearth of such facilities in Glasgow, this would relate to the majority of asylum applicants.

This is alarming given the prospects of further cuts to the public sector and also the proposals for reform of legal aid provisions currently under consideration. The likelihood of Scotland being brought into line with England and Wales in relation to legal aid funding and administration is strong when considering recent Scottish Government proposals and the feelings amongst those working in the sector. There have already been suggestions of this in relation to ‘Merits Testing’ for asylum appeals. SLAB published their report on Best Value in Asylum and Immigration and called for comments and views on the introduction of merits testing in relation to appeals of UKBA decisions. This was something that did not seem to be registered by those with whom I undertook research. Whether this had escaped their attention or was not something they set much stock by was unclear. However, it seems fairly reasonable to assume that SLAB wish to explore the implementation of this test in the Scottish system. The potentially negative effects of this on access to justice for those in the asylum process are overwhelming when considering the situation in England and Wales. Reports on those who are unable to access legal representation suggest that there are alarming numbers of people with a need for international protection being refused asylum.

Moreover, as Sommerlad's, and James' and Killick's research suggests, the disaffection amongst legal aid solicitors and caseworkers in England and Wales under such arrangements is likely to be experienced by Scottish practitioners; this could, in turn, result in more firms abandoning asylum work in favour of the more profitable immigration cases or other forms of legal work altogether.

7. Asylum Solicitors: Emotional labour and lawyer-client interactions

In this chapter I will discuss elements of the asylum solicitor-client relationship which relate to the Client's side of the 'Triangle of Misery' introduced in the preceding chapter. I will briefly consider the kinds of unpaid labour solicitors feel they undertake in asylum casework owing to the specific needs and demands of asylum applicants. Moving on to examine a form of unpaid, or unrecognised, labour that asylum solicitors undertake, namely emotional labour, I will draw on existing studies to examine the role of emotional labour as carried out by asylum and immigration solicitors in the Scottish context. In doing so, I will argue that solicitors are involved in processes of distancing themselves emotionally from the often traumatic and upsetting accounts they are told by asylum clients. This kind of emotional labour undertaken by solicitors, it will be shown, is part of a process of professionalisation developed during legal practice but which starts initially during their training as students at law school.

7.1 Asylum Casework Funded by the Scottish Legal Aid Board

As mentioned in the previous chapter, asylum work is funded by the Scottish Legal Aid Board (SLAB) under the 'Civil Legal Assistance' funding stream and usually under the form of legal aid known as Advice by Way of Representation (ABWOR). SLAB's Civil legal Assistance Handbook (2012) describes the different work that the Board will pay solicitors to undertake. This is done under a 'template' scheme and so for solicitors to be paid the work they undertake must fall within the template of work that SLAB deems necessary to represent a client during their asylum claim and asylum appeal. In my research solicitors often spoke of applying for 'sanction' to instruct an expert report (see Chapter 6). This means that a solicitor must first get the permission of SLAB to instruct an expert to write a report, otherwise they are likely not to get payment for the report and risk themselves or their firm having to bear the cost of the report. Expert reports tend to be expensive and so obtaining one for a client does not automatically fall under the 'template' for legal aid in asylum appeals.

Solicitors will be paid the sum of £95 to undertake initial work in an asylum claim. This sum covers a first meeting with the client; taking instructions from the client; and providing the client with advice about making an asylum claim (SLAB, 2012: Part III, Chp. 5 S.2). A solicitor may apply for an increase to the 'asylum claim template' up to the sum of £950 once they have undertaken the steps above and where they require further funding to: have a lengthy meeting with the client to take detailed information and statement; correspond with the UKBA; frame a statement of additional grounds; correspond with a client about the progress of the case; examine the decision of the UKBA; meet with the client to discuss the decision and advise on the outcome and the prospect of appeal if necessary; and pay an interpreter (SLAB, 2012: Part III, Chp. 5 S.2).

In the asylum appeal template, once a solicitor has met with their client to take their instructions and frame the grounds of appeal they can apply for a 'template increase' up to the sum of £1800 to carry out the following work: meet the client to finalise and amend the witness statement; attend the Case Management Review hearing; frame the witness statement; frame the inventory of productions; frame the skeleton arguments, if necessary; copy productions; lodge documents; obtain evidential materials; examine evidential materials; correspond with the client, the court and the UKBA; prepare for the hearing; cite witnesses; attend and present the appeal hearing; examine the Immigration Judge's determination; meet the client, advise on the outcome and the prospects of appeal; and pay an interpreter (SLAB, 2012: Part III, Chp. 5 S.2).

As discussed in the previous chapter, some of my respondents spoke about difficulties with obtaining funding from SLAB once they had sent an account to them following the conclusion of a case. They noted that although SLAB set the increased template to £1800 they do not routinely agree to pay that much even where all the additional work outlined above (see SLAB, 2012: Part III, Chp. 5 S.2) has been undertaken. In this sense, then, the solicitors in my research did, at times, feel as though they were not being fully remunerated for all the work they had done on a case.

Aspects of claiming asylum that the claimant will have to deal with and for which legal assistance is not funded by SLAB relate to matters concerning their housing, financial support provided by the National Asylum Support Service ('NASS support') and other issues which arise in relation of trying to live and survive whilst going through the claims

and appeals process. These will be discussed below in relation to what solicitors regarded as coming under the remit of their role as legal representative in asylum cases. First though, this chapter will now turn to a discussion of the emotional labour, as a form of unpaid labour, that asylum and immigration solicitors undertake when representing a client.

7.2 Emotional Labour and Asylum Casework

Often, asylum applicants provide traumatic and visceral accounts of persecution during the asylum process. The recounting of such events can result in the distress of both the applicant and their legal representative. In addition, the sensitive nature of the process of eliciting these kinds of statements means that it is necessary for solicitors to build relationships of trust and a good rapport with clients. Each of these factors points to the need to manage emotions during the asylum process. It is fitting, therefore, to consider the emotional labour undertaken by asylum and immigration practitioners during the course of their casework.

Emotional labour is the term used by Hochschild (1979, 1983) to refer to processes of emotion management that workers undertake to meet the demands of their job. Hochschild explores the ways that individuals not only *display* the kinds of emotions that seem appropriate in any given work situation, but also the ways in which they strive, in certain circumstances, to actually *feel* specific types of emotion in order to elicit the associated expression of that emotion. In this way, Hochschild's model of emotion management seeks to expand on the work of Goffman (1957) which focuses on the 'surface acting' that individuals enter into in order to display the kinds of emotional responses required by the social rules and norms governing their interactions (Hochschild, 1979). Building on this, Hochschild highlights the need to consider the impact of the 'deep acting' that individuals undertake which involves changing one's inner feeling in order to elicit the appropriate emotive expression. The aim is, therefore, to make the case for a sociology of the emotions that a person actually attempts to experience as opposed to those which they merely display because they think they should. Hochschild argues that the emotional labour and emotion management undertaken is subject to some form of supervision by management or an employer. Therefore, the alarming consequence of the 'emotive dissonance' (1983: 90)

which can come about as a result of such enforced processes is the alienation of workers from their own feelings (Garot, 2004: 737).

The emotional labour involved when carrying out asylum law casework has been explored by Westaby (2010) in her study of asylum practitioners in the Yorkshire Humber region of England. Westaby's study consisted of semi-structured interviews with a total of 6 participants whom she had recruited for the study using purposive sampling (2010: 158-9). This kind of sampling method was adopted, according to Westaby, in order to gain the perspectives of participants with varied levels of experience working in the asylum process. She selected participants who were qualified solicitors at the time of interview. In addition, Westaby chose interviewees based on the size of the firm for which they worked in order to explore to what extent 'the social dynamics of individual firms may possess specific attributes' that may, in turn, affect the emotional labour performed by the solicitors working within them (2010:158). Westaby discovered that asylum and immigration practitioners have to negotiate a difficult balancing act to ensure that their displays of emotion in different situations correspond to those displays expected of them by the norms of their occupation. Before going on to consider, in light of Westaby's findings, the emotional labour performed by the asylum and immigration practitioners involved in the current research it is useful first to elucidate her use of the term 'emotional labour'.

Taking the work of Hochschild (1983) as her starting point, Westaby defines 'emotional labour' as 'the management of feeling undertaken to present emotional displays expected within the workplace' (2010: 154). Building on this, she draws on the work of Ashforth and Humphrey who argue that emotional labour can be produced in three ways: 'genuine emotional responses, deep acting and surface acting' (1993 in Westaby, 2010: 156). Genuine emotional responses still require emotional labour according to Ashforth's and Humphrey's formulation because a certain amount of effort is required to exhibit an 'appropriate emotional display' (1993: 89 in Westaby, 2010: 156). This reflects Ashforth's and Humphrey's view that the term 'emotional labour' 'refers to emotions that ought to be publicly expressed' (1993: 89-90 in Westaby, 2010: 156). They use the idea of 'display rules' to refer to expectations about someone's behaviour in relation to which emotions to express and which to hide. The work of an asylum solicitor who has to conform to display rules in order to facilitate interaction and a trusting relationship with their client, whilst at the same time performing appropriate emotional responses so that they appear professional

and are seen to be corresponding to organisational display rules can, therefore, be seen to involve a significant amount of emotional labour, as Westaby found.

Westaby's research suggests that solicitors often have to resort to deep acting to convey emotions that they are not experiencing in order to develop trust or confidence with their clients. Similarly, it highlights that solicitors may also engage in such deep acting to suppress emotional responses that they are experiencing in order to maintain client confidence or a 'professional' demeanour in front of colleagues or managers (2010:160). Indeed, as Westaby writes:

There is clear tension between the desire to produce authentic emotional displays of empathy and sympathy towards the client and develop a trusting relationship, and the understanding that to do so completely may well result in becoming too emotionally invested in the client's case. This might in fact result in the inability of the solicitor to maintain the desired level of detachment from the case, which is regarded as unprofessional, as well as affecting the emotional well-being of the solicitor (2010: 161).

In the above extract, Westaby highlights a number of key points which I found relevant to the experiences of the solicitors in my study. The tension between being empathetic and sympathetic towards a client whilst not wanting to become too emotionally invested in a case; remaining detached from a case in line with the demands of conducting oneself professionally; and dealing with one's emotional well-being when carrying out asylum casework were all prevalent issues amongst my research participants, as I will go on to explore below.

7.2.1 Emotional Labour and the Emotional Well-Being of the Solicitor

In Westaby's study, solicitors spoke of finding it difficult to deal with listening to emotional and often traumatic accounts when working with asylum clients. The need to remain emotionally resilient whilst working within the asylum process arose as an issue during practitioner discussions of a breakaway seminar at the Scottish Refugee Council's 2010 annual conference entitled: *A Fresh Start? The new Government's agenda for reforming the asylum system in the UK*, held at Hampden Park in Glasgow. Discussion around this topic was largely introduced by the asylum and immigration solicitor

facilitating the session. In talking about some of the reasons that it is difficult to get the ‘right’ decision on asylum claims and appeals in relation to credibility findings, he mentioned an article by Herlihy and Turner (2009). In it, Herlihy and Turner suggest that apparent inconsistencies, and thus a perceived lack of credibility, in asylum accounts may be attributed to an interviewer’s reluctance to ask claimants questions which may not only re-traumatise the claimant, but also traumatise the interviewer (2009: 186-7):

Sol I: I’ve interviewed many asylum seekers and obviously UKBA case owners interview lots of asylum seekers and one of the great difficulties is that when you conduct an interview with an asylum seeker and you are trying to get them to give you their account, you can see that you are, in some instances, putting them through a process of ‘re-traumatisation’. What the psychiatric experts say about that is that it also has another effect...what you also get is avoidance by the interviewer. It might be by the decision-maker, it might be by the lawyer because actually it’s quite traumatic (*slight laugh*) to hear someone tell you about some of their experiences. I can certainly think of a number of occasions where I’ve had clients who’ve had to disclose to me experiences of rape and that’s taken an awful lot for them to be able to do that. And this is in *NO* way to devalue their experience, but it *takes a lot* actually to sit there and take that account from them as well. And so, what the experts have shown is that many interviewers will actually avoid asking these questions, ‘cause they can sense the trauma that they may feel in having to hear those accounts especially if you do this work day-in-day-out. So there’s a real risk from the interviewer’s perspective that *you do* you find yourself trying to avoid traumatising yourself.

(Fieldwork (transcribed notes from recording¹⁸) 29 /10/2010)

The solicitor in this example admitting that he has often felt uncomfortable about asking clients certain questions because he knows that it will result in a kind of vicarious traumatisation lends support to the arguments made by Herlihy and Turner (2009) on this matter. Such avoidance strategies adopted by interviewers and decision-makers would also result in them not having to incur the same kind of demands to perform the emotional labour required to either facilitate these kinds of interactions or merely just to provide a response during them.

One solicitor who took part in my research, Solicitor B, spoke of the difficulties that he had experienced when dealing with the traumatic and often visceral accounts of clients’ experiences. He commented that he often found listening to such accounts difficult to deal

¹⁸ A student from another university who also attended this session of the conference asked if the group would mind her recording the discussion on her dictaphone for future reference. The group agreed and following the session, I approached Solicitor I to explain my research and ask his permission to use his comments once transcribed in an anonymous fashion in my thesis. He agreed and so his comments in the extract above are a transcribed account from the recording that the student e-mailed me after the conference.

with. The week that I conducted my interview with him was his last week of employment in the firm in which he had trained and worked as a solicitor for several years. He revealed in our pre-interview discussions that he had decided to move to a firm where he could focus on immigration law, in part, because he felt as though he'd 'had about all [he could] take' of asylum law practice (paraphrased fieldnotes, Solicitor B Interview, October 2011). When I asked him, during our interview, about emotions and casework I enquired about whether the difficulties he had experienced with these issues formed part of his decision to concentrate on immigration law and he conceded that it was one of the contributing factors (Solicitor B, Interview, October 2011). Solicitor B spoke about how he would often set breaks during meetings when he was taking a client's statement in order to 'take a breather' and to give him a break or relief from listening to their accounts of persecution. He also explained that he used to talk to his partner about what he had experienced during his working day, but that he had stopped doing this because he didn't want to burden her with such problems and risk also upsetting her. In contrast to Solicitor B's experiences of struggling with the emotional burden of carrying out asylum casework, others did not explicitly recognise or feel they experienced emotional responses to their clients' accounts of persecution.

7.2.2 Dealing with Emotions: Gallows Humour

In Westaby's study, the solicitors interviewed felt that training in how to deal with such emotional experiences would be useful. This is not a feeling that was shared by the legal practitioners with whom I spoke with some commenting that they did not think it would be 'taken up' by solicitors if offered (Solicitor F, Interview, December 2011). In certain circumstances, it was even approached with gentle humour and to some extent mock derision on the part of solicitors when I broached the subject during interviews (Solicitor A, Interview, July 2011).

A theme throughout many of the solicitors' responses to this topic was the fact that one way of dealing with the emotions and traumatic events involved in their work was 'gallows humour'. As one solicitor explained:

Sol F: you know it's a wee bit like up in the court you hear a wee bit of gallows humour and I think it is the same, you will get the same if you go to the Sheriff Court Common Room.

(Solicitor F Interview, December 2011)

Solicitor F's reference to the Sherriff Court Common Room is a reference to the common room for solicitors representing criminal law cases at the Sheriff Court in Glasgow. Another solicitor also likened the humour adopted in asylum law casework to that undertaken in criminal cases:

Sol A: /I think having a black sense of humour helps, definitely. It's the same in criminal as well. You have to be able to make a joke of everything, unfortunately, which is fine. But Firm X doesn't have counselling.

(Solicitor A, Interview, July 2011)

This was evident on certain occasions at the Tribunal when I was in a position to observe the interactions of solicitors. The opportunity to do so did not present itself too often given the organisation of the Tribunal and their tendency to spend time waiting on cases in the 'Reps' Room'. This is an enclosed space reserved for legal representatives and to which I was very rarely able to gain access.

On one particular occasion I had agreed with Solicitor C, a solicitor who had allowed me to observe her meetings with an asylum client from Pakistan, that I would attend the Case Management Review (CMR) hearing of the client's appeal. As outlined in Chapter 2, CMR hearings are largely procedural and do not require the asylum appellant to attend. Upon entering the hearing room I noticed that there were only the Home Office presenting officer sitting at the desk usually reserved for the Home Office in FFTIAC hearings and one other person who was sitting at the clerk's desk at the back of the court. Knowing the presenting officer from other cases I had observed, I assumed the other person was a solicitor. I took a seat at the back of the court. A short time later a group of legal representatives entered and sat along beside me at the back of the court; the man at the clerk's desk acknowledged them but did not join in their conversations. Solicitor C sat down beside me and greeted me warmly. She seemed nervous and when I enquired whether she was okay, she explained that this was the first CMR that she had done¹⁹. Upon hearing this, the solicitor sitting to the other side of Solicitor C commented that she would

¹⁹ Solicitor C was a trainee solicitor. Trainee solicitors are only permitted to represent clients at courts and tribunals in their second year. This is when they are able to apply for their 'practising certificate'. I therefore assumed that this was the first case that Solicitor C had taken to the Tribunal since being granted her practising certificate.

'be fine' and that the whole process was easy. He then proceeded to go through the process briefly with her and told her where she would sit and the order of proceedings. He made a comment about how the Immigration Judge was 'going to love his case' and that it was a 'one child policy in China' and then asked Solicitor C what '[her's was]'. She informed him that it was 'imputed political opinion in Pakistan, he can't return because he fears the state but he claims that he is in danger from *all of* the political parties in Pakistan. All of them'. The other solicitor retorted that 'he's been busy' and Solicitor C's reply was 'I know, tell me about it' (Paraphrased Fieldnotes, FTTIAC CMR, 15/12/2010).

Here Solicitor C could be seen to be adopting humour in discussing her client's case; she seems to slightly mock her client's claim that he would face persecution at the hands of all the political parties in Pakistan. It was not clear if she was using humour because she did not believe her client and found his case implausible or whether she was using it as a tool to mask the seriousness around the client's claims about what would happen to him if he were returned to Pakistan. Although Solicitor C's use of humour here is not particularly 'dark' in the way that 'gallows' humour may be understood to be, it remains an example of the use of humour to play down the seriousness of a client's case. It was also interesting to note how the solicitors referred to their cases, providing the legal issue in the person's claim rather than going into any personal details or adding a subjective context to the case. It could be argued that professional ethics would prevent them from disclosing the details of their client's case; it could also be seen as an example of the detached approach solicitors adopt to the cases they work on. It might also be argued that Solicitor C was using humour as a way to deal with the nerves and pressure that she felt about appearing in front of an Immigration Judge at a CMR at the FTTIAC for the first time. Unfortunately, I was not able to follow-up these questions with Solicitor C during an interview because she did not respond to my requests for her to take part in one.

Many of the comments about counselling not being useful, I feel, reflected the need to suppress emotions in order to appear professional and competent in fulfilling the requirements of one's role. Being seen not to need any kind of debriefing or training in how to handle emotions suggests that one is able to cope, that one can withstand the pressures of the job and still do the work well. Framing emotional issues in a humorous way provides an opportunity to discuss them in a light-hearted manner which does not involve having to disclose emotional stress or anxiety that a solicitor may be experiencing

in relation to them, thus conforming to the demands of the profession and projecting an image of competence.

7.2.3 Remaining Detached and Being ‘Professional’

Certain actors in the asylum process discussed the conscious strategies they undertook for dealing with emotional stress and detaching themselves from the emotional aspects of their job in order to remain professional. The following fieldwork exchange with one of the clerks to the Tribunal illustrates this. After observing a bail hearing, I became involved in a conversation with a clerk at the front desk at the Tribunal. I expressed relief at the fact that the applicant had been granted bail as so many of his family had travelled up from Manchester overnight to support him. I made a comment to the effect that I would not be very good at working on the bails if I were to work at the Tribunal, because I would find it hard not to get upset when bails were continually refused. The clerk responded:

Clerk2: (Shaking head and waving index finger) Ah no, see you can’t be doing that, there used to be someone, X, who used to work here. She was sharp, very sharp, too clever to be working here and she used to do the bails and used to get all upset and come out crying because she let herself get too involved but you can’t. You have to learn to step back from it and distance yourself from it.

(Paraphrased Fieldnotes FTIAC 26/10/2010)

This particular clerk explained that he ‘doesn’t “do” panic, stress or anger’ because of his past experiences of working in stressful situations. It appeared as though he had adapted his strategy of distancing himself emotionally from his previous job to suit his role at the Tribunal.

Many of the responses from solicitors in relation to the management of emotions and, in particular, the suppression of emotions in order to remain ‘professional’ depicted the ability to do this as one which is developed over time. Solicitors spoke of the difficulty they experienced in doing so ‘at the beginning’ of their careers and felt that it was something that is learned by solicitors gradually. The following response demonstrates this:

Sol F: I think you just become a wee bit immune to it. But I think, definitely at the start, I remember one case in particular really upset me. The Judge didn't believe the client's account because she didn't accept that the Security Forces who were persecuting him would have made him travel to the other side of the city every day to report. And, it involved something about a donkey and his point was 'the reason they made me go every day to report and then come back was that I could then no longer make a living in the market, because I was too busy going to report'. She didn't believe it but in the context of Darfur, Sudan and that kind of background you know, I think it was totally believable and that case really affected me. A lot of the Sudanese ones did and that was sort of early in my career, they weren't being accepted as refugees...And that one really annoyed and affected me, because of what was happening to people and to their villages and to their family members. Like, for example, a guy told me that he was blindfolded but he heard his brother being shot next to him and things like that were really affecting. But, gradually it becomes slightly less so and you just kind of get on with it. But it depends; you will occasionally get medical reports which are really pretty horrific. Some of the things that are carried out by certain security forces or soldiers are really pretty horrendous and they can be difficult, but I think, generally, you just become a bit used to it.

(Solicitor F Interview, December 2011)

Solicitor F here speaks of being 'annoyed and affected' by cases that he worked on 'early in [his] career'. However, he emphasises that gradually stories of torture and trauma become less affecting and one 'just kind of get[s] on with it'. Similarly, Solicitor E spoke about how learning to deal with the traumatic aspects of clients' accounts was something that is learned over time:

Sol E: It is hard. And I think it is hard to shut that off, but I think if you have got to do this job and at the end of the day it is a job for us, you've got to learn to be able to see it as that. And I think you can only learn that over time. I am a lot better at it now, 3 or 4 years down the line of doing it, than I was at the beginning.

(Solicitor E Interview, October 2011)

The notion that being 'professional' means suppressing or marginalising emotive responses may be seen to reflect the preference within law and legal discourse for 'value-neutrality' and 'rationality'. As will be explained in the next section, these issues have been considered in the literature on the specificities of law as a discipline and suggest that such conceptions of 'professionalism' may be instilled or internalised by law students during their legal training.

7.3 Conducting oneself in a Professional Manner: Lessons learned at law school

Developing a kind of detachment from cases was regarded by the solicitors in this research as something which is learned with experience. As a solicitor progresses in their career, they are thought of as being better equipped with how to deal with and manage these emotional responses and the desire to 'get too involved' in a client's case. Such emotional distancing can be seen as part of the professionalisation of solicitors. This element of their professional identity is something which scholars have identified as originating in their training as law students at university and is bound up with the law's preference for rationality and objectivity.

In his discussion of the role that legal pedagogy plays in maintaining professional world views (2007: 27), Good argues that teaching methods such as the Socratic dialogue are used in law schools to teach law students: 'a thought process that involves finding 'facts', selecting appropriate legal rules, and applying these rules to the facts to produce a legally correct result' (2007: 29). He highlights the distinction made between 'facts' and 'law' in legal discourse. A 'fact,' he points out, is something upon which a lay person can decide, whereas decisions about matters of law are the reserve of judges (2007: 30).

Good draws on experimental research carried out by Rigby and Sevareid (1992) with students of law and anthropology to show how conceptions of 'fact' and 'truth' vary between the two academic disciplines. In Rigby's and Sevareid's experiment with law and anthropology students they showed them the film *Dead Birds* by Robert Gardner, which deals with the issue of warfare in Papua New Guinea (Good, 2007: 31). Their results showed that the law students took the information that was presented to them in the film as 'fact' and used these 'facts' to make the case for the need for 'codified laws and strong government' (Good, 2007: 31). The anthropology students, by contrast, began by questioning the 'facts' themselves. From this, Rigby and Sevareid claimed that there is a general contrast between law and other social scientific disciplines. Lawyers unproblematically adopt the notion of 'fact' and then concern themselves with 'general principles these facts call into play' (Good, 2007: 31), whereas anthropologists, owing to the focus on fieldwork within their discipline, are more conscious of the contingent nature

of ‘facts’ and the problems with gathering and using data in an unqualified way (Good, 2001: 31).

As Good points out, drawing from the work of other scholars on this issue, this way of thinking and approaching problems is internalised by law students during their training:

Students are required to concentrate on ‘the structures and text that give legal opinions power’, rather than the ‘attendant moral and social contexts’ (Mertz, 2002)...Lawyers...internalise during their training ‘both a way of talking about problems and the logic that lies behind that way of talking’ (Conley and O’Barr 1998: 135), and this professional discourse is the means whereby law exerts its coercive and discursive power (Muller-Hoff 2001).

Similarly, Mertz has undertaken research into the ways that law school teach students to ‘think like a lawyer’ (2007). Studying the linguistic commonalities between the classroom dialogue of first-year contract law courses in eight North American universities, Mertz found that:

[I]n the law school classroom...linguistic norms are ruptured as law students are urged to give up old approaches to language and conflict and adopt new ones. “Thinking” like a lawyer turns out to depend in important ways on speaking (and reading, and writing) like a lawyer. This change is largely a matter of a shift in language pragmatics (2002: 492).

Mertz demonstrates how law students learn to treat legal texts as ‘detachable chunk[s] of discourse’ that can be applied in varying contexts (Mertz, 2007: 62 discussed in Barclay, 2008: 434). In so doing, they learn to marginalise the human conflicts and social factors in stories and focus on the ‘legal’ rules and norms that may be at issue (Barclay, 2008: 434). In this connection, and like Good’s arguments cited above, internalising the training they are given results in ‘both a way of talking about problems and the logic that lies behind that way of talking’ (Conley and O’Barr 1998: 135, quoted in Good, 2007: 29).

It is possible to suggest, therefore, that the process that lawyers undergo when being trained at law school may contribute towards them being able to separate the emotional and ‘human’ elements of an asylum case from the legal issues to which that case gives rise. When solicitors and advocates who took part in my own research talk about ‘learning’ to be objective or detached from their clients and their cases, this may be conceived as a development in the professionalisation processes that were started at law school.

This process of separating the legal and social elements of casework also arose when solicitors in my study spoke about maintaining boundaries in their lawyer-client relationships. Such boundaries served not only as a way for them to focus on the client's case and avoid becoming 'too involved'; they were also used as a way of managing client expectations and setting the parameters of the level of help and guidance that the solicitor may be reasonably expected to provide the client while they represented them.

7.4 Creating Boundaries between Legal and Social Relationships

The imperative to exercise restraint in relation to the emotional investment in a client's case was expressed by many of the solicitors who took part in my research, both during interviews and in exchanges that took place whilst I was carrying out participant observation at the FTTIAC and at various CPD events and seminars. For example, the sentiments in the comments by the advocate and solicitor below suggest that the suppression of emotion or over-identification with clients is part of a process of professionalisation which is developed over time:

Adv A: I think I'm too old and hard bitten to be there but I think young lawyers, I think I can see some people to who that has happened. Another thing that I see going wrong with the young lawyers is over-identification. I think I was even guilty of it myself when I started out in the field. After all, the reason that you are doing it is probably because in some sense you want to *do good*. And you are aware that the people you are dealing with are vulnerable in various ways and I have seen a tendency in, and as I say I think I was guilty of it myself at the beginning, to not build barriers. I think there need to be barriers for everybody's interests between the lawyer and the client. I think you *can't* allow yourself to become too involved you've got to preserve objectivity, you've got to still be in the right place to deliver the difficult question.

(Advocate A, Interview, August 2011)

Sarat and Felstiner (1995) have discussed this difficulty in the context of divorce lawyers and their clients in the US. They stress the need for lawyers, when carrying out legal work for someone who may be suffering emotionally or in a context that may be charged with personal issues, to distance themselves from clients: 'Most lawyers keep their clients at a distance....lawyers work hard to construct a boundary between legal and social worlds and restrict their efforts to the legal side of divorce while leaving the management of the

client's personal difficulties to someone else' (Sarat and Felstiner, 1995: 57-58). This sense of not allowing oneself to get too involved in order to focus on the legal side of asylum was something of which Solicitor E was also conscious:

Sol E: So you can then feel a more emotional attachment to clients that you listen to their story and think 'This is *hellish*'. But, I think at the end of the day, you do have to remind yourself that you are doing a job. And you have to do that to protect yourself as well, to make sure you are doing it correctly and you are doing it in the manner of a solicitor and are not becoming too involved and missing other points. And it is always hard if you have created that sort of relationship with a client.

(Solicitor E Interview, October 2011)

In the extract above, it is clear that this solicitor thinks there is a direct link between becoming 'too involved' and failing to discharge one's professional duty appropriately by 'missing points' that may be important to a client's case. The blurring of edges that the solicitor mentions can sometimes be difficult to avoid when trying to build rapport with clients so that they trust the solicitor and make disclosures about their claim. As the following extract demonstrates, the same solicitor was aware of the importance of maintaining a limited level of formality with clients in order to create a more equal relationship:

Sol E: I try to be not *informal* with clients but clients don't call me Ms. X, I tend to just introduce myself as Y. And most people just kind of call me by my first name, which is different from another generation of solicitors that don't do that. Not that they are my *friends* but I just think it is a more even playing field for when we are talking.

(Solicitor E Interview, October 2011)

The need to maintain an appropriate distance from cases and clients seemed, for this solicitor, to be in tension with a real concern for her clients' wellbeing. Solicitor E appears to want to maintain a fairly relaxed relationship with her clients in as far as they call her by her first name. By not using her title 'Ms.' when addressing clients, Solicitor E wishes to allow for 'a more even playing field when [she and her clients] are talking'. This point raises important questions around the power dynamic in solicitor-client interactions and relationships, an issue that has also been addressed by Sarat and Felstiner (1995).

Sarat and Felstiner argue that in the context of divorce procedures, power in lawyer-client relationships is a 'complicated resource that, over time, is constructed and reconstructed so that its possession is neither necessarily obvious nor rigidly determined' (1995: 19). They

go on to show that this may be due to the different kinds of knowledge that the lawyer and client hold in divorce proceedings. Although lawyers have superior knowledge in relation to the legal aspects of divorce settlements, clients who have greater knowledge of their spouses are better able to predict their likely response to proposals put forward in the mediation process; in this way divorce clients are often on a level footing with their lawyer in certain negotiations (1995: 58).

The same could not be said, however, of the asylum law context. Although asylum clients will generally have a better knowledge of the conditions in their country of origin and of what happened to them in the past, this does not tend to alter the power dynamic with their solicitor. On the whole, asylum clients are extremely dependent on their legal representative to help them navigate the legal process and articulate their claim in a way that will be recognised in law. Unlike some of the clients in Sarat's and Felstiner's study, therefore, asylum clients very rarely possess greater knowledge or power than their legal representative in lawyer-client interactions. Owing to the vulnerability of asylum clients, they may tend to rely on their solicitor for help with aspects of the asylum process, such as housing and financial support; issues with which solicitors are not remunerated by SLAB to help them. Therefore the creation of barriers to protect against over-identifying with clients, or becoming too emotionally involved in their case at the risk of not doing one's job properly, also comes to serve as a way of delineating the labour and service that a solicitor is prepared, and expects, to undertake for an asylum client.

7.5 Creating Boundaries and Managing Expectations

Although solicitors in my research emphasised the importance of maintaining boundaries with clients in order to remain resilient and emotionally detached from the casework on the client's claim and appeal, they also spoke about the importance of boundaries in relation to the client's expectations about the role of the solicitor. As mentioned above, because of the specific needs of their clients, extra demands are often placed on solicitors for advice and assistance which falls outwith the remit of work for which SLAB will pay them. This is one aspect of the solicitor-client relationship which seems to cause frustration for asylum and immigration practitioners and which impacts negatively upon their morale. As the following interview extracts suggest, this was considered by some to cause additional and unpaid labour during the course of representing a client:

Sol E: The other thing as well is the amount of unpaid hours that you do in asylum. I think that there is a lot of unpaid hours that you do just in general. And a lot because your clients do tend to be different from say, for example, a conveyancing client who knows that you don't need to see your solicitor all the time or who understands the system so they know that you will phone them if you need to phone them. But with a lot of asylum clients, they come in maybe every time they get a letter and they want to know what the letter is about, and they are worried about things. They are maybe on their own and they don't have friends and they are very isolated, so they do tend to want to come in here more. They feel that they know you and maybe they blur the edges of what you actually are to them. And at times you have to say 'Look that isn't what I do. I am not there to sort out your finances or your housing or your problem with your flatmate. I can't do that for you, you need to go and see the Scottish Refugee Council and places like that'. So, you do spend a lot of time dealing with issues that aren't really *legal* issues. But, a lot of these people are on their own or they have a very small network and you are one of the most important people to them at this point. They start to see you as being there for them and they phone a lot and they want to just pop in without appointments. And I am maybe a bit of a soft touch, if they come in and they are there, I will usually go out and speak to them and just say 'Look, I don't need to see you just now I will contact you when I need to'. And again all these things do take you away from other work.

(Solicitor E, Interview, October 2011)

Solicitor E emphasises her comments about maintaining a boundary with clients so that they do not think that they are friends where she discusses the ways that clients might 'blur the edges of what [the solicitor] actually [is] to them'. These boundaries are not created, however, so that she can maintain an emotional distance from clients to prevent over-identification with them, but instead they serve as a way of delineating what she is or '[is] not [t]here to do'. In this respect, Solicitor E felt that assisting clients with problems relating to their 'accommodation or finances' was not part of her role in that she was not paid to address them. Solicitor E was wary of spending time with clients 'dealing with issues that aren't really *legal* issues' and by virtue of her building a barrier between legal and social worlds she could set the limits to the help she was willing and able to provide a client. This sentiment was also shared by Solicitor A who mentioned that often the divide between legal and social work in asylum casework can result in clients turning to their solicitor with any problems that may arise:

Sol A: So yeah, there can be a blurring, I think that is especially the case with asylum and immigration clients. You sometimes feel like a social worker and not a solicitor. I think I have reached the point where I have no truck with that, I am just like 'nope, not dealing with that, go away'. Because it is easy when you first start to just go 'yeah, just deal with it' and it stops you doing what you are supposed to be doing.

(Solicitor A Interview, July 2011)

As with Solicitor E above, Solicitor A appears to have developed a distinction between dealing with a client's problems that may not be legal in nature and 'doing what [he is] supposed to be doing'. The need to prioritise the 'legal' elements of casework over the kinds of support that an asylum applicant should be expected to seek elsewhere was also raised during the interview that I conducted with Advocate A:

Adv A: People come to you with a *legal* problem. They aren't coming to me because they want a social worker, if they want a social worker they will go to a social worker; they're not coming to me for counselling, if they want counselling they can go to a counsellor; people come to me because they have a legal problem and my duty is to deliver a legal solution to their legal problem.

(Advocate A Interview, August 2011)

Advocate A's response reveals the way he conceives of his role in asylum casework. He separates the legal elements of a person's problems and clearly defines his role as that of legal adviser and not as a 'counsellor' or 'social worker'. Again, the work of Sarat and Felstiner offers useful insights here in relation to the different roles that divorce lawyers in their study fulfilled for their clients:

One lawyer in Massachusetts routinely engages in behaviour common among friends, but atypical in lawyer-client interaction. She reveals extraordinary biographical detail to her clients, talking at length about her own divorce, health, finances, housing, and the eating habits of her children. This lawyer violates the standard normative understandings concerning appropriate professional distance, becoming friend and therapist as well as legal adviser. These multiple roles enable the lawyer who adopts them to use therapeutic moves and appeals to friendship to shape her clients' definitions of the legally possible and, at the same time, blunt any critique of her performance (Sarat and Felstiner, 1995: 58).

The solicitors who took part in my study were explicitly opposed to engaging in the kind of behaviour described by Sarat and Felstiner in the extract above. In fact, during a meeting in prison between Solicitor A and his client, at which I was present, I observed the ways that such lines between the social and legal worlds of solicitors may become blurred. In the fieldwork example which follows, the client can be seen to be sharing his non-legal problems with Solicitor A and seeking his help in relation to them. In contrast to the 'lawyer in Massachusetts' mentioned above, Solicitor A can be seen to be maintaining an 'appropriate' professional distance from the client and refusing to perform the role of

friend or therapist. I argue that he does this not to protect himself from any emotional distress or over-identification with his client but to reinforce the parameters of what the client may reasonably expect of him.

7.5.1 ‘Unreasonable’ Client Demands: The case of Mr. L

In December 2010, I accompanied Solicitor A to a prison in order to observe a meeting he was to have with a client being held there for immigration offences. At the time of our visit, the client, Mr. L, was facing deportation upon release from prison and part of his appeal against this deportation order was that he feared he and his family would be persecuted if returned to Pakistan. He had therefore decided to make a claim for asylum. The journey by car to the prison took roughly 45 minutes and this gave me an opportunity to discuss certain issues relating to Mr. L’s case with the solicitor. Solicitor A supplied some background to Mr. L’s situation. The information that he provided may be summarised as follows: He explained that Mr. L had entered the UK on a working visa granted in the name of someone else and that he had continued to work and subsequently brought his family over on this same visa. Mr. L had then set up a business and his wife also worked in the UK during this time. When immigration officials discovered that Mr. L had entered the country ‘illegally’ and then continued to reside and work illegally, as well as bring his family to the UK under the same visa that he had used, he was sentenced to two years imprisonment and was charged with people trafficking offences.

During our conversation about Mr. L’s case, I commented that I thought that it was unusual that Mr. L had been ‘done’ for people trafficking in this situation, but the solicitor just mused that it was because Mr. L had brought his family into the country. When I then questioned what seemed to me to be quite an ‘extreme’ jail sentence that Mr. L was serving, Solicitor A seemed unconcerned and went on to say that it was in keeping with the standard sentence for using a false passport.

On previous occasions Solicitor A had mentioned that Mr. L annoyed him. We had gone to a different prison a week earlier with the intention of visiting Mr. L, only to discover that he had been moved, and during that journey Solicitor A advised me:

Sol A: So, you'll probably be able to tell when we meet him that Mr. L annoys me.

KF: (slightly laughing/confused) He *annoys* you? In what way?

Sol A: I dunno, he just does, he just annoys me.

(Fieldnotes 01/12/2010)

The conversation turned naturally to other matters relating to the visit and so I never got the opportunity during that day's fieldwork to draw Solicitor A further on this. When I brought it up with him during our subsequent journey to the second prison, it transpired that it was not actually Mr. L, himself, who annoyed the solicitor but rather his case and certain factors relating to it. Solicitor A explained that Mr. L's family had been in touch with him regarding the fact that they had no money. He spoke of how Mr. L's nephew had turned up on several occasions at his office without an appointment wanting to speak to him about this because he was paying for the house that the family lived in up in Alloa. Solicitor A then discussed the possibility that the family could apply for 'section 4 support' but that this would mean they would have to accept NASS accommodation, and that he didn't think that this is what they wanted. In explaining this, he also mentioned that Mr. L's wife phoned him quite frequently about this matter. This prompted him to state in a quite matter of fact way:

Sol A: And that's not really my job(!)

(Fieldnotes 14/12/2010)

It seemed that what particularly frustrated Solicitor A about Mr. L's case was the demand put on his time by Mr. L's family members concerning matters that Solicitor A did not think were part of his remit. These unreasonable, as Solicitor A saw it, expectations on the part of the client and his family in this case appeared to be one of the reasons the solicitor appeared unsympathetic towards Mr. L and during our conversation, when I would exhibit sympathy towards Mr. L's situation, Solicitor A would respond by stating that Mr. L was 'here illegally'. This same issue around financial difficulties also arose during the meeting with Mr. L, once we were at the prison.

During the meeting with Mr. L, Solicitor A provided him with an update of the current situation with his case and dealt with forms that he required Mr. L to sign. Solicitor A then asked how he was doing generally, if he was being treated well and if there was anything else he would like to discuss about his case. At this point Mr. L started to talk about how he was worried about his wife because she was 'not doing well', he went on:

Mr. L: She has suffered a miscarriage, she has lost the baby and she is on the phone to me all the time asking what she should do (**Mr. L starts to cry**) because I'm the one who brought in most of the money and now I'm in here and she is very depressed and she's not sleeping and the children, she has to get them to school (**looking at me as Sol A had started to look down and away from Mr. L and concentrated on the letter that the Home Office had sent Mr. L regarding his deportation**) you know (**I involuntarily nod and try to remain composed whilst still engaged with Mr. L's direct eye contact as he becomes increasingly overwrought**) they gave her some money for the taxi to school but she is a proud woman, she doesn't want to have to ask for money and she has no money for the children and I mean you know, (**gesturing towards me**) you have come with Mr. X, you must know and/

Sol A: /Uh-huh, is your nephew still paying your family's rent, is he still happy to do that?

Mr. L: (to me again) And my nephew is having to pay the rent you know and my wife, she's always worked, she has paid national insurance and everything you know so she thought there must be something, she would maybe be owed something.

(Fieldnotes 14/12/2010)

The solicitor asked Mr. L to remind him of when he had entered the UK and Mr. L outlined a rather detailed account of business trips to the UK under his own name and then recounted his entry and his family's entry on the falsified working visa that he had used to remain in the UK. Solicitor A responded that he and his wife were working illegally on that visa and that, because of this, it was irrelevant to the authorities that she had paid national insurance contributions.

During the whole time Mr. L spoke, outlined in the excerpt above, Solicitor A looked away from his client and down at his files. This meant that Mr. L focused on me and I performed the emotional labour involved in listening and responding non-verbally to him. My natural response was a genuine emotional one (Westaby, 2010: 156) and so it became more of a struggle to remain composed and display what might be considered the 'professional' response in keeping with the display rules expected of a 'researcher'. Despite the difficulty I experienced in dealing with Mr. L's distress, Solicitor A did not appear to acknowledge Mr. L breaking down and was undemonstrative towards him during this time. This is because, I would argue, Solicitor A was trying to refrain from entering into a discussion with Mr. L about matters which he felt did not fall under his remit as legal adviser. Sarat and Felstiner have claimed that: 'In the face of continued client demands for the "unreasonable", lawyers restate technical or strategic difficulties, try to recast reasonable goals into acceptable outcomes, or simply change the subject. They do not directly tell their clients that they are being unreasonable' (Sarat and Felstiner, 1995: 57). In this way,

marginalising the non-legal aspects of Mr. L's problems and emphasising the legal elements of his case allowed Solicitor A to manage Mr. L's demands for help into those which he viewed as having more 'reasonable goals'. By asking Mr. L to 'remind' him of the facts of his 'criminal' case Solicitor A could be seen to be reverting to a discussion of the legal issues of the case in order to steer the encounter away from being an emotional or subjective one and back on to being a formal, objective and professional meeting centred on the legal nature of the two men's relationship. By ignoring Mr. L, in this manner, and then moving on to change the subject back to the facts of his case, Solicitor A could avoid having to tell Mr. L that he thought he was being unreasonable because, as he had revealed to me earlier, he did not feel that dealing with the problems Mr. L was raising was '[his] job'.

7.6 Conclusion

This chapter has examined the emotional labour that solicitors undertake when representing asylum applicants. Interviews and discussions with the solicitors who took part in my research suggest that asylum solicitors often have to suppress emotional responses during their casework in order to maintain a professional demeanour. Listening to harrowing accounts of persecution their clients have experienced in their countries of origin resulted, for solicitors such as Solicitor B, in needing to take breaks during interviews in order to compose themselves and appear 'in control' in front of their clients.

Solicitors in my study had diverse strategies for dealing with the emotional or distressing aspects of their casework. Solicitor B revealed that he would sometimes discuss these matters with his partner, though he was wary of the strain that such discussions might put on their relationship in that he didn't want to then upset her and so he would generally keep this information to himself. Other solicitors were less forthcoming about how they dealt with the stress of dealing with asylum casework; many felt that learning to deal with these aspects of the job were part of conducting such legal work. The more experienced legal practitioners, such as Advocate A, were explicit about the strategies they had developed in order to address these matters. Advocate A spoke about how he deliberately tried to maintain a distance from clients in order to not become too affected by their accounts. He also stated that becoming 'too involved' with clients was something that a legal practitioner may do at the start of their career, but which they soon have to learn to

grow out of in order not to burn out from their work. I have argued, in this chapter, that learning to suppress emotions and maintain objectivity are skills which are learned by solicitors during their time at law school. In learning to privilege accounts for the legal issues to which they give rise and marginalise the human conflict or social context contained within them, solicitors are able to identify what aspects of casework that they are expected to deal with.

Another way of identifying the type of work that it would be reasonable to expect solicitors to undertake was whether they were likely to get paid for the work by SLAB. Additional demands or requests for assistance by asylum clients which related to issues around housing or finances were viewed by solicitors to be falling outwith their remit. In maintaining boundaries between these requests for social rather than legal work, solicitors were better able to manage the expectations of clients steering them towards more reasonable goals or acceptable requests for assistance.

8. Cultures of Disbelief? Criminalising Discourses in UK Asylum Procedures

The last chapter examined aspects of the asylum lawyer-client relationship and focused on the emotional labour of solicitors involved in representing an asylum applicant at appeal. This chapter considers the ways that a criminalising discourse around asylum seekers permeates the asylum process. It will also examine how this discourse of criminalisation and disbelief extends to the solicitor-client relationship and the impact that this may have on solicitors' views about the believability of their clients and the role that solicitors think they themselves play during an asylum appeal. In order to define my use of the term 'criminalisation', the chapter will begin by briefly examining some of the current literature on this topic.

8.1 Immigration Detention: Criminalisation in UK asylum legislation and policy

Banks argues that 'current approaches to asylum are evocative of approaches to crime and punishment' (2008: 43). In order to understand recent developments in asylum legislation and policy, he contends, one must consider them in light of penal and criminological theory. This is because, according to Banks, developments in asylum legislation and policy increasingly borrow from crime control mechanisms within the criminal justice field and 'only make sense if asylum seekers are problematised as deviant and dangerous'. Thus, he argues, such developments reflect a general tendency towards the criminalisation of asylum seekers and refugees (Banks, 2008: 43).

One such development is the use of detention in asylum and immigration procedures. Welch and Schuster (2005a) point out that prior to 1988 there were no permanent detention centres in the UK, although detention was used in some cases²⁰, it was deemed an exceptional measure and was rarely employed (2005a: 337). By 2002, however, detention

²⁰ Where immigration detention was used, immigrants and those seeking international protection were detained in prisons. In Scotland, people were detained for immigration 'offences' in Greenock Prison and at Cornton Vale.

had become a key feature of UK government policy relating to immigration control, with the Home Office explicitly stating in its white paper entitled *Fairer, faster and firmer: A modern approach to immigration and asylum* that ‘detention is now an essential element of the UK’s immigration policy’ (Home Office, 2002: para 4.74 in Banks, 2008: 44). Apart from recent undertakings on the part of the UKBA to end the detention of children for immigration purposes (Home Office, 2010) the use of detention remains a key tool in the UKBA’s immigration control policy. Indeed, the last two decades have seen a significant increase in the number of immigration removal centres with the establishment of no fewer than 10 immigration removal centres across the UK by 2005 (Schuster, 2005: 614). The management of these has largely been outsourced to private companies; however, three are, in fact, run by HM Prison Service (Schuster, 2005: 614).

As has been explained elsewhere in this thesis (in Chapter 2), where a person’s claim for asylum is subject to a Fast-Track process they are likely to be detained in an immigration removal centre whilst the UKBA makes an initial decision about their application. In addition, many asylum applicants are detained following an initial refusal of their asylum claim by the UKBA before their appeal is heard. Owing to this, some critics cast doubt on government claims that detention is generally used ‘at the end of the asylum process prior to deportation’ (Schuster, 2005: 612) and point out that detention is imposed on people at all stages of the asylum process. Thus, because many people applying for asylum may be detained while their claim is being decided, immigration detention and its potential impact on asylum appeals is also a significant consideration for this research.

Several NGOs and campaigning organisations challenge the use of detention in these Fast-Track cases, as well as its use more generally. The NGO Bail for Immigration Detainees (BID) highlights in its report *A Nice Judge on a Good Day: Immigration Bail and the Right to Liberty* (2010), that despite the power to detain being rather extensive, it is not ‘unfettered’ (2010: 10). BID emphasises the fact that principles which set limits to detention powers have been developed through both domestic and international case law (BID, 2010:10)²¹. In addition, BID points out that immigration detention, unlike detention in the criminal justice system, is meant solely for administrative purposes to enable the UKBA to carry out its functions more efficiently; it should not be used in a punitive manner (BID, 2010: 8). In spite of this, there are those who question the purely

²¹ A discussion of these developments in case law does not fall within the scope of this chapter, for a fuller discussion of these principles see Clayton 2010.

administrative function of detention and argue that it must be viewed as a further measure in the UK's increasingly 'punitive approach as a response to asylum seeking' (Banks, 2008:44).

Similarly, Hailbronner argues that irrespective of whether their entry into the UK was legal or not, the detention of asylum applicants is an interference with their fundamental rights, and that due to the fact that it affects people who are in need of international protection, detention inflicts 'a treatment upon them which denies their claim for a secure residence right' (2007: 65). Hailbronner makes the point that restrictions on someone's liberty tend to be used as a form of punishment or to prevent serious dangers to the public order' (2007: 65). For his part, Banks argues that in order for the government to push through such restrictive and draconian policies as the use of detention, asylum seekers must be constructed as deviant and criminal. The asylum applicant is, therefore, portrayed as a dangerous and deviant other who is intent on exploiting the asylum process in Britain. As he writes:

Thus, to maintain an asylum policy underpinned by retribution and deterrence an image of asylum seekers and refugees as a criminological other- a monstrous, dangerous and deviant figure must be evoked and maintained. As such they are categorised as a social threat that must be contained or excluded...Thus, it is argued that states actively construct criminal representations of asylum seekers and refugees through discursive and legislative responses that serve to convince the population that such groups are a problem (Banks, 2008: 49)

In a similar vein to Banks' argument in the extract above relating to the discursive construction of asylum seekers and refugees as a problem to the citizen population, Welch and Schuster have also explored the ways that a moral panic over asylum seekers operates in the UK. The panic works in such a way that people believe that the use of controversial detention practices is justified (Welch and Schuster, 2005b: 403). Welch and Schuster adopt Cohen's term 'moral panic' as a theoretical framework through which to compare the responses to asylum applicants in the UK and the US. As they explain, Cohen extensively developed the concept of moral panic in relation to the production of heightened concern to Mods and Rockers created by the public, media and politicians in the late 1960s (Welch and Schuster, 2005b: 399). The moral panic that was created around these groups of youths was used to justify the use of heavy police powers and a greater investment in criminal justice measures. They explain that, according to Cohen, a moral panic occurs when: 'A condition, episode, person, or group of persons emerges to become defined as a threat to societal values and interest; its nature is presented in a stylized and

stereotypical fashion by the mass media and politicians' (1977: 9, quoted in Welch and Schuster, 2005b: 399). Welch and Schuster also note that in applying the moral panic concept to asylum seekers, Cohen has argued that:

Governments and media start with a broad public consensus that *first*, we must keep out as many refugee-type foreigners as possible; *second*, these people lie to get themselves accepted; *third*, that strict media criteria of eligibility and therefore tests of credibility must be used. For two decades, the media and the political elites of all parties have focused attention on the notion of 'genuineness'. This *culture of disbelief* penetrates the whole system. So 'bogus' refugees and asylum seekers have not really been driven from their home countries because of persecution, but are merely 'economic' migrants, attracted to the 'Honey Pot' or 'Soft Touch Britain'. (2002: xix; emphasis in original; quoted in Welch and Schuster, 2005b: 400).

Cohen's argument that 'a culture of disbelief penetrates the whole system' is one shared by most refugee charities, NGOs and campaigning organisations in the UK (Asylum Aid, 1995; 1999; Amnesty International UK, 2004; the Medical Foundation for the Care of Victims of Torture (latterly, 'Freedom from Torture'), 2009; UNHCR, 2005; Independent Asylum Commission, 2008; Immigration Advisory Service, 2009). Souter has examined the research produced on this topic by these organisations and notes that they have shown that Home Office decision-makers tend to base their disbelief of asylum applicants on 'subjective and speculative arguments; unsubstantiated assumptions about asylum seekers' behaviour, beliefs, motivations, actions and knowledge; bald assertion; and fallacious and disingenuous reasoning' (Souter, 2011: 49). Moreover, Souter argues, when assessing the credibility of asylum applicants, caseworkers have been found to have engaged in what, drawing from Trueman (2009), he calls 'the manufacture of discrepancy'. This is where decision-makers focus disproportionately on apparent discrepancies in peripheral factors in a person's account and use these inconsistencies to justify their decision to disbelieve the entire asylum claim (Souter, 2011: 49).

Although, as Souter argues, reference to the existence of a 'culture of disbelief' has been overused to the extent that it risks being seen as something of a cliché, claims made by a whistleblower and former UKBA employee about her colleagues' treatment of asylum applicants and their claims demonstrate that, at the office within which she worked at least, a 'culture of disbelief' permeated the decision-making process (Taylor and Muir, 2010). Louise Perrett, who made the allegations against her ex-colleagues, worked as a UKBA case-worker in Cardiff over a period of three and a half months. Perrett recounted how she witnessed asylum applicants being treated in a hostile, rude and indifferent manner by

UKBA staff, explaining that on one occasion she was advised to refuse a difficult case and just ‘let the tribunal deal with it’ (Taylor and Muir, 2010). On her first day she was told by a senior member of staff that: ‘If it was up to [me] I’d take them all outside and shoot them’, referring to asylum applicants (Taylor and Muir, 2010). In addition, Perrett described how a stuffed toy of a gorilla named the ‘grant monkey’ would be placed on the desk of whoever had granted an asylum claim so that they could be subject to ridicule and condemnation from their fellow staff members.

In spite of the fact that the UKBA failed to address the specific claims made by Perrett, as Souter highlights, and perhaps conscious of the criticisms levelled against it, the Home Office has adopted the term ‘culture of disbelief’ in its own guidance to staff. In the Home Office’s code of practice on dealing with asylum seeking children, Souter notes, it refers to not becoming ‘caught up in a culture of disbelief’ (Souter, 2011: 48). The ‘culture of disbelief’, and discourse of ‘bogus’ or ‘genuine’ asylum applicants outlined by Cohen above, however, operate on all actors within the asylum process and not only those first-instance decision-makers within the Home Office. Scholars such as Kyambi (2004) have argued that those working within refugee status determination procedures fail to appreciate that the product of the so-called ‘genuine refugee’ cannot be extracted from the process which creates it. We must, she urges, examine the ways that the process creates the conditions under which someone might be perceived as a ‘genuine’ or alternatively ‘bogus’ refugee or asylum seeker.

8.1.1 Asylum in the UK and Discourses of ‘Genuine’ and ‘Bogus’ Asylum-Seekers

In her work on refugee status determination processes, Kyambi (2004) explores the way that refugee law constitutes the figure of the ‘genuine’ refugee. Drawing on post-structural theory, she argues that the presumption that decision-makers in the asylum process simply serve a declaratory function in deciding who ‘is’ or ‘is not’ a ‘genuine refugee’ is based on a logic that denies the constitutive role of the asylum process (2004: 26). She states:

The assumed declaratory nature of the decision on refugee status uncouples the process from the product. The process of determining refugee status is assumed to have no connection with the product of that process- the refugee. This belies the fact

that the refugee is, in fact, constructed in law by the process by which he is recognised as a 'refugee' for the purposes of the law (2004: 26).

According to Kyambi, this has turned the discourse on refugees in the UK into one of 'genuine' and 'bogus' asylum-seekers because the 'logic' of the asylum process which presumes identity to be self-evident and pre-existent allows doubt to be cast on the validity of a refugee's claim during the asylum process (2004: 29-32). Kyambi's argument here can also be seen to relate to points that were developed in the previous chapter (in Chapter 7) about the self-evident nature of the 'truth' as defined in legal disciplines. In that chapter, I discussed how Good has written instructively on the definition of 'truth' as it differs between legal and social scientific disciplines (Good, 2007: 29-37). In Good's terms, therefore, legal practitioners' and decision-makers' assumptions about whether a person is a 'genuine refugee' or not is a reflection of the tendency within legal or juridical structures to adopt a positivist stance and presume that there is an 'essential' or 'true' answer to this. Where a solicitor takes the view that a client either is or is not 'genuine', therefore, this shows a lack of recognition of their constitutive role within the asylum process.

MacIntyre (2009) has argued that solicitors often underestimate their instrumental role and the significant level of agency that they exercise within the asylum process. She suggests that such agency and instrumentality of asylum solicitors during asylum cases has been sorely neglected in the literature (2009: 180), arguing that:

Ignorance of the instrumentality of representation in the refugee determination process damages both academic understandings of refugee law but more importantly, damages the law's ability to protect refugees from *refoulement* and violations of their human rights (2009: 181).

The solicitors in my study did not always appear to regard their role in the construction of asylum narratives to be an instrumental one. MacIntyre's arguments will be considered below in relation to the discussion of empirical findings made during my research with legal representatives. The clearest examples of the discursive constructions used against so-called 'non-genuine' refugees in the asylum process, from the current research, however, were during bail application hearings.

It is to such depictions and discursive representations of asylum applicants as criminals and deviants made during the course of immigration bail hearings that this chapter now turns. Exploring what occurs on a daily basis at these hearings reveals how discursive responses

by the state which further the criminal representation of asylum seekers are articulated in the linguistic and performative practices of Home Office presenting officers (HOPOS or 'presenting officers') and other immigration officials.

8.2 Immigration Court Bail Hearings and the Criminalisation of Asylum Applicants

Immigration bail hearings are court hearings during which an Immigration Judge considers whether or not to grant an application for bail release made by a person subject to immigration detention (BID, 2011: 13). Bail hearings are usually heard by a single Immigration Judge sitting at the FTTIAC. If the Immigration Judge decides to release the person on bail, then the hearing is also used to set the conditions of that person's bail release. The applicant has the right to attend the hearing though their participation is usually facilitated by way of video-link with the detention centre where they are being held. Also in attendance are an applicant's legal representative, a clerk, a Home Office presenting officer, an interpreter where necessary and, if they are able to attend, people who are to act as cautioners for the applicant. A cautioner is someone who is willing to provide the bail sum to the Home Office as an assurance that the bail applicant will not 'abscond' or run away while released on bail. In the absence of this added incentive to bail applicants to maintain contact with the immigration authorities, Immigration Judges are not usually inclined to grant bail. This is in line with advised procedures in Guidance Notes issued in 2011 by the President of the FTTIAC to Immigration Judges (FTTIAC Bail Guidance, 2011). The Guidance Notes advise Immigration Judges that they should consider the following when deciding on whether to grant an application for immigration bail:

4. In essence, an Immigration Judge will grant bail where there is no sufficiently good reason to detain a person and lesser measures can provide adequate alternative means of control. An Immigration Judge will focus in particular on the following three criteria (which are in no particular order) when deciding whether to grant immigration bail.
 - a. The reason or reasons why the person has been detained.
 - b. The length of the detention to date and its likely future duration.
 - c. The likelihood of the person complying with conditions of bail.

...In practice it is often not possible to separate one issue from the others and Immigration Judges will need to look at all the information in the round.

(FTTIAC Bail Guidance, 2011 para. 4)

Deciding on a bail application is therefore described as an exercise in risk assessment. However, as can be seen from the guidance to Immigration Judges above, where means of control which are less severe than detention are available, these should be used in the place of detention. Such measures may, for example, relate to the use of reporting with the Home Office or at a local police station on a regular basis. Observation shows though that this is not the decision often taken by Immigration Judges during immigration bail hearings.

Over the course of my time spent conducting participant observation at the FTTIAC in Glasgow, I observed immigration bail hearings undertaken there during the period August 2010- June 2011. Initially they served as a way for me to gain access to solicitors whom I had identified as potential research participants. It soon became apparent, however, that bail hearings were significant for this research in that they presented examples of discursive practices which worked to criminalise asylum applicants and adversely affect perceptions of not only their credibility but also their moral authority and good character.

At the FTTIAC in Glasgow, there are two hearing rooms designated for immigration bail hearings. One is set up with the equipment and facilities required to conduct video-link hearings and the other is used because it is the largest of all the hearing rooms, which means that there is more space between the Immigration Judge's 'bench' and the desk where the applicant sits when present in court. One of the clerks explained the reasoning behind this to me one day as we moved from the video-link court to the hearing room where immigration bail proceedings would be heard in the presence of the applicants who had been brought through from Dungavel:

Clerk 1: Well, they prefer to hear the bails in the bigger court because in the past a chap applying for bail got rather angry and threw a glass of water at the Judge and went for the bench. So they like to keep a distance now. And, we don't have water for the appellants anymore.

(Paraphrased Fieldnotes, FTTIAC, (8/10/2010))

The approach of the FTTIAC described by Clerk 1 immediately sets up an attitude of mistrust between the person requesting bail release from immigration detention and the officials of the state and court. This is representative of what Banks refers to as the process

of ‘othering’ of asylum seekers in that it immediately attributes an inherent deviance or malicious intention to them. It implicitly depicts them as untrustworthy and what Banks calls ‘threatening outcasts’ (2008: 49). Such representations can be seen to be perpetuated during the language used in immigration bail hearings.

On witnessing proceedings at immigration bail hearings, one is immediately struck by the loaded language invoked by the representative of the state. The following fieldwork extracts typify the approach taken by immigration officials during such hearings:

Immigration Judge: Mr. X, would you like to begin?

Home Office Presenting Officer (HOPO): Thank you M’am. The Home Office would seek to oppose bail...Mr X has used false documents, the Home Office *abhors* the use of false documentation.....he has *deceived* us...Also, M’am we are convinced that if he is released he will *go to ground*....

(Fieldnotes Bail App.2. 31/08/2010)

HOPO: ...the appellant has *deceived* the authorities of the UK.

(Fieldnotes Bail App.1. 31/08/2010)

HOPO:....it’s *deception* M’am. *Nothing more, nothing less*....we are very worried that if released *he’ll go to ground*....and so we’d rather keep him where we can see him for the time being...

(Fieldnotes Bail App.1. 17/09/2010)

The use of ‘us’ and ‘we’ to refer to the Home Office and the UK authorities also suggests a collective ‘us’ that is opposed and contrasted to the ‘them’ constituted by those who are held in immigration detention. This can be seen as an example of the type of ‘othering’ processes in asylum legislation and policy that Banks describes as akin to that in criminal justice systems. The use of words such as ‘deceived’ and ‘deception’ to describe the actions of bail applicants and ‘abhors’ when referring to the Home Office’s stance on the behaviours of these groups illustrates the ways that bail applicants are depicted as deviant and almost despicable during the immigration bail hearing process.

While attending immigration bail hearings, I observed this same HOPO regularly using very similar language in relation to bail applicants. He often sought to construct an image of the applicant as a deceptive or fraudulent individual with many resources at their

disposal to remain undiscovered by the UKBA should they abscond. On one occasion, he continually referred to the person applying for bail as ‘the subject’, stating that:

HOPO: If you look at his immigration history M’am, it is *deplorable*. He has deceived the authorities and he’s been backed up by people who have known what he was doing. Now, he seeks to frustrate the removal process by submitting a claim for asylum which in light of his immigration history is simply *intolerable*, M’am.

(Paraphrased Fieldnotes FTTIAC, 17/9/2010)

Similarly, a different, female, HOPO would also regularly use language which conveyed a sense of deviance or sense of criminality on the part of the bail applicant. During one of the bail hearings that I observed, this presenting officer repeatedly stated the applicant was ‘a prolific offender’, without elaborating on this accusation or providing further information to support her claims. The Immigration Judge in this hearing did not ask her to provide such information or to explain her reference to the applicant as a ‘prolific offender’.

In order to counter the Home Office’s depictions of their clients as deviant, solicitors representing detainees applying for bail regularly attempted to portray their client as an honest individual who complied with authority. An example of this was during a bail hearing where the solicitor sought, amongst other things, to emphasise the community work that the bail applicant had undertaken:

Solicitor: My client did not come to the attention of the authorities through crime, M’am. And he *is* making efforts to regulate his stay in the UK. He has a history of being active in the community M’am and is well regarded by those that he has been doing voluntary work with. My client would also comply with all bail conditions that M’as is minded to pose on him...that’s all M’am though if I can address any question that you might have about his time in the community?

(Paraphrased Fieldnotes Bail App.2. FTTIAC, 31/08/2010)

In the above extract the solicitor can be seen to be trying to create an image of the bail applicant as upstanding or of good character. Such efforts on the part of legal representatives are designed to try and steer the discussion of the bail applicant away from the deviant and threatening individual that the HOPOs paint them as. In fact, solicitors will often open their submissions by stating that their client is ‘no threat to society or the state’, or, as one solicitor submitted:

Solicitor: My client is a good candidate for bail, he poses no danger to public health or security.

(Paraphrased Fieldnotes Bail App 2 FTIAC, 22/10/2010)

The representative for the Home Office frequently responded to this by using the fact that bail applicants may have entered the country using false documents to suggest that the individual is dishonest or fraudulent. Although this does not suggest that the bail applicant is a threat to society or the state, it creates a sense of illegitimacy around the bail applicant's presence in the UK and brings their moral character into disrepute. Bohmer and Shuman argue that because entering the country using 'fraudulent' documents is symptomatic of many people's experiences of claiming asylum, they are therefore 'criminalised' from the outset of the process because of this (2008: 82-3).

Judgements about an individual's character seem to extend to those made about the people standing as cautioners in a bail hearing. During one hearing the Home Office representative pursued a line of questioning of the applicant's sister, who had undertaken to provide the bail sum, which went into the reasons she did not do anything about the fact that her brother was living in the country 'illegally' prior to his detention by the immigration authorities (Fieldnotes Bail App.3. 3/09/2010). She responded that she was not aware that he was not allowed to be in the UK; however, bail was refused.

In another hearing, the person posing as cautioner was the bail applicant's brother-in-law. The Home Office representative argued that in the past he had been 'unable to control' the applicant and that he would fail to do so again. In her refusal of the bail application, the Immigration Judge relied on this point to suggest that the applicant's brother-in-law would not be able to make sure that he stuck to the bail conditions imposed on him. By judging this cautioner to be inadequate at meeting the demands of the role, the Immigration Judge seemed to offend him. This became apparent following the bail hearing where he caught up with me as I left the Tribunal and initiated conversation outside the Eagle Building. He asked what I thought about the outcome of the bail hearing and went on to try and justify the fact that he was unable to stop his brother-in-law breaking immigration rules:

Cautioner: What she said though, that I didn't control him...how can you control another person? I mean, I couldn't! You can't, it's impossible innit?

(Fieldnotes Bail Apps 31/08/2010)

He seemed extremely upset and it definitely struck me as though he felt that the refusal was partly a judgment about him. It appeared as though he was trying to defend himself to me, or make a case for his brother-in-law's release. It seems, therefore, that explicit or implicit judgements about one's character also could be said to extend to those who provide the money to secure a detainee's bail.

8.2.1 Undermining an Opponent's Claims through Non-Verbal Communication

It was my experience that there were more observers in bail hearings than asylum appeal hearings on any given day. During my time spent observing bail hearings, I noticed that one of the HOPOs who regularly appeared at bail hearings would use forms of non-verbal communication to express his reactions to the submissions of solicitors. He would often look at the clerk who mainly dealt with the bail hearings and also at me in *faux* shock or mock disgust during solicitors' representations. In addition, I noted that he tended to clear his throat or cough when solicitors made claims or arguments in favour of their client that it seemed he did not to agree with.

I found this particularly difficult to deal with and on one occasion was unable to hide my annoyance, rolling my eyes and deliberately looking in the other direction. After the hearing the HOPO approached me to try and explain why he had looked at me in the way he had:

HOPO: See the reason I looked at you aghast there, was because that solicitor there was trying to get the judge to make a decision on the legacy case and she can't do that.

(Fieldnotes, Bail App.4. 31/08/2010)

It seemed to me, therefore, that this amounted to an acknowledgement of a strategy of undermining solicitors and their clients in a non-verbal manner. I wondered if this was normal behaviour for this HOPO or whether he was prompted to act in this manner because, by virtue of my presence in the hearing, I offered him an 'audience' for such non-

verbal performances. However, on talking to the clerk who oversees bail hearings, it seemed that the HOPO would usually conduct himself in this way:

Clerk3: He's just a total joke. I mean have you seen the way he'll look at me and pull faces and I'm meant to be impartial? He shouldn't be doing that, it makes it really difficult for me.

(Paraphrased Fieldnotes, FTTIAC, 8/9/2010)

The question of the conduct of this HOPO and the perceived impartiality of those working at the FTTIAC is an important one. As mentioned previously (in Chapter 2), research into onward appeals in the asylum process in Scotland reveals that there is a perceived lack of impartiality on the part of the FTTIAC in relation to asylum and immigration cases (Craig et. al, 2008). Given this HOPO's behaviour and the difficulties that it posed for Clerk 3, it would be easy to see how a witness or bail applicant might feel that their case was not being dealt with in a fair and impartial manner at the FTTIAC.

The problem could be compounded in this case by the fact that the HOPO in question was well liked by the other clerks and would regularly chat and joke at the clerks' desk in the waiting area of the Tribunal. This meant that people waiting for their appeal cases or those waiting to support someone applying for bail would see the friendly banter between the Home Office and the employees of the Tribunal and could easily assume that the Home Office was closely linked to the Tribunal.

What is more, on several occasions this particular HOPO was badly prepared during appeal hearings and was unable to provide accurate and appropriate representations on the part of the Home Office. At one hearing he was even unable to advise the court at which detention centre the applicant was being held. The applicant had been moved during the night with no opportunity to contact his solicitor and so his whereabouts were unknown at the outset of the bail hearing. This was particularly worrying for the solicitor and appeared to cause great distress to the applicant's family members who had travelled to Glasgow for the hearing.

I was unsure if it was perhaps the case that it would be very difficult for any representative of the Home Office to appear at bail hearings with such information given the different teams and departments that would be dealing with the bail applicants cases. However,

when I discreetly raised this issue with a solicitor, he seemed to think that it was due to this HOPOs disinterest in the work:

Solicitor A: Nah, he just doesn't care. He wants out, he's only going to be there for a while and then he's off somewhere else.

(Fieldnotes, client meeting with Solicitor A, 07/09/2010)

Eventually, this behaviour was the issue of a complaint by an Immigration Judge who had been hearing immigration bail hearings at which this HOPO was present. It was reassuring to note that such conduct had been identified as unsatisfactory by an Immigration Judge but the fact that it was allowed to go on for several months and during multiple immigration bail hearings suggests that more should have been done by other Immigration Judges to address this. In spite of the poor presentation of the Home Office's opposition to the granting of bail and with Immigration Judges explicitly stating their dissatisfaction with the reasons put forward on the Home Office's behalf (Fieldnotes Bail Apps 31/08/2010 and 03/09/2010), it did not seem as though less weight was given to his evidence or submissions as is required of Immigration Judges by the Bail Guidelines; most of the hearings during which he represented the Home Office resulted in bail being refused.

As mentioned above, though, it is not only those people who represent the Home Office that may disbelieve asylum applicants' claims. Although the latter group's disbelief can be seen to manifest itself during their representations at bail application hearings where they attempt to criminalise those who are subject to immigration detention through their choice of language and submissions to the Tribunal, discussions with solicitors during my research revealed that they also often feel that their clients' accounts lack credence. Solicitors are involved in a complex process of, on the one hand, having to represent their client to the best of their ability in accordance with professional codes of ethics and conduct, whilst on the other hand often disbelieving their clients' claims. At times, I observed how legal representatives made judgements about the credibility of their own clients based on factors such as the demeanour of a client during solicitor-client meetings. I will examine these empirical findings in light of the literature presented above in order to explore the ways that a culture of disbelief may be seen to operate amongst some asylum solicitors.

8.3 Asylum Solicitors' (Sub)Conscious Judgements about the 'Truth' of Clients' Asylum Claims

During conversation with a solicitor on the car journey back from a prison I had attended with him to visit a client, discussion turned to past colleagues who had left the firm that he worked in, Firm X. When the solicitor mentioned a colleague who had recently left, the following exchange took place:

KF: Oh right, I met her, she was really passionate/

Sol A: /Yeah (...) and she used to believe *everybody*, totally lapped up *everything* her clients told her and got really involved and you used to just think **(in a patronising yet almost affectionate tone)** 'aww X'.

(Paraphrased Fieldnotes 14/12/2010)

It was interesting to note the way that Solicitor A spoke about his colleague 'believing everybody' as though it was naïve or erroneous to do so. It seemed to me that, in contrast, Solicitor A was more sceptical of clients, or in any case less quick to believe 'everything his clients told him'. This appeared to be confirmed on a subsequent occasion, during Solicitor A's discussions with another legal representative following an appeal:

Sol B: How many, since you started, how many *genuine* cases do you think you've had?

Sol A: About 3 or 4 maybe.

KF: During your whole time doing asylum law? Even as a trainee as well?

(Solicitor A nods)

Sol B: Yeah, I tend not to believe too many either.

(Fieldnotes, FTIAC, 06/01/2011)

Solicitor A's response to Solicitor B's enquiry showed that during his whole career of practising asylum law he had only believed the claims of three or four of his clients. During an interview I later conducted with Solicitor A, he elaborated on this issue of trusting clients when he steered the discussion about emotional reactions towards the topic of whether or not he believed his clients:

Sol A: Well a lot of the time you come away feeling really sorry for the client and you want to do the best you can for them because...I mean it depends how truthful you think the client is a lot of the time as well. Which you have not asked me about, in your credibility interview: 'Do I believe the clients?' **(Both laugh, KF slightly nervously)**. Are you coming to that?

I proceeded to enquire what would make Solicitor A more or less inclined to believe a client:

Sol A: Well once you have been doing it for a while I think you develop a nose for knowing when the client's not telling the truth. I think. I may be wrong, it may be that only I think that. I think, as a solicitor, you accept what your client's position is unless it is obviously not right and you deal with it the best you can. But of course every case you have, you decide. Well, you don't decide, but you have an inkling about whether your client is telling the truth.

KF: Do you think you subconsciously decide?

Sol A: Uh-huh, yeah. Not subconsciously, I just decide anyway; but it doesn't stop you doing your job. But, yeah, you think, 'that doesn't sound right to me' or 'yeah, that sounds credible and I know from dealing with these cases in the past that that is the case'. So, you *do* do that, but it doesn't make a difference to what you do for the client. Or it shouldn't, and it doesn't to me.

(Solicitor A, Interview, July 2011)

Solicitor B returned to the fieldwork exchange cited above during an interview I conducted with him several months later:

Solicitor B: We get 'genuine' clients and most of the time, you know who your 'genuine' clients are, not always. And clients do tell lies, appellants are so desperate to leave their own country for whatever reason that they will sometimes make up a claim and I think that is a reality.

(Solicitor B, Interview, October 2011)

It is understandable that a legal representative should have certain feelings about whether a client is telling the truth or not, as discussed by Solicitor A in the extracts above. Often, as other solicitors and those working in the asylum process commented to me, asylum clients do lie about their experiences or journey to the UK because they are told to do so by the smugglers whom they have paid to help them escape and travel to the UK. This does not then mean that their claim for asylum is untrue, but rather that the truth has to be 'coaxed out of them slowly' (Solicitor L, Interview August, 2009).

Solicitor A's reference to 'accepting a client's position' suggests that he saw his task as being merely to put forward a client's claim rather than help 'coax' out the claim or help the client articulate what their claim, or narrative, is through the preparation of the witness statement. In this way, the role of the solicitor in co-constructing the claim through the

witness statement is underplayed. Solicitor A's reference above to a client's 'position' suggests that Solicitor A perceives his role to be one of presenting the views of his client based on the 'instructions' that the client gives them. Such assumptions about the role of an asylum solicitor underestimate the levels of agency that solicitors have in relation to the decisions that are made about the ways to represent a client during their case (MacIntyre, 2009). The assumption that asylum clients are sufficiently empowered to provide 'instructions' to their solicitor also raises questions about how solicitors view the power dynamic in their relationships with asylum clients. In fact, other solicitors I spoke to did not see themselves as instrumental in the construction of the asylum narrative when preparing the witness statement with clients. They too spoke of an applicant's asylum narrative being 'their story', or 'their account', with the onus for the construction of the asylum narrative presumably being on the asylum applicant rather than the narrative being a co-constructed account that emerges out of their interactions. Solicitor K's comments below illustrate this:

Solicitor K: It's their account. 'If it's true they'll remember it' is the attitude that I have.

(Solicitor K, Interview August, 2009)

Where solicitors claim that 'it is the client's story' or 'it is their claim', this would, in MacIntyre's terms, therefore, represent a failure to take account of the solicitor's pivotal role in relation to the decisions that are made and the statements that are constructed as the asylum client goes through the asylum appeals process. The suggestion here by Solicitor K that applicants will 'remember' their account if they are telling the truth assumes a quality of memory and sophistication on the part of asylum applicants which is unrealistic. Applicants are provided with a printed version of their witness statement prior to attending their asylum appeal hearing. This version is written in English though and so, where applicants are not able to read English, the only full version of the account that they often have is an oral reading of it to them by an interpreter. The fact that this version of their account will also have been mediated through the interpreter and solicitor and, additionally, through the version of the applicant's account of persecution as recorded by the Home Office at the asylum interview, means that it is unrealistic to expect someone to remember everything that they have said and the ways that this has then been presented by solicitors and immigration officials.

This apparent lack of recognition of the important role that solicitors play in assisting in the creation of a claim that appears ‘true’ was also echoed in some of the comments by certain immigration decision-makers, with one judge exclaiming during an informal discussion:

Immigration Judge A: It is fascinating, I mean, sometimes you just would really like to know what the truth *actually is!*

(Fieldnotes, FTTIAC, 7/6/2009)

Immigration Judge A’s comments show how she fails to acknowledge her role in the ‘constitutive process’ (Kyambi, 2004: xiii) of asylum decision-making in that she assumes that there is an external ‘truth’ about a claim without taking into account the different structural factors which might impact upon her decisions about the ‘truth’ of a given claim. Additionally, these issues were emphasised when solicitors would make reference to knowing when a client was telling the truth or not.

Solicitor A’s reference to ‘developing a nose’ for when someone is telling the truth was also reflected in the comments of other solicitors who felt that experience of working in asylum law made them well placed to judge whether a client was lying or not. Solicitors E’s and K’s comments below relate to this point:

Sol E: I mean, I’ve been doing this a long time. I know when someone is just at it.

(Paraphrased Fieldnotes, CPD Seminar, September 2010)

Sol K: It tends to be anyway that where there are large divergences between statement and the interview, they’re going to be refused anyway. If they’ve been telling lies to that degree then it’s obvious...as I say where it’s wildly divergent they’re always going to lose anyway. I mean after 6 years I know who’s going to win and who’s going to lose although I do occasionally get surprised’.

(Solicitor K, Interview August, 2009)

The assumption here about telling lies seems to conflict with research in the psychological literature around the divergences in accounts that occur during repeated interviews in the asylum process (Herlihy and Turner, 2009). It also raises the question of why the solicitor would not explore such divergences with their client and attempt to explain the inconsistencies between the account provided when responding to the asylum interview

questions and the one which is developed with the applicant by the solicitor. It is not the aim of this thesis to pass judgement on the practices of asylum solicitors, although the issue of appeals reaching court with large discrepancies between accounts not being addressed or explored is an important one when considering the level of quality in legal representation and advice. However, this interviewee did acknowledge that inconsistencies did not mean that an account was not truthful; he then went on to provide anecdotes about cases where great lengths had been gone to by the legal representative to try and decipher all the conflicting information provided by applicants in order to tease out what had actually gone on and to work out the reasons behind such inconsistencies.

In one of the first few extracts quoted in this section, Solicitor A talks of the effect that dealing with similar cases in the past has on whether a legal representative is inclined to believe a new client. Where a solicitor has researched country of origin conditions for cases in the past, it would seem that they then feel well placed to compare and evaluate subsequent accounts of clients from these same countries based on what they know from previous cases. Such prior knowledge can be essential in order for an efficient flow of communication during the taking of the witness statement (Maryns, 2006: 19-21). In fact, solicitors did indeed speak of the difficulties in preparing witness statements and appeals when representing a client from a country they had never dealt with before (Solicitor K, Interview, July 2009).

Prior experience of dealing with clients from similar countries and with similar claims, though, also resulted for some solicitors in a 'case-hardened' approach to their work. Solicitor K, in particular, spoke of being case-hardened or sceptical due to bad experiences with applicants in the past (Solicitor K, Interview July, 2009). This point was also mentioned during the interview I conducted with Solicitor J:

Sol J: I mean a lot of the judges I think *like most of us* become quite case-hardened.

(Solicitor J, Interview, July 2011)

Thomas has highlighted the problem that 'case-hardening' may have on credibility assessments in asylum adjudication, stating that: 'The longer someone hears asylum cases then the more case-hardened and cynical they become' (2011: 164). Solicitor J's comment 'like most of us' in the above excerpt suggests that he believes he has, himself, become

case-hardened. This highlights the fact that the difficulties involved in not allowing past experiences to shape subjective interpretations of new factual situations in making decisions in relation to asylum claims may also extend to solicitors' evaluations of a client's credibility. Solicitor A's comments above that whether a solicitor believes a client or not should not make a difference to the job that they do for the client suggests that solicitors may feel a professional obligation to represent clients even where they feel that, for whatever reason, they are not being told the truth about certain aspects of the person's claim. In England and Wales, however, where a merits test operates in relation to the provision of publicly funded legal representation, as outlined earlier in this thesis (in Chapter 6), such judgements about the credibility of a client may have a detrimental effect on whether solicitors think that the client satisfies the criteria in the merits test to qualify for legal aid. Solicitors who are case-hardened may make decisions on this basis. As I also discussed earlier (in Chapter 6), there are strong indications that the Scottish Legal Aid Board are keen to introduce a form of merits testing for legal aid in asylum cases in Scotland. Were these plans to be realised, this would raise important questions around the assumptions that solicitors make about the believability of their clients and the potential impact that this might have on whether a client secures legal aid funding for their case or not.

8.4 Conclusion

In this chapter I have examined the ways that a criminalising discourse around those subject to asylum and immigration procedures in Scotland permeates the asylum process. I have relied on data gathered during my observation fieldwork to show how this discourse operates in practice in the language used by Home Office representatives during bail hearings at the FTTIAC. Such observations have revealed the ways Home Office presenting officers attempt to depict bail applicants as deviant and deceptive individuals who are untrustworthy and a risk to public order. Through their use of language and decisions to support the continued detention of such individuals they can be seen to be contributing to the processes of 'othering' that Banks argues takes place in UK asylum legislation and policy. Banks claims that in order to understand these policy measures it is necessary to think about current asylum laws and policies in relation to penal and criminological theory. Others have used Cohen's theory of moral panics to suggest that

concern or panic around asylum seekers and immigrants is created by the public, the media and political elites in order to justify such restrictive measures as immigration detention. I have also argued in this chapter that where officials at the FTTIAC cannot be seen to challenge the criminalising discourse perpetuated by Home Office representatives during bail hearings, there may be a perceived lack of impartiality at the FTTIAC and these officials may be seen to be more closely aligned to the ideologies of the Home Office.

In addition, this chapter has considered the ways that the discourse around ‘genuine’ and ‘bogus’ asylum applicants extends to the legal representative community in asylum processes. I have shown that many of the solicitors in my study formed opinions about whether their clients were being honest about their backgrounds and fear of persecution, with many believing that their client was ‘at it’ or not being completely truthful. I have considered the ways that making such judgements about whether a client is ‘genuine’ or not creates a situation in which solicitors fail to appreciate their pivotal role in the eventual decision about the credibility of their client at appeal. The solicitors in my study did not always appear to recognise their role in the construction of asylum narratives as an instrumental one. There appeared in some instances to be an unrealistic attribution of agency to asylum applicants in the ways that legal practitioners regard their client’s autonomy in constructing their claim. As far as some solicitors were concerned, providing the facts of a case was the responsibility of the client and they did not explicitly recognise their role in ascertaining and co-producing these facts. Those solicitors felt that it was their job to note and present the facts of a claim as these were explained to them by their client. I have suggested that such judgements may prove problematic if a merits test for legal aid funding were to be introduced in Scotland and solicitors allowed their own opinions about the credibility of their client to influence their evaluation of whether the client would have a case which qualified for legal aid. Because the consultation about these new measures was ongoing at the time of writing, this is an area that may warrant further research in the future.

In the chapters which follow, I consider the issue of the asylum narrative as it emerges during the various parts of the asylum claims and appeals process. I will demonstrate the ways that Home Office representatives and immigration officials attempt to attack the credibility of asylum applicants through their interview questioning and practices, and also through their examination strategies and oral representations during asylum appeal hearings. I will engage with some of the arguments raised in this chapter around the role of

solicitors during the construction of the asylum narrative and will examine the different constraints, within which they work during the production of the narrative, created by the asylum process itself

9. Testing the Witness Statement: the appeal hearing, Home Office cross-examination and the communication of the asylum narrative

In this chapter I consider the ways that an appellant's asylum narrative is presented and tested at the asylum appeal hearing. The chapter begins by outlining the prominent position that the witness statement occupies during asylum appeal hearings. I then examine the ways that pre-hearing processes are used in order to undermine the truth of the statements adopted by the appellant as their evidence at the hearing. The demands of institutional procedures are presented as posing structural barriers to what an appellant may say at the hearing. In addition to this, I consider how other aspects of asylum appeal procedures beyond the control of the appellant affect the extent to which they are able to participate in the appeal process. This is significant because it raises questions about the nature of this process and points to the importance of pre-hearing interactions and their influence on the appeal hearing and its outcome.

9.1 The Witness Statement and the Asylum Appeal Hearing: examination-in-chief

In legal procedures, a witness statement is a signed written statement by a person that details the evidence which that person would be allowed to give orally (MoJ, 2009 in Good, 2011: 100 n.8). In the asylum process, the witness statement is a record of the evidence that the asylum applicant would be able to give at their appeal hearing at the FTTIAC. As discussed earlier in this thesis (Chapter 2), the witness statement is generally the most important piece of evidence in a person's asylum claim because, owing to the conditions under which they have fled their country of origin, they are often not able to produce documents or other evidence in support of their claim (Ensor et. al, 2006). Moreover, it is often the case that the only other witnesses to the persecution that the asylum claimant has suffered are the persecutors themselves.

At asylum appeal hearings, the witness statement occupies a central position during the examination of evidence. At the start of proceedings, the appellant's legal representative is responsible for presenting the 'evidence-in-chief'. This enables the appellant's solicitor 'to elicit the evidence concerning the basis of the appellant's claim for asylum' (Thomas, 2011: 118). As the following fieldwork extract demonstrates, this process is usually extremely brief:

Solicitor: Mr. X, I am going to put to you a document. **(She walks over to her client and presents him with a document which she puts down in front of him on the desk.)** Can you clarify whose signature that is on the bottom of these pages? **(She turns each page and points to the bottom of each one.)**

Appellant: (through Interpreter) Yes, it is my signature.

Solicitor: Was this statement read back to you in a language that you understand and is the statement contained in this document true and accurate to the best of your belief?

Appellant: (through Interpreter) Yes.

Solicitor: And would you like to adopt the statement as your evidence to the court today?

Appellant: (through Interpreter) Yes.

(Fieldnotes, FTTIAC, 25/2/2011)

There were only slight variations in the language used by solicitors when going through this process of having their client adopt the witness statement as their evidence-in-chief; generally the process was the same in all appeal hearings I observed. When interviewed, some representatives commented on the perception that asylum appellants are not afforded much space to present their account of persecution due to this process:

Sol F: For as long as I have been doing it you have had to produce a witness statement. And then, you will have seen it, they just adopt it. It is really bad sometimes when people come in to watch hearings that *don't* know. We try and explain it to our clients, but sometimes their case can be over in thirty or forty minutes. Because the Home Office haven't turned up, I haven't had any questions, the Judge hasn't had any questions and it's just simply been submissions. And they sort of think, 'Why did I not speak?' And say someone has come into watch for the first time; they think 'Well, why's this guy not getting the chance to put his case across'.

(Solicitor F, Interview, December 2011)

Here Solicitor F is referring to the appeal hearing not providing the space for the appellant to provide full oral testimony relating to their account of persecution and claim for asylum.

Appellants are effectively denied the opportunity to ‘put their case across’ because they are made to adopt their written witness statement as their evidence-in-chief as opposed to having their solicitor question them about their claim in front of the court.

When I asked about whether it would, in fact, be possible for the solicitor to lead the evidence of the client orally rather than having the statement adopted, this solicitor felt that it would not be allowed by most Immigration Judges:

KF: So you couldn’t sit and actually do an examination-in-chief with your client for say three hours?

Sol F: If you wanted to be a little bit cheeky, you probably could do a very short statement and go in and try it. And maybe if you were an Advocate of a number of years, a Judge might just sit back, but I think if the majority tried it then they probably wouldn’t get very far. It would depend on your Judge. Some Judges will allow you to ask more questions than are in your statement, some will ask you to explain why and others will just not give you any leeway.

(Solicitor F, Interview, December 2011)

Solicitor F’s response here implies that, in some instances, Immigration Judges will not even allow solicitors to ask questions of their clients for which the answers are not provided in the witness statement, let alone allow them to tease out their client’s full claim through questioning. This illustrates how important the witness statement is, then, to the asylum appeal hearing and indicates how pre-hearing interactions and documents shape what might go on during the proceedings at asylum appeals; if something is not covered in the witness statement then for some Immigration Judges it cannot be brought up during examination at Court. Similarly, Solicitor E commented on her experiences of this. She explained that, on occasions where she had produced a witness statement, Immigration Judges had questioned her attempts to ask her client any questions at all:

Sol E: Judges are a bit funny; if you have a Statement then they will say ‘Why do you need to ask any questions, it should be covered in the Statement?’ So, basically, the safest way to do it is to cover everything and sometimes that can then make for a really convoluted, long Statement but I always think well this is people’s opportunity to put across their full claim and at the end of the day.

(Solicitor E, Interview, October 2011)

In other words, Solicitor E now prepares as full and detailed a witness statement as possible on the assumption that she may not be permitted to ask her client any questions during examination-in-chief at the appeal hearing. Similarly, Solicitor F’s answer also

suggests that it is a matter of course that the witness statement forms the core of an appellant's evidence in this way and that to deviate from it and lead evidence orally, where one does not have the professional standing or stature of an Advocate, is considered by the Immigration Judge to be acting 'cheekily' and outwith the accepted behaviour of the court. Although it was Solicitor F's experience that Immigration Judges have varying views and responses to this practice of trying to elicit more detail from the client than is actually included in the witness statement, it is in fact the practice directions of the FTTIAC which provide for this approach where they state:

7.5 In most cases, including those appeals where a CMR hearing is to be held, the Tribunal will normally have given to the parties the following directions with the notice of hearing:-

(a) not later than 5 working days before the full hearing (or 10 days in the case of an out-of-country appeal) the appellant shall serve on the Tribunal and the respondent:

(i) witness statements of the evidence to be called at the hearing, *such statements to stand as evidence-in-chief at the hearing*;

(FTTIAC, 2010: Part 4, 7.5, emphasis added)

This means that having the appellant adopt the witness statement as their evidence-in-chief is not a matter for Immigration Judges' discretion but is actually set out as the institutionally required procedure in the practice directions. It is, therefore, an institutional rule that impedes the provision of full oral testimony when presenting the evidence-in-chief at asylum appeal hearings. Craig (2006) highlights how this process of having appellants at Tribunals adopt pre-prepared witness statements as their evidence-in-chief was introduced in the asylum and immigration context in 2001. Before then, as Craig points out, the position in Scottish tribunals tended more towards the oral presentation of evidence. The requirement that written witness statements be lodged in advance of hearings was adopted in Scotland after similar arrangements were introduced in England and Wales. This measure was motivated by a desire to have cases dealt with more expediently (2006: 316). In this way, the institutional demands for efficient and timely Tribunal adjudication can be seen to pose as a structural barrier in the asylum appeal process that puts restrictions on what an appellant can say in support of their claim at appeal.

Here, McBarnet's (1981) arguments about the lack of examination-in-chief by a legal representative in court hearings can be seen to be of relevance in the asylum appeal hearing

process. As outlined previously (in Chapter 3), McBarnet claims that the unrepresented accused in criminal court hearings is disadvantaged by the fact that s/he is not able to have his or her story drawn out through the sympathetic questioning of a legal representative (1981: 128). Jackson (1994) uses these assertions to support his argument about the significance of cross-examination procedures in the effective communication of a person's story in legal hearings. Jackson argues that cross-examination practices impede an individual from being able to communicate their story in the narrative framework that they would like. In such situations, the restrictive question-and-answer format of cross-examination means that the narrative or story of a person is communicated in a very specific way (1994: 101). In the case of asylum appellants then, during the court hearing, their asylum narrative is drawn out through the cross-examination by the Home Office presenting officer and without the benefit of having first been teased out during questioning by a legal representative. The asylum narrative that is performed or enunciated during the hearing, therefore, is one which seeks to cast doubt on the appellant's claim. This is because, as I will go on to discuss below (at 9.3 in Chapter 9), the strategy of the presenting officers during these processes is often to try and highlight any inconsistencies in an appellant's answers and to catch an appellant out. The asylum narrative which is constructed during asylum appeal hearings in front of the Immigration Judge will therefore always be one which is associated with doubt and suspicion by the Home Office presenting officer. In this way, the asylum appellant is constrained and is unable to present their asylum narrative through full oral testimony.

Although this may appear to go against the point of the appeal hearing, in actual fact the main aim of the appeal hearing, as Thomas states, is for the Home Office to cross-examine the appellant on the evidence that they adopt and put before the court (Thomas, 2011:118). Thomas found that this was done with varying degrees of quality and competence during his study of tribunal adjudication in 2007-09. It is to a discussion of the process of cross-examination that I now turn.

9.2 Cross-examination at the Appeal Hearing: Peripheral details, ‘fishing expeditions’ for inconsistencies and judicial interventions

The Home Office presenting officer, or ‘HOPO’, will usually cross-examine the appellant once the solicitor has had them adopt the witness statement. The cross-examination usually involves the HOPO asking the appellant questions about their evidence by cross-referencing their Screening and Asylum interview transcripts with their witness statement and any other evidence provided by the appellant. This process of cross-referencing is usually undertaken in order to unearth or emphasise any discrepancies. Before moving on to consider this process and the quality with which the task is executed, it is useful to first examine the main documents from which the HOPOs organise their cross examination, namely the screening and asylum interview records.

9.2.1 Screening Interview

The screening interview is an interview conducted by the UKBA with the asylum applicant once they have made their claim. The purpose of the interview is to gather basic details from the asylum applicant that will enable the UKBA to process their claim. Applicants are often fingerprinted and issued with an ID card at this stage. The screening interview is not intended to be a full interview that goes into the substance of a person’s claim and their fear of persecution. In fact, applicants are told this at the start of the Screening Interview; immigration officials are instructed in the Screening Interview standard form to read the following to the applicant:

The questions I am about to ask you relate to your identity, background and travel into the United Kingdom. At this stage you will only be asked to give very brief details about your asylum claim.

I will write down what you tell me and this information will be passed to officers who will process your application.

Do you understand? (Yes/No)

(See Appendix 3)

In addition to the advice given to applicants above, a copy of an Aide Memoir that was accidentally sent to an applicant who took part in this research along with a copy of their screening interview, explicitly and emphatically states:

SECTION ELEVEN: BRIEF DETAILS OF CLAIM

11.1 & 11.2 are for the purpose of determining how we handle the claim (administrative purposes), e.g. Asylum or DFT, and only brief details are required – you must not probe the substantive claim. (emphasis in original)

(UKBA Aide Memoir; Fieldnotes/Mr. I's Case File from Solicitor A)

In spite of the advice given to applicants not to go into too much detail, as well as the guidance to Home Office staff cited above that the screening interview is not to be used as a forum for exploring the applicant's substantive claim, the screening interview transcript is often used by presenting officers at appeal hearings to cast doubt on the appellant's claim. This is generally done by picking up on minor discrepancies that may exist between the screening interview record and later interview records or witness statements. Presenting officers might also ask the appellant why certain details were not disclosed at the initial screening interview. Indeed, when questioned about this at the appeal hearing, many applicants recount how they were advised at their screening interview not to go into too much detail about their asylum claim. This is illustrated by the fieldwork excerpt below:

HOPO: I would like to refer to your Screening Interview. You said that cannot return to your home country because your husband's father was arrested and you never saw him again, is that correct?

Witness 1: (through Interpreter) Yes.

HOPO: You mention that your husband and Father-in-law were arrested but didn't mention that you were arrested- why is that?

Witness 1: (through Interpreter) Because I wasn't asked about it. The immigration officer asked me questions and I answered 'Yes' or 'No'.

HOPO: You were asked why you can't return.

Witness 1: (through Interpreter) Is that correct? When I was interviewed I was told that it was a simple interview without a lot of detail and that I would get a detailed interview later.

(Fieldnotes, FTIAC, 26/11/2010)

Screening interviews are frequently carried out shortly after a person arrives in the country. They are often tired and disoriented and most will not have had the opportunity to seek legal advice. Given this, it seems problematic that the screening interview should be relied upon so heavily by initial decision-makers at the Home Office when coming to an

assessment of a person's claim for asylum. The argument against such weight being afforded to it (11 Million, 2008) can only be strengthened when considered in light of the Home Office's own internal guidance to employees, i.e. that it should be used solely for administrative purposes in order to decide how best to process a person's claim. The opportunity to gather information about someone's claim is meant to be provided to HOPOs and Immigration Officers during the substantive Asylum interview.

9.2.2 The Asylum Interview

The asylum interview takes place once a person has made a claim for asylum, and usually once they have been dispersed following their Screening Interview. In some cases, the asylum applicant will have had the opportunity to seek legal representation before the asylum interview, in which case they may have undergone the process of providing a witness statement to, and been questioned on the detail of their claim by, a solicitor. However, in other cases, where solicitors do not take statements before asylum interviews, the applicant will not have had the opportunity to prepare a written account of their asylum narrative with the help of a solicitor, nor will they have experienced the process of being questioned about the different, or apparently conflicting, aspects of their account.

The asylum interview, according to the home office, is meant to focus on 'establishing and testing the key aspects of the claim and avoid areas which are not relevant' (Home Office, *Conducting the Asylum Interview* v.4.5: 4.1). Although an applicant's solicitor is permitted to attend the interview, they are not allowed to comment or intervene during the process. Instead, the following instructions are read out at the beginning by the immigration officer conducting the interview:

I would ask your legal representative and your interpreter not to interrupt during the course of the interview. If they wish to make any comments they will have the opportunity to do so at the end of the interview.

(See Appendix 5)

Solicitors that took part in my research did not routinely attend the asylum interviews because they were not generally funded to do so. Moreover, as Solicitor L pointed out, when they do attend the asylum interview, they are then not able to request that the interview be tape recorded. The right of the asylum applicant to request that the asylum

interview be tape recorded was set down in the judgement of the case of *Dirshe v. Secretary of State for the Home Department* [2005]. This became incorporated into policy in the form of the UKBA Recording Policy contained within the process guidance documents that the Home Office provide for staff. The policy states that:

The UK Border Agency is required to allow applicants, with some exceptions, to have their asylum interviews electronically recorded where they make such a request. The exceptions are those entitled to publicly funded legal representation at interview, or the resources to fund their own legal representation. This means that Interviews should not normally be recorded where a legal representative is present, or where applicants with self-funded legal representation choose not to have their legal representative present. (Home Office, *Conducting the Asylum Interview* v.4.5: 5.1)

Solicitor L was critical of this aspect of UKBA policy. Although the UKBA had recognised the applicant's right to request that their interview be recorded, Solicitor L felt that it did not seem just that applicants who wanted to have their interview recorded had to forego the option to have legal representation at the interview. According to Solicitor L, the purpose of having legal representation at the asylum interview was not to supplant the need for the interview to be recorded:

KF: And are you generally able to attend the substantive interview?

Sol L: No (.) that's a huge problem and the Home Office rules don't really seem to make a lot of sense on it. If you've got a representative you can take your rep; if you don't have a rep or your rep is unable to attend then you can have it tape recorded, but you can't choose to do both. It seems to me to be nonsense because you would want your rep there for altogether different reasons than you would want it tape recorded.

(Solicitor L, Interview, September, 2009)

Solicitor L believed that actually having the interview recorded, rather than a legal representative present, might serve her client better were any disputes about translation or queries about the interview transcript to arise:

Sol L: Ehm yes if you're there then it's not recorded. It's one or the other, which just doesn't make sense. You want your lawyer there to make sure that procedures and things are being followed and you want it tape recorded to make sure the interpreter's doing their job. That's a huge, huge problem because I mean these interviews can last 4, 5 even 6 hours. With things like Arabic and Kurdish, ehm, there could be dialect problems or answers can be lengthy, taking place over a really *long* period of time, and of course interpreters are going to make mistakes and one word, especially where singular and plural are confused, can make an enormous difference in somebody's case.

(Solicitor L, Interview, September, 2009)

Other solicitors cited financial considerations for not attending the Asylum interview. Solicitor K pointed out that legal representatives are only funded to go if they are representing clients who are minors. Like Solicitor L, he also felt that it was of more use to his client's case for him not to attend and then be able to get a recording of the interview:

Sol K: Well no, SLAB won't pay for us to go. The only time they'll pay for us to go is for minors. I don't see the point in my going because the only reason why I want the tape recording is so that I can ehm assess whether or not, or rather, have some other interpreter assess whether the interpreter at the meeting was doing it right. Because it's always interpretation problems that are blamed for any credibility issues that arise; so there's no point in me being there because I don't speak any of the languages and the only value the tape has is to be able to check the interpretation so I don't go to them.

(Solicitor K Interview, August, 2009)

UKBA states that the asylum interview is the applicant's chance to provide all the information that is needed to make a decision about their claim. It is meant to provide the opportunity for the interviewing officer²² to gather as much information as they can in order to reach a decision about it. Some legal representatives were of the opinion, however, that their clients were often not asked about details relating to their claim that they were later asked about at appeal hearings. Solicitor B, for example, commented that the question-answer format of the interviews meant that clients were not always given the opportunity to give all the details relevant to their claim:

Sol B: The way that I think the Home Office extract the information is a question-answer format and we have this discussion at Court quite a lot when the Judge says 'Oh you didn't tell the Home Office this' and you say to the Judge 'Well, it's an interview, they're answering the questions they are asked' and the Judge will say 'Well, that doesn't matter you would still say that you've been detained or this has happened'.

(Solicitor B, Interview, October 2011)

This actually happened during a number of appeal hearings I observed where the HOPO asked why something had not been disclosed, as in the following two examples:

HOPO: You mention in your witness statement that you were involved in the dissemination of information. What information does this relate to?

²² I use the term 'interviewing officer' here to refer to Immigration Officers who tend to conduct the Asylum Interview. Although some HOPOs may do this as well, it is not always the case that the HOPO at an appeal will be the same person who has carried out the substantive interview with the appellants.

Appellant: I share video clips and add comments online in order to inform people about what is going on in my country.

HOPO: Why didn't you mention this in the Asylum interview?

Appellant: They didn't ask me. I was told 'We ask questions, you answer'.

(Fieldnotes, FTTIAC, 25/2/2011)

HOPO: Did you always know that Y was a member of the Jabouri Tribe?

Appellant: Yes

HOPO: Why didn't you raise this at your asylum interview?

Appellant: I was never asked, I'd never been asked this.

(Fieldnotes, FTTIAC, 8/2/2011)

Late disclosure of details relating to an asylum claim is treated by the UKBA as a factor which detracts from the overall credibility of an applicant's claim (Ensor et. al, 2006 see UKBA, *Considering the Asylum Claim: 58*), despite research (e.g. Asylum Aid, 2005) which cautions against the danger of doing so. From my observations at Tribunal hearings, it seemed that HOPOs are keen to create the impression, in order to diminish the appellant's overall credibility in the eyes of the Immigration Judge at appeal, that they have deliberately withheld information relevant to their claim at pre-hearing stages of the asylum process. Another way in which HOPOs attempted to do this was to try and pick up on discrepancies or errors between an appellant's accounts of persecution. As Thomas discusses, though, where this was done to excess during cross-examination in his research it pointed to a lack of competence and poor quality representation on the part of the HOPO (2011: 119).

9.3 Quality of Cross-Examination

During his observational research into tribunal adjudication in England in 2007-09, Robert Thomas witnessed how the quality of cross-examination conducted by Home Office Presenting Officers varied greatly (Thomas, 2011: 118). He noticed that although some presenting officers subjected an appellant's account to close scrutiny, others became too 'carried away', and overstepped the mark by engaging in aggressive cross-examination (2011: 118). Thomas also noted that, at times, HOPOs were unable or unwilling to cross-examine the appellant effectively and he states that some of the Immigration Judges that took part in his research felt that presenting officers would often simply state what the appellant had said during interviews and in their witness statement and try to pick holes in

it (2011: 118). This, he went on to explain, meant that the appellant's evidence had not really been tested sufficiently and that this may have implications for whether or not judgements about the credibility of the applicant could be made (2011:119).

Similarly, from my own research, the quality of the presenting officers was variable as was their approach to cross-examination, with some being more aggressive and, one could even say, 'bullish' than others. In addition, like the Immigration Judges in Thomas's study, it was my experience that presenting officers would often outline statements made by the appellant and then attempt to draw out minor inconsistencies in the accounts provided in order to damage the credibility of the appellant. At times it seemed that presenting officers would ask questions about slight discrepancies that appeared inconsequential in relation to the overall basis of the claim being appealed.

9.3.1 Focusing on Peripheral Details and Inconsequential Inconsistencies

In the excerpt below the HOPO began questioning the appellant on his relationship with his cousin, specifically, how he was related to his cousin. The significance of this was unclear and it led to a great deal of confusion amongst all those present at the appeal. However, in such circumstances, where the appellant becomes confused and unable to answer questions, the potential is raised for their credibility and reliability to be called into question. This is because a sense of incoherence is therefore introduced into the appeal hearing proceedings and the impression may be given that appellants do not know facts about their own life:

HOPO: How are you related to your cousin that you went to the demo with?

Appellant: (through Interpreter) He is my maternal aunt's son.

HOPO: So how is he related to your maternal uncle then?

(At this point, both the solicitor and the Judge look very puzzled by the HOPO's question)

Appellant: (through Interpreter) I don't understand

HOPO: Is that the son of your maternal uncle?

Appellant: (through Interpreter) My Mum's sister's son...well...my mother's maternal uncle and his son? **(Shrugs shoulders)**

(At this point the HOPO, solicitor and Judge look confused. The Judge scowls and looks annoyed. The HOPO moves on to a different question).

(Fieldnotes, FTTIAC, 17/2/2011)

Another excerpt demonstrates the ways that HOPOs try and tease out errors or contradictions in the very minor details relating to a person's claim. On this occasion, the appellant had just answered a question about going to visit his father in detention when he was arrested for his religious beliefs and practices in his country of origin. The HOPO then attempted to highlight an error in the appellant's account:

HOPO: Did you go to look for your father alone?

Appellant: Yes.

HOPO: Then why, at another question, did you say 'We went to see my father but they wouldn't let us see him'. Now just to clarify, you went on your own?

Appellant: In the beginning I went on my own and then later all the family went.

HOPO: Why have you used a word 'we' that suggests more than one person?

Appellant: That's because in the beginning I went on my own but then later the whole family went.

(Fieldnotes, FTTIAC, 26/11/2010)

It appears from the above exchange that the appellant had a plausible explanation as to his use of 'I' and 'we'. The HOPO did not pursue this line of questioning and the next question after this sequence of questioning related to a different aspect of the appellant's claim and did not seem to build on this apparent inconsistency so as to make a point about its relevance to the appellant's account or basis of his claim. It merely seemed to serve the purpose of painting the appellant in an unfavourable light. One solicitor commented, in this way, on the approach of the Home Office to credibility:

Sol F: I always think about it like they muddy the waters or they throw mud at it. If there is enough confusion in the air then the Judge is going to find it difficult to find the client's true account through it and there's just all this sort of information floating around- some of it's pretty outrageous. So, it is a difficult job obviously for the Immigration Judge, but I think the Home Office tactic can often be 'just throw enough mud until it sticks'.

(Solicitor F, Interview, December 2011)

Other solicitors also found this to be the case and some made reference to occasions where HOPOs would go off on 'fishing expeditions', where they would drill the appellant until they found an inconsistency which they could rely upon during their submissions to point to a lack of credibility:

Sol E: And again, there are certain Judges you go in and think ‘That’s great, I’ve got that Judge they’re really reasonable. They understand the low burden Standard of Proof, they’re not going to let the Home Office have a fishing expedition and they’re going to focus the Home Office on to the main points.

(Solicitor E, Interview, October, 2011)

In a similar vein to Solicitor E’s reference to ‘fishing expeditions’, Good (2011) argues that presenting officers will often ask the same question more than once but phrased in a different way in order to try and trick appellants. On one occasion during my observation fieldwork at appeal hearings, it seemed as though a HOPO was subtly attempting to make the court believe that an appellant had twice provided the same answer to a question posed by Home Office staff at separate interviews. The HOPO then went on to claim that the information in the appellant’s witness statement contradicted the answer he had given to the Home Office:

HOPO: In your screening interview in January 2010 you said that you re-entered the UK in 2009.

Appellant: (through Interpreter) No, I came here in January 2010.

HOPO: Can you remember the exact date?

Appellant: (through Interpreter) No, I can’t recall.

HOPO: Why did you state that you returned in 2009?

Appellant: (through Interpreter) I do not recall saying 2009.

HOPO: You also said it at your interview at Stewart Street police station.

Appellant: (through Interpreter) That was the same day- was that not the same thing?

HOPO: I am just trying to clarify the date that you entered.

(Fieldnotes, FTTIAC, 6/1/2011)

My prior knowledge of the appellant’s case from my observation research with his legal representative meant that I was aware that he had undergone his screening interview in the police station mentioned by the HOPO. Here then I could conclude that the HOPO appeared to be trying to make it seem like the appellant stated on *two* separate occasions that he entered the UK in 2009.

In addition to these techniques and strategies which sought to highlight apparent inconsistencies in an appellant’s account, presenting officers would regularly embark upon detailed cross-examination without providing any kind of signposting to the appellant. For example, they would often launch into questions about extremely specific points without providing any context or background to their questions. At times, they would even quote

statements the appellant had apparently made without explaining where this information came from.

9.3.2 Lack of Signposting during Questioning

The lack of signposting during cross-examination often confused appellants with some asking for the first question to be repeated (Fieldnotes, FTTIAC, 6/4/2011) and others taking long pauses or even asking if they had ever said what the HOPO had quoted back to them and if they had, when they had done so (Fieldnotes, FTTIAC, 19/3/2011). The example below is illustrative of this lack of signposting and the appellant's subsequent request for clarification:

HOPO: When you left China, you did so using your own passport is that correct?

Appellant: (through Interpreter) Yes.

HOPO: And to refer to your witness statement you said you were able to do so because the snakehead bribed immigration at the airport, is that correct?

Appellant: (through Interpreter) Yes.

HOPO: Now to refer to your asylum interview where you said 'If anything happened to us, it's the first snakehead who I gave the money to that is responsible', is that correct?

Appellant: (through Interpreter) What was the question that I answered that to?

HOPO: The question was about problems at the airport. You gave an account and then said what was just quoted. I am asking you if you said this.

Appellant: (through Interpreter) Well, I said to the snakehead 'Will someone like me get out okay?' The snakehead said not to worry, that he had bribed immigration at the airport and if he didn't know that I'd get out then he wouldn't have taken me there.

(Fieldnotes, FTTIAC, 26/11/2010)

Here, the appellant manages, deliberately or not, to avoid answering the closed question with a 'yes' or 'no' response as he had done to the previous questions and provides more detail than is requested in order to actually give an account of what happened during his travel out of China. This happened very often during hearings, where appellants would attempt to contextualise the answer that they had offered to the questions in the first instance in order to provide clarification. These attempts were often met, though, with interventions by the Immigration Judge who would ask the appellant to ensure that they only 'answer the question asked'. This happened in the same case in the previous example where the appellant became particularly upset and recounted his experience of going to visit his father in prison.

HOPO: You went to the religious affairs bureau after father did not return, is that correct?

Appellant: (through Interpreter) They told me ‘Your father was very stubborn; if you want to see him you will need to go to the detention centre’. I went there and they told me that there was someone there of his description. They told me that if I wanted to pass something on to him.... **(at this point the appellant becomes upset and visibly distressed)** The last time I saw my father was when I saw his bones.

(Appellant is now extremely upset and the Judge interrupts).

IJ: (In a detached manner which, to my mind, displayed a lack of empathy) Now, you were asked a question about where you went to look for your Father and were asked whether or not this was correct. You have gone on to provide a lot of detail. You must only answer the question that you were asked. I’m sure Mr. W will ask you more questions.

(Fieldnotes, FTTIAC, 26/11/2010)

In the above example it can be seen that the appellant is asked a question about the occasion on which he went to the religious affairs bureau following the disappearance of his father. Although the question is a closed one, it prompts the appellant to begin to discuss the event as he remembered it providing detail and telling the Court about that experience. He is interrupted by the Judge though who directs him to only answer the questions asked. When appellants try and provide this amount of detail, because it is obviously how they remember it or discuss it, they are then inhibited by the procedural demands of the appeal hearing and the opportunity for them to talk is closed down. In spite of restrictions, such as a Judge’s instructions to only answer the question asked, on the appellant’s ability to contribute to the hearing process, the appellant is even more severely restricted from participating when there is no Home Office representation at appeal hearing.

9.4 Lack of Home Office Representation and the Implications for Testing an Appellant’s Credibility

As mentioned above, it seems counter-intuitive that the appellant is asked very little by their legal representative during examination-in-chief at asylum appeal hearings. The silence of the appellant is, at times, even more profound when there is no Home Office representation at the appeal hearing. Over the course of this research, the presence of HOPOs at asylum appeal hearings varied. Initially, it seemed there was a real lack of

Home Office representation at the FTIAC. A solicitor commented to me, for example, before one appeal hearing that it might not be that interesting for me to observe the appeal because there would be no HOPO and she went on to say that there had not been one at any of her cases in a long time. After I asked why she thought that was happening, she explained that one of the reasons she thought that presenting officers had stopped attending hearings was that they had relocated offices out of the building in which appeals were held. The HOPOs, she explained, used to be located on the 10th floor of the building and would almost always come down for the hearings. Following the introduction of NAM, she stated, case owners would still attend but their attendance, in her opinion, had started to 'fizzle out'. Giving a rough estimation she said that she thought there were only presenting officers in about half of the cases in which she appeared (16/6/2009).

On another occasion, the lack of any presenting officer at an appeal prompted one Immigration Judge to comment at the hearing:

Immigration Judge: Nobody from the Home Office today then (?)

Solicitor: No M'am, I believe not.

Immigration Judge: No, I know. It was more commenting - I can't remember the last time I saw the Home Office at an appeal.

Solicitor: No, it has been a while. They don't seem to be coming very often.

(Fieldnotes, FTIAC, 3/8/2009)

Following this appeal, the Immigration Judge asked me if I had any questions about the hearing. I commented that I didn't have any questions about the procedure but noted that she had made mention of the fact that the Home Office had not been turning up at appeal hearings. She included the solicitor in this discussion and explained to me that it did seem to be becoming an issue and asked the solicitor: 'I mean, what is going on over there? (**by 'there', I assumed she meant Brand Street**²³). The solicitor commented that she thought that they were having problems with staffing (paraphrased fieldnotes FTIAC 3/8/2009).

One solicitor felt that the HOPOs were starting to come back to the hearings in autumn 2009, but that the continuity and accountability of case owners envisaged by the NAM was not operating properly in practice:

Sol H: I think in terms of NAM, the whole concept of it was to allow for accountability in the decision process so that the NAM presenting officer in court

²³ Brand Street is where the UKBA's main offices in Glasgow are based.

would be the person who had written the Reasons For Refusal Letter and they would then be responsible for the content of it. That has completely been scrapped. For a period of probably about a year or so there were no presenting officers in the cases, unless they were very select cases. Now, there are NAM people there but it's still quite rare and they're never the people who have actually written the refusal letter, which in itself is surprising because they're meant to be the person dealing with the asylum claim all the way through the process.

(Interview, Solicitor H, September 2009)

Again, this issue has been considered in the literature on asylum tribunals. During his research, for example, Thomas discovered that the absence of HOPO representation was a 'depressingly familiar occurrence' according to the Immigration Judges he encountered (2011: 123). Thomas highlights the difficulties that this creates in relation to the appropriate way for Immigration Judges to adjudicate under such circumstances (2011: 122-5). Generally, where all parties are represented, he explains, Immigration Judges are expected to only ask limited questions for clarification once evidence has been examined and cross-examined by the appellant's legal representative and the HOPO (2011: 120). They are to refrain from 'descending into the arena' and, although they may pick up on points in the refusal letter or witness statement that are not mentioned during examination-in-chief or cross-examination, they are not meant to make their own line of argumentation or present a case which has not been made by either party during the evidential section of the hearing. It is widely accepted that Immigration Judges should not perform in a hostile manner or question the appellant in a manner that suggests they have already made up their mind about the case (2011: 120).

However, Thomas explains that when the Home Office is not represented at hearings there is an expectation that Immigration Judges will follow the guidelines on how to proceed in such circumstances as they are set down in the case of *Surendran v Secretary of State for the Home Department* [1999]. The Surendran guidelines state that the Immigration Judge should, in the first instance, continue to hear the appeal even in the absence of the Home Office. They further advise that the Judge should not adopt an inquisitorial role in the proceedings but instead, where the Immigration Judge knows that there is to be no HOPO in advance of the hearing they should put in extra preparation before the hearing. Where there are credibility issues raised in the refusal letter, or where these are not raised in the letter but the judge decides that there are credibility issues arising from a reading of the papers, then the judge should ask that the appellant's representative deal with these matters. It was often the case in my own research that the Immigration Judge would advise

the legal representative during the preliminary matters of the issues upon which he or she needed further clarification or that needed to be addressed in order for him/her to be satisfied that s/he could make a decision. Thomas elaborates on the definition of 'clarification' that might be used by judges in such circumstances:

After evidence and submissions, the judge may ask questions for clarification purposes. Clarification can go beyond checking whether something has been understood or for confirmation of a fact; it is legitimate for the judge to raise the questions relevant to the Home Office's refusal letter or later material to which the judge considers he needs answers if he is to deal fairly, adequately and intelligibly with the material upon which he is being asked to adjudicate. It is not for the judge to cross-examine the appellant, but to ask questions for clarification purposes subject to the necessary caveat as to their timing, length, and content (2011: 124).

As Thomas points out, though, these are guidelines and not rules of law (2011:124). Therefore, it may be difficult to appeal a negative determination of an appeal where it is felt that the Immigration Judge did not adhere fully to the guidelines. As he observed in his own research, the approach of Immigration Judges in the absence of Home Office representation also varies from one judge to another with some adhering to the guidelines more strictly than others (2011: 125).

The solicitors who participated in my study had strong views on what they thought was the proper way for the Immigration Judge to proceed with the hearing when the Home Office failed to provide representation. These views are best reflected in the following comments made by Solicitors H and M:

Solicitor H: I think there's a difficulty because you don't want to basically have a situation where the Judge is asking your client lots and lots of questions. I think if there's no presenting officer there it would be appropriate for the Judge to ask limited questions about the issues that were raised in the refusal letter. I don't think it's appropriate for the representative of the client to then basically quiz them or cross-examine them.

(Solicitor H, Interview, September 2009)

Solicitor M: Where one party isn't represented I don't think anyone would have a problem with the Judge being a bit more inquisitorial in the way they examine a client by asking open questions and seeking clarification of points. But there's always a difference between doing that and actively cross-examining someone; I think the danger is when the Judges go beyond making enquiries and asking questions for clarification and actually asking questions in a challenging manner in the way a cross-examiner would.

(Solicitor M, Interview, September 2009)

The key concern amongst legal representatives in Scottish asylum adjudication processes was that Immigration Judges should refrain from taking on the role of the Home Office during appeal hearings where there are no presenting officers in attendance. Moreover, representatives felt that they themselves should not be made to cross-examine their client on behalf of the Home Office for the benefit of the Immigration Judge. Many felt that doing so would undermine their professional and ethical obligations to their client and would mean that they were doing the Home Office's work for them. Solicitor B commented that the lack of HOPO attendance had caused him problems in this way because he felt the Home Office had appealed the Judge's decision to grant the appeal based on a point that it was the HOPOs responsibility to raise at the hearing:

Sol B: There was a period where they came to practically nothing, other than a couple of wee immigration things, but now they are back to coming to the asylum stuff. Not always though, and it seems very random. I just think it is an issue that they really need to sort out, because them not turning up creates *all sorts* of problems. I've got a case at the moment, a Zimbabwean case but I won it, it was actually quite a difficult case to win but I won it, there was no HOPO there and now they're appealing against it saying that the Judge didn't look at the Country Guidance Case. It really annoys me, I think 'well you should have turned up and pointed him to it'.

(Solicitor B, Interview, October 2010)

A further source of frustration was the feeling that, were they not able to turn up and represent their client, the latter would not be afforded the same treatment that the Home Office is when there are no HOPOs at appeals. This related, again, to the perception that in the absence of Home Office participation, Immigration Judges often take it upon themselves to test the appellant's evidence under the auspices of cross-examiner. This would result in what Thomas refers to above as 'descending into the arena' and raises questions about the proper role of Immigration Judges in such situations.

In one case during the research, a judge's questioning in the absence of any HOPO at the hearing seemed to verge on inappropriate when the judge appeared to produce her own evidence in the case and attempted to question the appellant on it. The case was that of a young man from Iraq. His claim related the fact that he had been involved in buying and selling goods bought cheaply from Kurdistan to Arab shop owners in Iraq. He was then made to take other items by rebel forces during these trips. He feared persecution upon his

return based on this activity. He had a fear of the State because he could be seen to have been involved with rebels and he feared persecution at the hands of group that made him work for them because he had refused to continue these activities and had run away. The judge was not satisfied that his original business of buying goods in Kurdistan and selling them in Iraq would have been an 'economical venture'. She did not think that the profit made from selling the goods on in Iraq would merit the costs involved in first buying the goods and paying to rent a car to transport them. The appellant explained that the goods were very cheap to buy and that in selling them on he made a good profit; if he wasn't making money from it, he reasoned, then he would not have done it. At that point in proceedings the Judge produced a map passing one copy to the solicitor and having her pass a further copy to the appellant. The solicitor was visibly unsettled by this, she looked concerned, she frowned for quite a sustained time, and the following exchange occurred:

Solicitor: I have not had sight of this evidence.

IJ: No, I know. I just photocopied it now.

Solicitor: M'am, may I ask that I hear the question before my client does.

IJ: Yes, certainly...I want to know if he can point out the place he said he stayed with his uncle²⁴.

Solicitor: M'am, I am afraid that I don't think my client will be able to answer that. The place names on this map are in English.

IJ: That's fine if he can't.

Solicitor: And no adverse inference will be drawn if he is unable to pin point it?

IJ: No, I just want him to clarify it and I don't want to assume his answer. Since it was a big issue in the rejection letter, I think he should get the chance to address it.

Solicitor: Okay.

(Fieldnotes, FTTIAC, 16/6/2009)

The Judge then put her question to the appellant through the interpreter on this matter. He struggled to identify what area the map was of and explained that he could not make out the places on the map because they were illegible and also where they were clearer, they were in English. The Judge did not push the point and moved on. Following the hearing the solicitor was extremely frustrated with what had happened and came over to the interpreter who was standing directly in front of me and asked 'Have you ever seen them do that before? Introduce evidence?' The interpreter responded with a slight grin and said 'I have seen *her* do it before'. This suggested that this particular judge acted in this manner during other hearings where there was no presenting officer. This action seemed to demonstrate an occasion where the judge had taken on the role of the Home Office and pursued a line of questioning which was improper. Following the Surendran guidelines and supplementary

²⁴ The appellant had claimed to have stayed with his uncle when he ran away.

guidance (Thomas, 2011: 123 n. 77), then, the solicitor in this case would no doubt have been able to appeal a negative decision by the Immigration Judge on this basis.

Thomas argues that, for most judges, the lack of Home Office representation gives rise to dilemmas and a tension as to how they should behave (2011:125). He states that the problem for the judge is that ‘there is no one present to cross-examine the appellant. Nevertheless, the appellant’s claim should be properly tested’ (2011: 123). Thomas concludes that ‘appeal hearings which proceed in the absence of the Home Office can impair the effectiveness of the adjudication process’ (2011: 125). In addition to this, appeals that are heard in the absence of the Home Office before an Immigration Judge who is reluctant to cross the line and enter the arena by questioning the appellant, raise issues around credibility assessments and access to justice in asylum appeal hearings. As I outlined in Chapter 2, Judges in onward appeals in asylum processes are disinclined to reconsider credibility assessments because they do not feel able to make such assessments where they are merely deciding cases on the papers. They are of the opinion that decisions about credibility are best made by first instance appeal Judges who have the opportunity to see the appellant be cross-examined. In situations where such cross-examination processes do not take place, as recounted above, questions about the Immigration Judge’s ability to effectively assess the credibility of the appellant must therefore be addressed.

Such occasions also demonstrate a further ‘silencing’ of the appellant during the appeals process. In situations when there is no presenting officer to cross-examine the appellant at an appeal and the legal representative feels it would be against their professional obligations to do so; when that appeal also is heard by an Immigration Judge who does not want to run the risk of being seen to enter the arena and undertake the cross-examination of the appellant themselves, the result is an appeal hearing in which the appellant is given the opportunity to say very little. Solicitor F commented on how this was a hindrance to an appeal of a refused asylum claim that was based on a negative credibility finding by the Home Office:

Sol F: Sometimes you are hindered because you have to put in the written statement so you don’t have the chance to give oral evidence. And you can often tell, you might form your own slight view, or sometimes a strong view, from taking oral evidence from someone in a meeting because you can see maybe over like five or six hours from taking statements, going through the Refusal Letter, you can see how they are, how they respond to questions and how they are able to give you details and

things. But that doesn't always translate at the court because you just have the written statement and they are not able to give their oral evidence.

(Solicitor F, Interview, December 2011)

From Solicitor F's comments above, it becomes even more apparent that the witness statement forms the sole basis of an appellant's evidence and account at such appeals. Moreover, the solicitor's concerns over the ability of a judge to assess the credibility of an appellant based solely on the witness statement are further compounded if they are considered in light of the ways that the appellant's account in the witness statement emerges from the results of the asylum interview and refusal letter.

9.5 Conclusion

An examination of asylum appeal hearing processes reveals the structural barriers that asylum appellants face when trying to present their asylum narrative in appeal hearing settings. The imposition of the adoption of a pre-prepared witness statement as the asylum appellant's evidence-in-chief denies the appellant and their legal representative the opportunity to draw out the asylum narrative in a coherent and effective way during a process of examination-in-chief. Institutional demands such as this one have been shown to be part of a practice to speed up tribunal adjudication processes. As discussed in this chapter, comments from solicitors who took part in my research reveal that even where they attempt to draw out more detail from their clients about their claim once the witness statement had been adopted they are often met with disapproval by the Immigration Judge. As a result the asylum narrative develops during the appeal process through a series of, at times, aggressive questions posed by the Home Office presenting officers during cross-examination. I have sought to highlight the significance which is attributed by presenting officers to pre-hearing interactions, such as the screening interview, when conducting such cross-examinations. Although scholars such as Thomas argue that the main point of an appeal hearing is to test the appellant's narrative, he recognises that the quality of cross-examination by the presenting officers is variable and can often lead, in a bid to paint an appellant in an incredible light, to an emphasis on peripheral details which are ancillary to an asylum claim. Using data from my observations at asylum appeal hearings at the FTTIAC in Glasgow, I have argued that Home Office presenting officers often seek to create confusion and incoherence when questioning asylum appellants about aspects of

their claims. Referring to apparent inconsistencies allows presenting officers to suggest that asylum appellants are not credible and that their claims should therefore not be believed. In the absence of any process of detailed examination-in-chief, solicitors therefore rely on the witness statement in order to convince Immigration Judges about the credibility of their client's claims. In the next chapter I will, therefore, turn to consider the implications of this in light of how the asylum narrative develops during the preparation of the witness statement that is ultimately lodged with the FTTIAC and adopted by the appellant as the evidence-in-chief at the asylum appeal hearing.

10. Co-Constructing the Witness Statement: the impact of the asylum interview and refusal letter and the binding implications of this at the FTTIAC appeal hearing

In the preceding chapter I discussed the ways that the asylum appellant's narrative is presented and tested during the asylum appeal hearing at the FTTIAC. I argued that pre-hearing interactions and procedures are used by Home Office presenting officers to undermine the truth of the account that an asylum appellant adopts as their evidence-in-chief at the appeal hearing. In this chapter, I therefore, turn to consider these pre-hearing interactions and their impact on the development of the asylum narrative vis-à-vis the witness statement that an asylum appellant prepares with their legal representative.

The chapter begins with a discussion of the asylum interview that an asylum applicant has with the Home Office prior to the initial decision about their asylum claim being made. I will assert that the question-and-answer format during the asylum interview shapes the sequence of the narration of an applicant's claim which then constrains what might be said during the construction of an applicant's witness statement with their solicitor. This is due to the fact that the process of preparing the witness statement becomes one of *responding* to the Home Office Reasons for Refusal Letter in which the applicant's case has emerged through the eyes of the Home Office Interviewer. This sets the scene for and frames the future telling of the person's asylum narrative.

The chapter then presents the differing approaches that the solicitors who took part in my research adopted when preparing the witness statement; the different motivations for the approach that they adopted will be considered as will the potential effects that this may have on the outcome of the statement taking process. In the final section of this chapter, data from an asylum appeal that I was able to 'trace', to some extent, as it progressed through the appeals process will be used to examine how the witness statement is constructed in these ways. I will conclude by suggesting that the articulation of the claim becomes ever more restricted the further an applicant advances through the asylum

process, to the point that they become bound at the asylum appeal hearing by their interactions and statements prior to the hearing.

10.1 The Asylum Interview: Miscommunication and misunderstandings

Scholars such as Maryns (2005; 2006) have shown how miscommunication and misunderstandings due to factors such as varying discursive practices permeate the asylum interview process. Maryns' research focuses primarily on Belgian asylum procedures and concentrates in particular on asylum applicants of African origin. Her work explores the effects of African asylum claimants in the Belgian asylum procedure being forced to assimilate their language to English in order that they may take part in the monolingual interview process with Belgian immigration officials (Maryns, 2005). Maryns shows how this assimilation process for speakers of pidgin or Creole, which are denied as languages in their own right (2005: 300), gives rise to difficulties for such applicants when trying to make themselves understood. In the UK, the Home Office will generally attempt to provide interpreters in the language of the asylum applicant though it is not always possible to secure an interpreter whose first language is of the same dialect as the applicant. Maryns' research is therefore also relevant to the British asylum process.

Key insights that might be taken from Maryns' work relate, amongst other things, to how the structure and organisation of the interview itself may put asylum applicants at a disadvantage and enable officials to refuse their claim. For example, Maryns illustrates the ways that the initial 'bureaucratic' style of questioning in the asylum interview breaks down the opportunity for a narrative flow to be provided by the claimant when answering the questions put to them (2006: 32). The constraints posed by these interview norms prevent the contextualisation that is needed in order to make sense of the asylum narratives provided. When officials feel that applicants are providing detail that is ancillary to answering the basic questions put to them, they will often interrupt the claimant. This means that spaces for the applicant to provide their account and 'story' are closed down.

Maryns' findings also reveal the power of the interviewer over the interpretation and formation of the asylum narrative, or account, in the final report relating to the applicant's claim. Her study showed that different institutional expectations may shape and structure

the responses that are recorded by the interviewer, with the applicant not usually being given the opportunity to fully assess the official's version of their account (2006: 87). Although, in my research, applicants were usually scheduled in for a meeting with their solicitor to discuss the asylum interview transcript and to submit or correct any errors in the recording of their answer, the latter were not always taken fully into account and did not mean that the applicant would be able to assess the summary of their claim that the interviewer would later construct when preparing the refusal letter. Maryns' work reveals that important details are often left out, lines of questioning are not pursued or elements of the claim are prioritised over others; the control over all these factors are the responsibility of the interviewer as first instance decision-maker in the asylum process. This is significant because the witness statement that solicitors prepare with their clients will often use the asylum interview transcript and the refusal letter, which is put together by the interviewing immigration officer in light of the asylum interview, when constructing the account of persecution with the asylum applicant. Before going on to explore the possible implications of this, it is first necessary to discuss the different ways that the solicitors in my study dealt with the preparation of the witness statement in asylum appeals.

10.2 Preparing the Witness Statement: Differing approaches

When exploring the process of preparing a witness statement with the solicitors who took part in this research, it was clear that each solicitor had a different approach to how they put the statement together with their client. The solicitors differed, for example, in terms of the number of meetings they felt were required to complete a witness statement. One participant explained that she would block out an entire afternoon in order to get the statement done in one sitting:

Sol E: I prefer to do Witness Statements in the one sitting, so sometimes what I do is just cancel out the whole afternoon...Usually, it does take me about 3 hours if I am going to do it. But, I like to do it all in the one sitting because it means that the person is in the right frame of mind. The only time I've had to stop is if it's particularly distressing circumstances and with certain clients. If it is quite hard for them to talk about it then I can make different appointments. But basically, I normally find that most clients once they are would just rather *do* the statement and have it *done*; just do it the once and that's it. I feel like I am also in a better frame of mind to do it in one sitting but that's my own personal choice.

(Solicitor E, Interview, October 2011)

In addition to Solicitor E's personal preference to do the interview in one sitting, she also cited business considerations as a motivation to approach the preparation of the witness statement in this way:

Sol E: I don't like to break it up because I just think it takes longer. From a *business* point of view, although I have never had this problem with SLAB because of the way we do it in our office, but I think it would be difficult if you have got to get an interpreter in 3 or 4 times; I mean, how do you justify that to SLAB that you're doing a Statement each time? You know, whereas if you can say well it took 2 or 3 hours, you've got one interpreter charged for that. And then you say 'I drafted the Statement, went over it, took the amendments, did the final draft and then got the client to sign it'. I don't know how I would justify, you know, that I met them on the Monday and did a bit, I met them on a Tuesday and did a bit...you know? I think, especially the way the Legal Aid are now, I think they would query it and say 'Why did you have to do this so many times?' *Especially* if there's the expense of an interpreter having to be incurred each time... Interpreters can charge waiting times and travel costs, so I always do just try to do it in the one sitting.

(Solicitor E, Interview, October 2011)

Solicitor E here explains that this approach was based on funding considerations and also a belief that it is better for the client to leave with the finished product and something tangible. Although this issue has been covered in greater detail elsewhere in this thesis (at Chapter 6) the extract above is a further example of the impact that funding considerations can have on a solicitor's working practices. It also points, though, to the effect that a legal representative's personal preference can have on the way that they prepare the statements.

Other representatives were of the opinion that it would just not be possible to take the statement in one session. This, they commented, was because they felt it was too overwhelming or 'too much' for them and for the client:

Sol B: In terms of *how* I do it, I don't tend to do it in block appointments, I know some solicitors do it at night or at the weekends, I don't do that because I think it is too much for *me* as well as the appellant and I tend to break it up and do a chunk at a time.

(Solicitor B, Interview, October 2011)

In contrast to Solicitor E's approach to taking statements that conform to what she felt were the preferences of SLAB, Solicitor A's comments suggested that he tended to have as many meetings with a client that were needed in order to take the statement. He noted that, often, several meetings would be required to get the statement done and then explained that he would subsequently have to negotiate with SLAB regarding payment for the work:

Sol A: you can usually do it in two meetings. Two fairly lengthy meetings, fair enough. But if it is a complicated case or if it is a really long statement you'll sometimes need three or four to get it right. And then you just have a struggle getting paid by SLAB for it, but if it needs done, it needs done.

(Solicitor A, Interview, August 2011)

Some research participants, such as Advocate A, felt that it was essential to take the witness statements over a series of meetings to allow for the client's account to be developed in a structured way with the legal representative fully understanding the claim:

Adv A: What you do is you have several meetings with the client. You write down what the person is saying, *you* write it down and then *you* structure it after you have gotten to the stage where you understand what the thing is ...You put it into a structure, you develop it chronologically or thematically and then you produce in hard copy a draft of the word processing and then you have a final meeting with the client and you give the client the opportunity to revise and finalise it.

(Advocate A, Interview, August 2011)

This sense of ownership or responsibility for the narrative expressed by Advocate A above, 'you write it down' and 'you structure it'; 'you develop it'; 'you produce it' was not shared by all the participants in the study. Some spoke about the fact that it was 'the client's' account and were cautious about putting too much of themselves into the witness statement. Others expressed concern about the point in the process at which to take a statement. And although some solicitors would take as full a statement as possible from their client before their substantive interview with the home office, many would wait until the outcome of the asylum interview was known and a refusal letter issued. Solicitor B was quite candid about the time constraints that influenced his decision not to do take a statement before the outcome of the asylum claim:

Sol B: Ideally, I would take a statement as soon as they came to me. Usually you would have two files, one 'pre-refusal' and one 'post refusal' and the Legal Aid Board will fund you to take a statement first time round but, in some cases, I try and put it off because taking statements is hard work and *very* time-consuming. In the

first file I usually just kind of hold their hand a bit and explain the procedure to them; I don't really take a statement. Now, the upside to that is that it saves you time and you only have to take a statement if they lose and you are going to use the statement. But on the other hand, it means that they have already given the information to the Home Office....But statements pre-refusal I don't tend to do. I should take them because I (can) get paid for them.

(Solicitor B, Interview, October 2011)

He did go on to explain that, in addition to the time demands of taking a full statement before the outcome of the asylum interview, a further motivation not to do so was a strategic one to avoid arming the Home Office with a pre-prepared account that they could then simply pick holes in:]

Sol B: If we don't give the Home Office the statement then the Home Office are left to get the information for themselves and do the hard work and say 'Look I have to extract information to do a statement'. If we give them a statement, then the Home Office don't extract information, they just look for the weak points and ask all their questions round about the weak points and give you a stronger refusal letter.

(Solicitor B, Interview, October 2011)

The legal representatives with whom Good (2011) conducted his research into witness statements and credibility assessments were also cautious about providing the Home Office with a witness statement prior to the substantive asylum interview. However, for Solicitor B the drawbacks of not preparing a statement before the asylum interview were that he was unable to advise clients about what parts of the statement were very important or test the client's evidence in order for them to clarify the details of their account (Solicitor B, Interview, October 2011). Solicitor A also highlighted similar advantages of preparing a statement with a client before the substantive interview emphasising that it was useful for the client to provide their account and answer questions by someone adopting a sympathetic manner prior to undergoing the Asylum interview process (Solicitor A, Interview, August 2011). It is interesting to note from Solicitor B's comments in the interview response above that a disadvantage of not having prepared a statement with a client prior to the Asylum interview was that 'they have already given the information to the Home Office'. This highlights the problematic nature of the asylum narrative, vis-a-vis the witness statement, being developed making reference and as a response to the asylum interview and refusal letter.

10.2.1 The Witness Statement as it Emerges Through the Asylum Interview and Refusal Letter

Despite the varying approaches of the solicitors in this study to how the statement was taken in terms of numbers of meetings, writing it up there and then or going away with notes and constructing a record of what was said, there was a key similarity in their methods in the way that the refusal letter formed the basis or starting point for taking a statement. This is significant because using the asylum interview transcript or the refusal letter as a point of reference when beginning to put together a witness statement may result in the statement becoming a response to the refusal letter and the issues raised during the asylum interview. The solicitors' responses below about how they go about taking the witness statement in asylum appeals are illustrative of how they use the refusal letter and asylum interview transcript in this way. It should be noted though that the point in the process at which solicitors take on clients may have an effect on the way that they prepare the witness statement; e.g. when a client comes to the solicitor with a refusal letter already issued, then the latter cannot help but prepare the witness statement after the asylum interview has been conducted and refusal letter issued. However, it seemed from my research that most solicitors would hold off until the outcome of the asylum interview before preparing a full witness statement with a client. As Solicitor E's comments below suggest, it is often the demands of the process which dictate that the solicitor start with the refusal letter when preparing an asylum appeal; this is because they have to prepare the Grounds of Appeal to be lodged with the FTTIAC within 10 working days of the refusal letter being issued by the UKBA:

Sol E: If somebody comes in and they've got their refusal letter, what we do first of all is go through the Refusal Letter with them. To be honest, at that point I am not really looking for them to give me a lot of comments about what they disagree with. We are just looking for a very rough, brief summary of 'This is wrong because...'. What I will then do is have a meeting with them and fill out the Grounds of Appeal based on what we've talked about. Once I've submitted the Grounds of Appeal, the next meeting I have with them is normally once we've gotten the letter in from the Court about the dates and I normally meet them before the CMR Hearing to talk about what the CMR Hearing is. And then I make an appointment for them to come in and, at that appointment, I really do the witness statement.

(Solicitor E, Interview, October 2011)

In their responses, most of the other solicitors also emphasised that it was necessary to address the refusal letter in order to prepare the Grounds of Appeal for the FTTIAC. As such the refusal letter can be seen to shape the way that the witness statement is prepared and becomes the frame of reference through which the appellant's narrative will take shape and develop.

Solicitor E's response above also highlights that the statement is often taken after the refusal letter has been issued and the CMR hearing has been held. This may mean that, following the CMR, she has a better idea of the issues that the judge may raise or that the Home Office may pursue. It also means, though, that the preparation of the statement will take place in light of all these various processes relating to the appellant's claim and after several other discussions about what the appellant's claim *is* and what the facts of the case *are*. Solicitor B spoke about his taking two separate statements so that the narrative could be considered in its own right by the judge at appeal with a second statement providing a response to the refusal letter:

Sol B: In general, if someone is refused I tend to take two statements. I take a statement of their claim from start to finish in a kind of semi-chronological, who are you? How did you arrive here? Why did you leave? And start at the beginning. At the end it is always, 'And then I came to Britain as I've described at the start'. Because if you don't have that, the only way the Immigration Judge can see the claim is in the Refusal Letter Summary or on the Home Office Interview and they jump about. And the way I describe to the clients is 'Hopefully the Judge will read your story in your statement from start to finish, so he knows what you are saying. And then he will read, hopefully, the Refusal Letter and says "Well, the Home Office have got some valid points there, that doesn't make sense and that doesn't make sense".' And that's why we do another statement, a second statement which is a response to the Refusal Letter.

(Solicitor B, Interview, October 2011)

As Solicitor B explained above, however, he tended to take the statement following refusal and so the narrative would still emerge through the lens of the asylum interview transcript and the interpretation of the appellant's claim by the Home Office in the refusal letter.

It may be argued, though, that the structure of the process itself means that the witness statement will tend to emerge following these other events in the asylum process. This is due to the changes to the process that were introduced under the New Asylum Model (or NAM, discussed in Chapter 2). Prior to the implementation of the NAM, applicants were given a Statement of Evidence Form (or SEF) and required to fill this in before their

substantive interview with the Home Office. Many would have the assistance of a solicitor to do this and so this stage would provide the point in the process at which the applicant's narrative would be constructed as a witness statement. The SEF contained standard questions which needed to be answered by all applicants. This may suggest that the applicant's asylum narrative would still be somewhat shaped by the SEF format set by the Home Office. However, solicitors spoke of how they would often score out the text boxes provided for the answers on the SEF and advise the reader to 'see attached', wherein they would have provided the answers to those questions in their client's witness statement. The SEF process meant that the narrative could take shape independently of the asylum interview record and refusal letter. This did mean that the Home Office were armed with a statement prior to the asylum interview which they could then base their questions around in order to 'pick holes' or uncover inconsistencies in the applicant's account, as Solicitor B discussed above (p. 157) in relation to the reasons he does not take a statement prior to the asylum interview. It did, however, also afford the applicants the opportunity, as mentioned by Solicitors B and A above, to go through a narration of their account, be tested on elements of it and have the opportunity to clarify any points in their narrative which might, on the surface, appear contradictory. The NAM removed the SEF stage of the asylum claim process, and, as described by research participants above, the statement currently tends to be taken in full following a refusal. Thus, the asylum narrative can now be seen to be constructed and produced in the shadow of the account drawn out by the UKBA officer who interviewed the asylum applicant and wrote their refusal letter. This may have problematic ramifications for the assessment of an appellant's credibility.

This issue of the refusal letter shaping the asylum narrative can be further problematised where, for example, the practices of solicitors mean that the refusal letter and the account as depicted by the Home Office is allowed to shape the narrative and the way that the appellant thinks about their account. An example of this was where Solicitor E explained that she would have a client take the refusal letter away to take notes in preparation for the meeting where they would prepare the witness statement:

Sol E: Depending on the client's grasp of English, what I normally quite like are clients that, or there's a lot of clients who are very keen to go through their Refusal Letter anyway at home because I say 'Look, this is how we are going to go through the Refusal Letter. We are going to go through it in more detail than we've went through today where you're going to get an opportunity to really go into detail as to why you don't like what the Home Office have said or why what they've said is wrong.' And so, what I normally say to them is 'Take the Refusal Letter yourself, go

through it yourself and write your own comments beside each paragraph as to what is wrong. So that, when we are both in doing the Witness Statement, you've already got maybe bullet points with things as well, that you need to tell me about as your solicitor as to why that's wrong'.

(Solicitor E, Interview, October 2011)

This means that clients will start to think about their account and experiences as mediated through the refusal letter which is itself based on the account that is produced by the Home Office from the answers provided at the asylum interview. Jackson's arguments about idealised narrative structures and the ways that people recall memories can be applied here (1994: 98). Where the applicant is sent away to read the refusal letter as preparation for putting together a witness statement with their solicitor, ways that the applicant recalls memories related to their account of persecution will then themselves be shaped by the idealised narrative structures that underpin the account set out in the refusal letter. In this way, when the applicant comes to prepare their witness statement with their solicitor, the recall and enunciation of their story will be affected by the narrative structure of the account provided in the refusal letter. In addition, further comments and articulations about their account, during cross-examination at the asylum appeal hearing for example, will be made based on memory recall that has been affected by the idealised narrative structures of the refusal letter, which subsequently feeds into the preparation and structure of the witness statement.

Indeed, one solicitor spoke of the way that he ensures that the witness statement matches up with the answers already provided at that stage:

Solicitor K: We have the client in and we take another statement, there should already be a statement done for the asylum claim so what I do then is I read through the interview record and make sure that what's in the interview is what's in my statement. If it's not then the statement changes to reflect the interview record because the Home Office have never seen the statement, so I make the statement reflect what they've been told at the interview. That may well raise ethical questions but I don't worry about that, it's for the Immigration Judge to decide whether they believe the claim...I just take what they've said at the interview as their account.

(Solicitor K, Interview, August 2009)

This was a rather extreme approach and it must be said not one that was explicitly shared amongst the rest of the solicitors who took part in my research. It could be argued, however, that the responses provided by the client at the asylum interview did shape the

narrative that was created during the taking of the witness statement. Here Solicitor A's comments hint at the ways that this might occur:

Sol A: At either the second or first meeting we try and take a huge precognition from them to work from, and then it gets a bit different after they've had their interview and depending on what they've told the Home Office. And then your statement for the hearing, if you get to an appeal hearing stage, will be based on the precognition, the responses they've given in the interview, and the issues that need dealt with in the refusal letter. So you end up with a statement that's a hybrid of all those things.

(Solicitor A, Interview, August 2011)

From the responses of other solicitors above, therefore, one can see how the witness statement does become less of an opportunity for asylum applicants to articulate their claim and construct an asylum narrative and more a process of responding to the refusal letter and attempting to maintain continuity between the statement and the responses provided during the asylum interview. The account that emerges from the asylum interview should, therefore, be regarded as a crucial component of the asylum claim and appeal.

This raises important issues about how asylum interviews are conducted and the ways that understandings and meanings are formed during the asylum interview process. In particular, the format of asylum interviews may have a significant impact on the narrative or account that is produced in the refusal letter. Although observation of asylum interviews did not form part of the research here, the work of those who have researched the asylum interview process in this and other jurisdictions (Maryns, 2005; 2006) provides crucial insights into the problematic nature of such processes. In addition, I had access to some of the asylum interview transcripts in cases that I was able, to some extent, to follow through the appeals process.

In a discussion of examples from one such appeal case that I partly 'followed' through the process, I will highlight the ways that certain details were prioritised over others in the consideration of the applicant's claim. These details then became core points used to justify the negative decision in the refusal letter and were the main focus of the witness statement. As discussed earlier (in Chapter 4), Scheffer has studied the ways that stories are subject to repetition and modification in different circumstances whilst journeying through legal procedures (2003: 339). He has also investigated the ways that utterances by those subject to legal procedures at early stages of the process bind the person that has

made them such that a procedural memory around those comments, utterances and statements is formed which makes it hard to modify them and rarely allows for ‘a fresh start’ (2007: 7). The applicant in the example to which this chapter now turns, to follow Scheffer (2004; 2007), became bound by earlier utterances in the asylum process. These utterances had themselves also been modified on their journey through the asylum appeal procedures and subsequently there was little opportunity to modify the official recording of the resultant account.

10.3 Examples in Practice: The Case of Mr. I

Although, as mentioned above, observation of asylum interviews did not form part of the research here, the interview transcripts, witness statements and notes of solicitor-client meetings of a case that I partly followed through the process reveal some of the ways that lines of questioning and deductions on the part of the UKBA decision-maker are presented in the refusal letter and then shape the account in the witness statement. I will also show the great degree of confusion that often surrounds the process of preparing the witness statement and provide insights into the production of the statement that appellants are then required to fully adopt at the asylum appeal hearing.

10.3.1 Mr. I

Mr. I was from the Democratic Republic of Congo and claiming asylum because of his membership of an opposition political organisation Les Compagnons d’Etienne Tshiskedi which was affiliated with the Democracy and Social Progress Union (UDPS). Mr. I had a very complex ‘travel history’ in that he had fled the DRC originally to France where he was refused asylum and returned to DRC. He left after problems associated with his political activity arose again and that time arrived in the UK in a lorry coming via France. Due to his previous claim for asylum in France, the British authorities returned Mr. I to France shortly after he arrived in the UK. Mr. I, however, made the journey back to the UK from France and claimed asylum in 2010.

Mr. I’s case is significant because the focus of the decision about his claim was closely related to his immigration history and the details of his route to the UK. The UKBA used

these aspects of his account to undermine his credibility and refuse his asylum claim. Moreover, it was possible to observe how details about Mr I's account became sidelined or not clarified or explored fully and the ways that this then played into the cross-examination and subsequent judgement at appeal. This case was also important because it illustrates the great deal of confusion that may surround the process of preparing the witness statement, an endeavour that takes place with the client, interpreter and solicitor, and, as this example shows, with a further interlocutor in the person of a paralegal.

10.3.2 Travel History and its use by the Home Office to Undermine the Credibility of the Claim

As mentioned previously, Mr I fled the DRC initially to France with the help of an agent. He was refused asylum there and then returned to the DRC via Brazzaville in late 2007, again with the help of an agent. Upon his return, Mr. I remained in a different province of the DRC to the one where he lived before. He was arrested in 2008 during a march against assassinations in the country. Mr. I was imprisoned and with assistance escaped and travelled to France, once more with the help of an agent. In 2009, he arrived in the UK from France in a lorry and claimed asylum. Mr. I was then deported to France after the UK authorities discovered he had previously made an asylum claim there. Whilst in France, he claimed that an agent made arrangements for him to get a visa to travel once more to the UK. The agent changed his mind though and Mr. I did not use the visa in the end. Instead he found a passport in a nightclub in Paris and used this to travel by train to the UK in January 2010.

Two aspects of his journeys from DRC to France and then the UK were highlighted by the UKBA as problematic. These were the fact that the UKBA had a visa application in a different name from Mr. I's, the fingerprints on which matched his; and the fact that Mr. I claimed to have travelled to the UK from France on the train using a passport that he had found in a nightclub in Paris. These details, along with two other points that will be discussed below, were relied on rather heavily by the Home Office to undermine the overall credibility of Mr. I's claim. The Home Office state in the refusal letter that:

22. These inconsistencies regarding your education, your statements on your dates of movement out of the country, your application for a Visa and use of false identities have seriously damaged your credibility and have as a consequence damaged your general asylum claim.

(Fieldnotes, Mr. I Refusal Letter 16/11/2010)

The letter then goes on to explain that because of this the rest of the claim is not believed. In the section which begins ‘Consideration of your claim to detention and escape...’ the refusal letter explains that this had been considered not credible due to contradictory statements that Mr. I apparently gave relating to his involvement with the political group of which he was a member. It then notes: ‘You have also admitted that you travelled to the UK without a visa on the 5th of February 2009 and again in January 2009²⁵ (AIQ 110, 111 and 117) in the full knowledge that this was an illegal act’ (Fieldnotes, Mr. I Refusal Letter 16/11/2010). It seems from this that Mr. I’s account of his detention and torture is not to be believed merely because of his undocumented entry into the UK.

Whilst preparing the witness statement Mr I.’s legal representative and the paralegal assisting in his case focused quite heavily on these details and they both asked Mr. I whether he could explain these matters and whether or not he had any other explanations about, for example, how he obtained the passport that he eventually used to travel to the UK (Fieldnotes 15/12/2010 and 20/12//2010). Mr. I stuck to his original explanations and this prompted the solicitor representing him to comment to me, once Mr. I had left the office after his final meeting before the appeal, ‘I really wish he had a better explanation about the passport. Saying he found it in a nightclub it just-it’s rubbish-the picture just looks so like him’ (paraphrased fieldnotes, 20/12/2010).

During the appeal hearing the majority of the HOPOs cross-examination related to these aspects of Mr. I’s claim, with the only other questions being four questions about where and when Mr. I held meetings with the UK arm of Les Compagnons d’Etienne Tshiskedi. The result was that the Immigration Judge in the case also took the opinion that Mr. I’s travel history detracted from the credibility of his account, stating in his written determination of the asylum appeal that:

²⁵ This is an error on the part of the Home Office. It should read January 2010

37. In addition, the Appellant's own actions in his immigration history adversely affect his credibility....He has clearly shown a history of using false documents and names in order to enter the United Kingdom illegally.

(Fieldnotes, Mr. I FTTIAC Appeal Determination 10/202011)

The Immigration Judge also relied upon the fact that he did not believe Mr. I's account of his detention and torture in order to refuse his appeal. Some of the aspects relating to this were relatively unexplored by the Home Office during the asylum interview and cross-examination and, one point, I would suggest was developed on the basis of a misunderstanding on the part of the Home Office.

10.3.3 Unexplored Details and Interviewer's Assumptions

Some of the details of Mr. I's account were left relatively unexplored by the interviewer during the asylum interview. One example of this relates to Mr. I's reference to being tortured and raped during his time in detention. Mr. I mentions this early on in the interview in response to a question about his general health:

23. **Interviewer:** How's your health?

Mr. I: I have been examined there and a report will be on Friday traces of torture of my body. I was raped while I was arrested.

(Fieldnotes Mr. I Asylum Interview Record 1/10/2010)

This mention of rape remains unexplored by the interviewer throughout the rest of the interview. He makes reference to physical abuse later on:

94. **Interviewer:** Is that where you were physically abused?

Mr. I: Yes, in the same camp there were military prisoners

95. **Interviewer:** Was it the military prisoners who attacked you?

Mr I: Yes.

(Fieldnotes Mr. I Asylum Interview Record 1/10/2010)

The interviewer then moves on to the escape narrative of Mr. I and questions him about how he got out of prison. Neglecting to explore this aspect of Mr. I's account appears to go against the guidance provided to UKBA staff in relation to the asylum interview where it states:

It is also important that allegations of torture or ill-treatment are fully investigated at interview with appropriate sensitivity (Home Office, *Conducting the Asylum Interview* v.4.5: 4.1).

No reference is made to it in the refusal letter and it was not pursued by the solicitor or paralegal in the witness statement or at the meetings which I observed. The refusal letter explained that the Home Office did not believe that Mr. I was detained as he said he was. Further details about his abuse during his incarceration may have provided greater internal consistency and credibility to support his account.

The escape narrative of Mr I from prison and how it was dealt with by the Home Office in the refusal letter and also by the Immigration Judge in his determination of the appeal is an interesting example of how a lack of clarification of details and assumptions about aspects of an account can disadvantage the applicant. At his asylum interview Mr. I provided an account of how he managed to escape from detention:

96. **Interviewer:** How did you get out of the prison?

Mr. I: I was very weak, I didn't know if I was going to live then I recognised one of the soldiers who was a friend of my brother in the East. I explained I knew him and asked if he could help me. He told me he could help me to get out but the guards were his friends. He explained if he could get someone to bribe the guards. I gave him a number to contact my wife. My wife managed to give him some money. Because in Congo the wage of guards 10 dollars, when they get 500/600 dollars then they do anything for you.

97. **Interviewer:** How did you get out?

Mr. I: My brother's friend explained I was very sick and needed to go to the infirmary. It was there that I could escape. I can't remember but happened the month of November 2008.

98. **Interviewer:** How did you escape from the infirmary?

Mr. I: He helped me to escape with the other guards but he told me they would look for me so he insisted that if I was captured again I could not divulge any names or I will be dead.

(Fieldnotes Mr. I Asylum Interview Record 1/10/2010)

This sequence of questions and responses became embedded in the refusal letter in the following way:

13. You claim that you became very weak and recognised one of the soldiers and asked him for help. You gave him your wife's phone number, to get some money to him and he arranged for you to be taken to the hospital as you were poorly. This was during November 2008. This soldier and some other guards that had been bribed helped you to escape from the infirmary.

(Fieldnotes, Mr. I Refusal Letter 16/11/2010)

It seemed on reading the asylum interview that Mr. I had sought the help of the soldier who knew his brother in order to escape. The move to the infirmary, upon my initial interpretation of the response, was part of the plan to escape. Instead it seems from the refusal letter that the initial bribe was intended for Mr. I to get medical help and then he subsequently sought to escape from the infirmary. Further still, it was then interpreted by the immigration judge from Home Office submissions and recorded in the determination as follows:

36...he was arrested again in June 2008 and placed in the camp. He stated on this occasion he was beaten badly and was weak but recognised a soldier who helped him go to the infirmary and to whom he gave his wife's telephone number to arrange for bribes to be paid to enable him to escape. I do not find the Appellant's claim credible.

(Fieldnotes, Mr. I FTTIAC Appeal Determination 10/202011)

It is a subtle point to note but the order of events becomes altered as Mr. I's answer is recorded at interview and then represented in the refusal letter and summarised at appeal and in the judgement about his appeal. The narrative shifts from the appellant arranging for the guards to be bribed following which they move him to the infirmary as part of the escape plan, to it being the case in the Immigration Judge's version that he was moved to the infirmary with the help of the guard friend of his brother's at which point he was then able to arrange for his wife to provide bribes to enable him to escape from the infirmary. It is worth noting that the witness statement reflects Mr. I's answer at interview on this point. Despite being a very minimal change it does demonstrate the ways that the account can become altered during the process and the appellant is then bound by it. If it had been the case that the decision-makers here did not believe the appellant because they did not think it plausible or credible that the guards would help him to the infirmary of their own accord without the influence of a bribe, then this mediation from one version to the other would have been seen to have had serious consequences. As discussed earlier in the thesis (in Chapter 3), factual findings made by an Immigration Judge at the initial asylum appeal at the FTTIAC cannot be overturned in an onward appeal of that Immigration Judge's decision. In the example above, therefore, Mr. I would have become bound by the shift in this part of his narrative and he would have been unable to appeal the negative credibility findings on this point.

10.4 Conclusion

Examining the pre-hearing interactions and their impact on the development of the asylum narrative vis-à-vis the witness statement reveals the ways that appellants become bound by the accounts of their claim that are drawn from the Home Office asylum interview and which are presented in the refusal letter. This I have shown to be problematic by drawing on the literature of scholars who have undertaken research into asylum interview processes to suggest that often asylum appellants at that stage are prevented from being able to provide their asylum narrative or account. They are restricted by the format of the interview which dictates that the questions are set by the interviewer. Interruptions by the interviewer when claimants attempt to provide what the interviewer regards as too much or ancillary information result in details going unrecorded and the narrative flows of the claimant being broken.

In exploring the working practices and preferences of the asylum solicitors who took part in my research, I was able to see how the asylum narrative that is presented in the refusal letter and the asylum interview transcript shape the narrative that is produced in the witness statement. This is because, as I have shown here, legal representatives will often take the refusal letter as their starting point when constructing the witness statement with clients. By virtue of this, the asylum narrative develops in the witness statement as a response to the account forwarded by the Home Office in their decision letter. In addition, solicitors may organise their working practices to make payment from SLAB for their work easier to negotiate. Solicitor E could be seen above to structure the taking of the witness statement into one meeting where she would also note and write-up a client's responses into a narrative which she would then give them to take home. Other solicitors felt that such practices would not give the appellant the space needed to provide a thorough narrative and to allow them to have a break between meetings which might provide the opportunity to change statements and comments made at previous meetings.

The final section of this chapter provided an analysis of data from an asylum appeal of Mr.I that I was able to 'trace, to some extent, as it progressed through the appeals process. Mr I.'s case demonstrated the ways that statements and narratives are repeated and become modified during the different stages of the asylum appeal process. It also showed that

appellants can become bound by what they have said early on in the process and how they then must deal with this during cross-examination at asylum appeal hearings.

Thus, the discussion and arguments made in this chapter can be considered in connection with those made in the preceding chapter on the way that the witness statement is tested during cross-examination. In Chapter 9, I argued that instead of the asylum appeal hearing providing an opportunity for appellants to narrate their experiences of persecution and articulate their fear of further persecution if returned to their country of origin, they are restricted in such representations of their claim by the necessity to comply with the institutional structures and expectations that govern asylum appeal hearings. Such structures and expectations dictate that the appellant must adopt their witness statement as their evidence-in-chief. The requirement to adopt the witness statement as the evidence-in-chief, therefore, further denies the appellant the opportunity to have their narrative elicited from them by their solicitor in a sympathetic manner. On the contrary, they are immediately subject to cross-examination by the Home Office presenting officer. Chapter 9 outlined the ways that such cross-examination procedures can be conducted in an aggressive manner with the aim being to highlight apparent inconsistencies and to pick holes in the appellant's account.

During such processes the appellant is expected to be able to answer questions about their witness statement, asylum interview and to address the comments of the Home Office in the refusal letter with often little or no signposting from the presenting officer undertaking the cross-examination. In the previous chapter I presented data from observations at the FTTIAC to suggest that this can often result in a great deal of confusion for asylum appellants as the different documents, statements and answers that they have provided throughout the process intersect and feed into one another. This chapter (Chapter 10) has further elaborated on the problematic nature of such institutional procedures by considering the 'pre-hearing' processes and interactions which reveal the different ways that the witness statement is, in fact, shaped and influenced by the asylum interview and the subsequent account of persecution presented in the refusal letter. The witness statement should not be viewed then as an independent account offered by the asylum appellant about their claim for protection, but instead as a narrative which is mediated through a combination of the asylum interview, the refusal letter and the appellant's own account. In this way, then, the structural demands of the asylum process can again be seen to constrain

the development of an asylum appellant's narrative such that the appellant may be better believed and deemed credible by decision-makers.

11. Conclusion

This thesis has focused on issues associated with the ways that solicitors approach ‘credibility’ in their daily working practices when representing asylum appellants within the UK asylum appeal process. Based on ethnographic research conducted over a period of 18 months, it has shown that varying factors impact upon the practices of solicitors who are involved in the preparation of their clients’ cases in the asylum appeal process. Through an examination of the role of the solicitor in asylum appeals this thesis has sought to show that the ‘credibility’ of an applicant is not something which is merely assessed and decided upon by the Immigration Judge at the appeal hearing, instead it is a factor which is addressed by legal representatives over the course of preparing the appeal. Drawing on the theoretical approaches offered by conversational analysis and narrative studies to the analysis of legal processes, I have argued that it is necessary to move beyond the discourse of in-court settings and to study the work undertaken by asylum solicitors during the pre-hearing stages of the process in order to examine the ways that aspects of the asylum claim emerge and develop. As I have shown, studying these pre-hearing procedures and exchanges using ethnographic methods highlights the significance of solicitor-client relationships to the production of narrative accounts in the asylum claim vis-à-vis the witness statement.

The thesis has also explored the different forms of paid and unpaid labour undertaken by asylum solicitors. In so doing, I have suggested that solicitors are involved in forms of emotional labour when carrying out asylum casework. Legal practitioners considered learning to suppress emotional responses and maintain relational distance from clients to be essential skills for ensuring professional competence. Moreover, I have shown that building these kinds of barriers within the lawyer-client relationship also serves as a way for solicitors to manage client expectations; setting the parameters of that relationship works to reinforce the level of service that a client can reasonably expect of their legal representative.

In addition, the thesis has analysed how external factors such as legal aid funding arrangements affect the working practices of solicitors who represent asylum claimants. It has sought to argue that these funding arrangements, and proposed changes to them, pose a real risk to access to justice in the asylum process. Similarly, structural aspects of the

asylum appeal process have also been presented as obstructing an asylum applicant's full access to, and participation in, the process. By denying the asylum appellant the opportunity to present their full testimony during examination-in-chief by their solicitor at the appeal hearing, the institutional demands of the FTTIAC force the appellant to rely on the adoption of a pre-prepared written witness statement as their evidence-in-chief at the hearing. The witness statement can therefore be seen to be of prime importance in asylum appeals. I have shown this to be problematic because of the ways that the witness statement is produced by many of the asylum solicitors who took part in my research.

Finally, I have argued that a criminalising discourse exists in the asylum and immigration processes at the FTTIAC in Glasgow. This thesis has sought to demonstrate that such discourses extend to a cohort of asylum solicitors working in Glasgow and that the culture of disbelief that exists amongst these solicitors results in them regularly disbelieving their asylum clients' accounts. I contend that this might cause difficulties for asylum applicants in the future if similar funding arrangements as are in place in England and Wales were to be introduced in Scotland. The strictures of those funding arrangements along with the culture of disbelief amongst asylum solicitors could potentially give rise to the underrepresentation of asylum applicants in Scotland.

11.1 Restating Aims and Revisiting the Chapters

The aim of this thesis was to examine how solicitors confront the issue of credibility in their daily working practices when representing clients in the asylum appeal process in Scotland. In addition, I wanted to explore how procedural and structural factors might affect how such legal practitioners go about undertaking this task.. I sought to do this through an ethnographic study of the asylum appeal process in Scotland which involved participant observation at FTTIAC hearings, solicitor-client meetings and associated events; interviews with legal representatives; and document analysis of case files of asylum appeals, and asylum law and policy.

Chapter 2 provided an overview of the key legislation and policy governing asylum claims and appeals in the UK. In addition, it outlined some of the key measures which have been implemented during attempts to establish a Common European Asylum System and it examined the organisation of the main institutions and procedures involved in the asylum

process in Scotland. The work and operations of the FTIAC were presented and it was argued that the function of the FTIAC is very much like that of any other court, in spite of its 'Tribunal' status. I suggested that there is a dispersal of power at the FTIAC and explored the role of the Tribunal clerks in order to support this assertion. This chapter also demonstrated the difficult task that Immigration Judges face when determining asylum appeal hearings; drawing on the findings in earlier studies of asylum adjudication in Scotland (Craig et. al, 2008) revealed that there is a perception amongst different participants in the asylum appeal process that a sense of impartiality permeates judicial decision-making at the FTIAC in Glasgow. The Chapter went on to contend that such impartiality might prove problematic where asylum appeals are refused by Immigration Judges on the basis of a negative credibility finding; assessments of credibility are considered to be matters of fact and it is not possible to appeal an Immigration Judge's decision on findings of fact.

Chapter 3 developed the focus on issues associated with credibility assessments in refugee status determination procedures. It examined the definition of 'credibility' in international and domestic law and policy and used arguments from the literature (Kagan, 2003; Sweeney, 2009) to assert that the UK Home Office uses a broad definition of credibility, understood as the overall strength of a case, which can often work to the detriment of asylum claimants. The chapter then examined the ways that credibility is assessed in asylum decision-making processes in the UK and highlighted problems with such assessments. It argued that when examining the internal consistency of asylum narratives it is essential that the psychological effect of trauma on memory and recall be borne in mind. An assessment of the external consistency of asylum applicant's accounts of persecution was shown to be problematic in light of the issues around the production and use of Country of Origin Information reports in UK refugee status determination procedures. In addition, I claimed that there was a risk of allowing cultural assumptions to pervade assessments about the plausibility of asylum narratives and that in order to avoid this the use of expert witnesses may be beneficial. This chapter detailed the findings of studies (Good, 2007) into the use of expert evidence in asylum adjudication which have shown that it has not always been respected and valued by the asylum courts. Through an engagement with the literature on credibility and witness statements, I presented the aims of the thesis and argued that there is a need for research into the role of the solicitor in the production of 'credible' witness statements. In so doing, I suggested that this thesis can make an empirical contribution to existing literature on credibility assessments and the

work of solicitors within the asylum appeal process and asserted that it be positioned in relation to this emerging area of study.

The existing literature on credibility and witness statements has tended to be underpinned by theoretical approaches provided by conversational analysis. In Chapter 4, I argued that a turn to narrative studies could make a useful contribution to such approaches. I discussed the work of those who have carried out research on the micro-processes of criminal court hearings (Scheffer 2002; 2003; 2004; 2007a; 2007b) to suggest that in order to examine how cases develop during the asylum appeal process it is essential to move beyond what happens 'in court' and to consider pre-hearing interactions and exchanges. Following Scheffer, I suggested that asylum appellants become bound by their utterances and responses during early, pre-hearing, stages of the asylum process and that such utterances limit and constrain the account of persecution within the asylum claim which solicitors are ultimately able to advance in their clients' witness statements, if they are to appear credible, during appeal hearings.

Chapter 5 outlined the methodology and methods that were employed in order to examine the research aims of this thesis. It argued that the research called for an ethnographic study and made a case in support of the use of ethnography in legal scholarship. The chapter presented the methods that were deployed to carry out the research and explored some of the issues around access which I experienced when trying to conduct participant observation with solicitors and their clients. I argued that issues around access might frequently arise when using solicitors as gatekeepers, as I did, due to the ethical and professional obligations they owe to their clients and I explain the reasons behind my decision to prioritise certain cases which I had access to over others in when presenting the data in this thesis. Reflecting on some of the difficulties that I experienced enabled a frank and constructive discussion of the approach that might be adopted in subsequent research in this field of study. This chapter also identified certain operational issues which arose whilst carrying out participant observation in court settings. The rapid pace of legal proceedings meant that taking fieldnotes whilst also following what was actually happening became a difficult process to negotiate. In accordance with the practices of scholars conducting similar research (Good, 2007), therefore, the accounts of interactions at appeal hearings that I present throughout the thesis tend to be paraphrased accounts of proceedings. Although securing access to solicitors was a difficult process in this research, I was able to quite successfully access the FTIAC. In Chapter 5, I discussed how I moved

from the position of relative outsider to one where I was trusted and accepted by the clerks to the Tribunal. Building a strong rapport with the clerks allowed me to negotiate access to cases that I was keen to observe as part of my research. Moreover, my ability to ‘hang around’ the clerk’s desk during breaks and adjournments provided me with the opportunity to communicate with solicitors who came by the desk to check on cases and speak to the clerks. My experiences as a law student at undergraduate level also afforded me some advantages in creating links with potential research participants by virtue of our social connections or similar experiences from having studied at the same law school. In addressing these factors in chapter 5, I outline my attempts to maintain a commitment to reflexive ethnography throughout.

Having contextualised the research in this thesis by outlining the institutions and procedures involved in the asylum appeals process; reviewing key literature in this area and the contribution that this thesis can make to it; and setting out the methodological approach that was followed in this study, the remaining chapters provided a discussion of the empirical findings of the research. Chapter 6 highlighted the important role that legal aid funding plays in relation to access to justice in the asylum process. In it, I also showed how issues around legal aid funding impact upon solicitor morale and, in some cases, even shape the working practices of solicitors. I argued that restrictions on legal aid arrangements in Scotland could potentially lead to a lack of quality legal services for asylum applicants and that this subsequently raises questions about access to justice in the asylum process. In addition, through an engagement with proposed changes to legal aid arrangements in Scotland, which would bring them more in line with those in place in England and Wales, I suggested that these alterations would only serve to intensify such difficulties and further compound problems of access to justice for applicants in the asylum process. The chapter began by examining how public administration in Scotland and, in particular, the discourse and ethos of the Scottish Legal Aid Board (SLAB) have been pervaded by New Public Management processes, which are motivated by a commitment to value for money for the taxpayer and economic efficiency. Such processes have given rise to the introduction of new measures which, amongst other things, make it the responsibility of a solicitor to conduct financial verification in order to ascertain if a client qualifies for legal aid funding. This measure was considered by many solicitors to pose a hindrance to access to justice for legal aid clients and was also the source of much frustration and added bureaucracy for the participants in my research. In addition to these new measures, the strictures of increasingly restrictive funding arrangements meant that some solicitors were

constrained in the course of action which they could take in an asylum appeal case. The need to be remunerated for work undertaken in a case was clearly a priority for some of the participants in my study. Prioritising the need to be paid for work done stemmed not only from external pressures of solicitors' employers to generate income for their legal organisation, but was also driven by a sense of worth and deserving to have their work recognised and valued by SLAB. I showed in this chapter that certain solicitors who took part in my research felt as though they were locked in a constant battle with the Scottish Legal Aid Board in order to negotiate payment for cases on which they had worked. Such battles and negotiations resulted in solicitors being made to feel as though SLAB viewed them as 'chancers' or professionally incompetent. Drawing on similar studies conducted in England (Sommerlad, 2001; 2004; 2008; James and Killick, 2009; 2010; 2012) revealed a commonality of experiences between the solicitors in those studies who felt as though they constantly had to justify the work they had done on a case to receive legal aid funding and the legal practitioners who took part in my research. The chapter also examined the effects of some of the funding arrangements in place in England and Wales that the Scottish Legal Aid Board is keen to introduce. I claimed that such measures would severely restrict access to justice in the asylum process through the underrepresentation of asylum applicants and also by virtue of the limited provision of quality legal services in this area. Such limited provision would stem from disaffected solicitors struggling with these new arrangements and abandoning asylum work in favour of the more profitable immigration cases of other forms of legal work altogether.

Chapter 7 built on the focus on solicitors' working practices and considered the different forms of labour which asylum solicitors provide when representing a client. Examining the emotional labour that solicitors undertake revealed that they often have to suppress emotional responses during their casework in order to maintain a professional demeanour. I demonstrated that solicitors in my research had varying strategies for dealing with affecting or distressing aspects of their work. For many, the process of cultivating an emotional distance from casework was part of a professionalisation process that was developed 'on the job' and over time. I contended in this chapter that learning to suppress emotions and maintain objectivity are, in fact, skills which solicitors begin to learn during their time as students at law school. Legal education teaches students to privilege the legal issues in accounts and stories and to marginalise the human conflict or social context contained within them. Such marginalisation helped asylum solicitors to identify the aspects of casework that they would reasonably be expected to undertake. Assisting clients

with housing or financial issues was not deemed by solicitors as falling within their remit because they were not legal problems for which solicitors would be paid by SLAB to provide advice or assistance. By drawing on similar research with divorce lawyers and their clients (Sarat and Felstiner, 2005), I highlighted the ways that barriers are constructed between legal practitioner and asylum applicants in lawyer-client interactions. Solicitors regarded the building of barriers between themselves and clients as necessary in order to combat their over-identification with asylum clients. As well as creating personal and emotional distance from clients, these barriers also assisted legal representatives with the expectation management of clients, reinforcing the level of service that a client may reasonably expect their solicitor to provide.

In Chapter 8, I examined how a criminalising discourse permeates asylum and immigration procedures in Scotland. Examples from fieldwork research suggested that this discourse operates in the language of Home Office presenting officers during their representations and submissions at asylum and immigration hearings at the FTTIAC. In addition to these examples, the continued use of detention in immigration and asylum cases contributes to the process of 'othering' that some writers (Banks, 2008; Cohen, 2002; Welch and Schuster, 2005a; 2005b) argue takes place in UK asylum and immigration legislation and policy. Such scholars also contend that in order to fully understand current asylum and immigration laws and policies, it is necessary to consider them in relation to penal and criminological theory. I argued that where officials at the FTTIAC cannot be seen to challenge the criminalising discourse perpetuated by Home Office representatives, particularly during bail hearings, there may be a perceived lack of impartiality at the FTTIAC and it may be regarded as being more closely aligned to the ideologies of the Home Office. This chapter also revealed how the discourse around 'genuine' and 'bogus' asylum applicants extends to the legal representative community in asylum processes. I claimed that solicitors' judgements about whether an asylum client is 'genuine' or not creates a situation in which they fail to appreciate their pivotal role in the eventual assessment of their client's credibility at appeal. I argued that solicitors in my study often failed to recognise their role in the construction of asylum narratives as an instrumental one and that this leads, at times, to them attributing an unrealistic level of agency to asylum applicants when discussing the production of witness statements. Such judgements about whether a client is 'genuine' or not would cause problems if a merits test were introduced in Scotland, as was discussed in Chapter 6. If solicitors were to allow their own opinions about the credibility of their client to influence their evaluation of whether the client had a

case which qualified for legal aid, then the judgements that solicitors in my research openly made would prove problematic. As changes to the legal aid funding landscape in Scotland were ongoing at the time of writing, I suggested that this might provide an important area for future research.

Chapters 9 and 10 developed the focus on the construction and treatment of witness statements in the asylum appeal process. In Chapter 9, I examined asylum appeal hearing processes and highlighted the structural barriers that asylum appellants face when trying to present an account of the persecution they have suffered, usually the main piece of evidence appellants are able to advance in support of their case, in appeal hearing settings. An example of this was the rule that a pre-prepared witness statement must be adopted by asylum appellants as their evidence-in-chief at asylum appeal hearings. This institutional demand meant that appellants were denied the opportunity to provide full oral testimony and to have their account teased out in a sympathetic manner by their legal representative. The solicitors who took part in my study also explained that attempts to draw out more detail from their clients about their claim once the witness statement had been adopted were often met with disapproval by Immigration Judges. Consequently, I claimed that the asylum narrative which develops during the appeal hearing process does so through an, at times, aggressive cross-examination by the Home Office presenting officer. Similar research in other jurisdictions (Thomas, 2011) has shown how the variable quality of cross-examination amongst Home Office presenting officers can result in an emphasis on peripheral details which are ancillary to the asylum claim. I then presented findings from my own fieldwork research to demonstrate the ways that this took place during my observation at the FTIAC in Glasgow. I pointed to the over-reliance by presenting officers on pre-hearing interactions, such as the screening interview, when attempting to discredit an asylum appellant's testimony and argued that they often sought to create confusion and a sense of incoherence when cross-examining asylum appellants about aspects of their claims. Referring to apparent inconsistencies allowed presenting officers to suggest that asylum appellants were not credible and that their claims should therefore not be believed. In the absence of any process of detailed examination-in-chief, solicitors were forced to rely on the witness statement and their own submissions in order to convince Immigration Judges about the credibility of their clients' claims.

Chapter 10 revealed the problems associated with relying in this way on the witness statement. This chapter examined the pre-hearing procedures that take place in the asylum

appeal process and revealed their impact on the asylum claim vis-à-vis the production of the witness statement. By exploring the working practices and preferences of the solicitors who took part in my research, I was able to show how the account presented in the refusal letter and the appellant's responses during the asylum interview shape the narrative of persecution that is produced in the witness statement. Where solicitors take the refusal letter and the asylum interview transcript as their starting point in the production of the witness statement, the asylum claim that develops during the construction of the statement does so in the form of a response to the account forwarded by the Home Office in the refusal letter. By virtue of solicitors working in this way, appellants become bound by their answers at the asylum and screening interviews and the subsequent accounts that are then drawn from the transcripts of these interviews and presented in the refusal letter.

I argued that taking the asylum interview transcript and the resultant refusal letter as a starting point was problematic because studies (Maryns, 2006) have shown that asylum applicants are often prevented from providing the full details of their claim at the asylum interview. In addition, by drawing on data from my own research, I was able to show how an asylum appellant's account was repeated and modified as it made its way through the different stages of the asylum appeal process. Appellants who are then bound by what they have apparently said during earlier stages of the appeal process must then defend and justify aspects of the asylum claim during cross-examination which they might not often recognise to be their own statements or explanations. This contributes to the sense of confusion or incoherence created by the Home Office presenting officers, discussed in Chapter 9, and may potentially detract from the overall credibility of the asylum appellant's claim as assessed by the Immigration Judge. From this reconsideration of the chapters and the arguments that they make, it is possible to review the contribution that the thesis makes to knowledge.

11.2 Contribution of the Thesis

The main contribution that this thesis makes to knowledge is an empirical one. Much of the literature on asylum appeal process in the UK focuses on the situation in England. The data underpinning the claims made in this thesis provide a representation of the asylum appeal process in Scotland. This allows for the opportunity for comparison between the Scottish

and English contexts and supplements the existing literature on credibility and asylum appeals.

Firstly, legal aid funding is organised and administered differently in Scotland and England, in spite of this, the thesis contributes to discussions (Sommerlad, 2001; 2004; 2008; James and Killick, 2009; 2010; 2012) regarding the difficulties faced by legal representatives when carrying out publicly funded legal casework. The data show the effects of strict funding rules on the sense of low morale experienced by asylum solicitors and the implications that such restrictive funding arrangements have on their working practices.

Secondly, the literature on credibility and asylum processes highlights the paucity of research on the role of solicitors in the production of asylum narratives (Good, 2007: 199). Although there have been recent contributions to this aspect of the field (Good, 2011), the most established and substantial studies of UK asylum adjudication (Good, 2007; Thomas, 2011) have mainly been carried out in English asylum courts and focused on participant observation of Immigration Judges. This thesis therefore seeks to contribute to this literature by exploring the daily working practices of solicitors as they prepare witness statements and appeal cases for their asylum clients.

Thirdly, by strengthening arguments about the forms of emotional labour involved in asylum casework (Westaby, 2010; James and Killick, 2010; 2012), this thesis makes a theoretical contribution to the academic literature on the nature of legal work. In addition, the data which I use to substantiate the claims made in this thesis lend support to theoretical arguments that call for a move beyond solely studying courtroom interactions and which highlight the importance of analysing pre-hearing processes, such as the work undertaken by legal practitioners, when examining how cases emerge and play out in legal settings (Scheffer, 2003; 2004).

Finally, this thesis makes a contribution to socio-legal scholarship on asylum processes. In arguing for an ethnographic study in order to investigate solicitors' approaches to the issue of credibility within the asylum process, the methodological approach in this thesis can be seen to set it apart from those studies which adopt a purely doctrinal approach to similar areas of study (e.g. Kagan, 2003; Millbank, 2009; Byrne, 2005; 2007). Instead, it should be considered to support existing socio-legal and anthro-legal scholarship which endorses a

qualitative, 'law-in-action' approach to the study of law and legal institutions (e.g. Baillot et. al 2009; 2011; Good, 2007; 2011; Thomas, 2011; Scheffer, 2002; 2003).

11.3 Implications for Future Research

The arguments put forward in this chapter and the contributions outlined above raise specific questions about the future of legal aid funding provisions in Scotland and point to the need for further research in this area. This thesis has shown that the Scottish Legal Aid Board is considering the introduction of new funding arrangements in Scotland that would bring them in line with those currently in place in England and Wales. Such new arrangements would include the contracting and tendering for publicly funded asylum and immigration work. This thesis has drawn from studies on the effects of such arrangements on solicitors in England and Wales (Sommerlad, 2001) to suggest that they would limit the provision of quality legal services to asylum claimants and pose a serious risk to access to justice for asylum applicants in Scotland. Where such changes were implemented, it would be vital to carry out research which sought to assess their impact on access to justice for those subject to the asylum process.

The Scottish Legal Aid Board's proposal to introduce a Merits Test into legal aid provisions for asylum and immigration cases (SLAB, 2011a) raises important questions about the implementation and reception of such a test by Scottish legal practitioners. Research on the operation of the Merits Test in England (James and Killick, 2009; 2010; 2012) has suggested the ways that the test is both endorsed and resisted by asylum solicitors and caseworkers. This thesis has argued that a discourse of 'genuine' and 'bogus' asylum applicants extends to asylum solicitors in Glasgow. It suggested that solicitors often make their own assessments of a client's credibility in asylum appeals and that these assessments are influenced by a culture of disbelief that pervades media, political and popular discourse and which operates in asylum and immigration hearings at the FTTIAC. As the legal aid funding situation transforms over time in Scotland (at the time of writing, current proposals are subject to ongoing consultation) the findings from this thesis, therefore, suggest the need for sustained qualitative research into the way that a Merits Test is applied by solicitors in asylum cases in Scotland.

Moreover, the introduction of these new measures would surely give rise to unrepresented asylum appellants at the FTTIAC. Such an increase in asylum appellants appearing at appeal hearings without legal representation would require research into how this is dealt with by clerks responsible for Tribunal administration; the implications of this for the way that appeal hearings are conducted by Immigration Judges and Home Office presenting officers would also need to be examined. Such research would be necessary in order to evaluate the impact of changes to legal aid funding on access to justice for asylum applicants in Scotland.

Appendices

Appendix 1: Research Information for Asylum Applicants

The Role of Credibility in the Asylum Process

Information Sheet (A)

This is an invitation to take part in a research study into the issue of credibility in the way that asylum claims are decided. Please read and think about the information that follows and feel free to request further clarification if anything is not clear to you.

About the Research

My name is Katie Farrell and I am a postgraduate research student at the University of Glasgow. I am currently carrying out research on the process of applying for asylum in the UK. My research is funded by the Adam Smith Research Foundation based at the University of Glasgow. The proposed research is to be carried out during the period June 2010- August 2011. The purpose of the research is to look at the way claims are handled and decided in the asylum process. I would like to be present at meetings that you may have with your solicitor. If you are uncomfortable with my being there at any time you can request that I leave and I will. I would like to take notes on the way that your solicitor deals with your claim or appeal and during meetings that you may have with him/her. If you wish to see these notes at any time, then you can let me know and we can discuss what I have written.

What happens if you agree to take part?

If you agree to take part in the research project, you do so voluntarily, and so, you can withdraw at any time and discontinue your participation. You should be aware that I am **in no way** connected to the Home Office and I **do not** play any part in the way that your asylum claim is decided. Agreeing to take part in the research will not improve your chances of being granted asylum. However, by taking part you may contribute towards research that could benefit applicants in the future.

What happens to the information that you provide?

I would like to use the data I gather during the research in my PhD thesis and other academic publications and conference proceedings. All information that I have about you and your claim will be anonymised and you will not be identified in any report that I make about the research. I will observe the requirements of the Data Protection Act 1998 and Freedom of Information (Scotland) Act 2002 and you are entitled to request a copy of any data that directly applies to you under the Data Protection Act 1998.

Questions or queries

If you have any questions about the research, please feel free to contact me at the details below:

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Conduct

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Appendix 2: Research Information for Legal Representatives

The Role of Credibility in the Asylum Process

Information Sheet (B)

This is an invitation to take part in a research study into the issue of credibility in the way that asylum claims are decided. Please read and think about the information that follows and feel free to request further clarification if anything is not clear to you. This can be done by contacting me using the details provided at the end of this information sheet, or by using the self-addressed stamped envelope provided.

About the Research

My name is Katie Farrell and I am a postgraduate research student at the University of Glasgow. I am currently carrying out a study on the process of applying for asylum in the UK and the ways that decision-making within the process operates. My research is funded by the Adam Smith Research Foundation based at the University of Glasgow. The proposed research is to be carried out during the period June 2010-August 2011. The purpose of the research is to look at how ideas around credibility affect the way claims are handled and decided in the asylum process. I hope to observe firsthand how you deal with asylum claims and appeals. I would like to take notes on the way that your organisation deals with claims or appeals and during meetings that you may have with clients. If you wish to see these notes at any time, then you can let me know and we can discuss what I have written. Ideally, my aim is to track the appeal as it develops and is decided upon at the First Tier Tribunal and, with your client's permission, to review the appeal determination issued by the Immigration Judge who sits in on the appeal.

What happens if you agree to take part?

If you agree to take part in the research project, you do so voluntarily, and so, you can withdraw at any time and discontinue your participation. I will provide a consent form, which must be signed, once we have talked over the research. You should be aware that I

am **in no way** connected to the Home Office and I **do not** play any part in the way that asylum claims are decided. By taking part you may contribute towards research that could benefit applicants in the future.

What happens to the information that you provide?

I would like to use the data I gather during the research in my PhD thesis and other academic publications and conference proceedings. All information that I have about you and your client's claim will be anonymised and you will not be identified in any report that I make about the research. The information I gather will be stored on a computer that is password protected and to which only I have access. Any paper copies of information will similarly be kept in a secure filing cabinet, again to which only I have the key. I will observe the requirements of the Data Protection Act 1998 and Freedom of Information (Scotland) Act 2002 and you are entitled to request a copy of any data that directly applies to you under the Data Protection Act 1998.

Questions or queries

If you have any questions about the research, please feel free to contact me at the details below:

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Appendix 3: Copy of Page 1 of UKBA Screening Interview

(Available on request from author)

Appendix 4: UKBA Asylum Interview- Compulsory Statements

(Available on request from author)

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